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Prolonged occupation and *de facto* annexation, two sides of the same coin? How the time factor influences the legality of the occupation in submissions made to the International Court of Justice in the context of the *Policies and Practices of Israel* advisory opinion

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This article delves into the issue of the legality of Israel's occupation of Palestine in light of the prohibition on territorial acquisition by force in the context of the International Court of Justice's 2024 advisory opinion on the Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem. A detailed analysis of the proceedings surrounding this advisory opinion indeed reveals that a significant portion of submissions from States and international organizations to the Court is devoted to characterizing the occupation of Palestine by Israel as annexation, particularly as a de facto annexation – a concept that, until now, has been primarily developed within legal scholarship. The proceedings thus offer a unique insight into the legal reasoning employed by States and international organizations to substantiate the existence of a de facto annexation. Notably, one of the most striking aspects of these submissions is the central role attributed to the temporal dimension of the occupation in this regard. Through a comprehensive examination of the submissions, this article demonstrates that the unprecedented duration of Israel's occupation as well as the permanence of defining measures implemented by Israel in the occupied territory – primarily the establishment of settlements – served as key indicators that led to its classification as a de facto annexation.

Cet article se penche sur la question de la légalité de l'occupation de la Palestine par Israël à la lumière de l'interdiction de l'acquisition de territoire par la force, dans le contexte de l'avis consultatif rendu en 2024 par la Cour internationale de Justice sur les Conséquences juridiques découlant des politiques et pratiques d'Israël dans le Territoire palestinien occupé, y compris Jérusalem-Est. Une analyse détaillée de la procédure relative à cet avis consultatif révèle en effet qu'une part significative des observations présentées à la Cour par les États et les organisations internationales est consacrée à la caractérisation de l'occupation de la Palestine par Israël comme une annexion, plus particulièrement une annexion de facto – un concept qui, jusqu'à présent, a été principalement développé dans la doctrine juridique. Les procédures offrent un aperçu unique du raisonnement juridique utilisé par les États et les organisations internationales pour justifier l'existence d'une annexion de facto. L'un des aspects les plus frappants de ces observations est notamment le

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rôle central attribué à la dimension temporelle de l'occupation à cet égard. À travers un examen approfondi des observations, le présent article démontre que la durée sans précédent de l'occupation israélienne, ainsi que le caractère permanent des mesures déterminantes mises en oeuvre par Israël dans le territoire occupé – principalement la création de colonies – ont constitué des indicateurs clés qui ont conduit à la classification de l'occupation comme une annexion de facto.

Dit artikel gaat dieper in op de kwestie van de rechtmatigheid van de bezetting van Palestina door Israël in het licht van het verbod op territoriale verwerving met geweld in de context van het advies van het Internationaal Gerechtshof van 2024 over de juridische gevolgen van het beleid en de praktijken van Israël in de bezette Palestijnse gebieden, met inbegrip van Oost-Jeruzalem. Uit een gedetailleerde analyse van de procedure rond dit advies blijkt inderdaad dat in een aanzienlijk deel van de verklaringen van staten en internationale organisaties aan het Gerechtshof de bezetting van Palestina door Israël gekwalificeerd wordt als een annexatie, in het bijzonder als een de facto annexatie - een concept dat tot nu toe voornamelijk werd ontwikkeld binnen de rechtswetenschap. De procedure biedt dus een uniek inzicht in de juridische redenering die staten en internationale organisaties hanteren om het bestaan van een de facto annexatie te onderbouwen. Een van de meest opvallende aspecten van deze verklaringen is de centrale rol die in dit verband wordt toegekend aan de tijdsdimensie van de bezetting. Aan de hand van een uitgebreid onderzoek van de verklaringen toont dit artikel aan dat de ongeziene duur van de bezetting door Israël en het permanente karakter van de door Israël in de bezette gebieden genomen maatregelen – voornamelijk de oprichting van nederzettingen – de belangrijkste indicatoren waren die geleid hebben tot de classificatie als de facto annexatie.

Este artículo profundiza en la cuestión de la legalidad de la ocupación de Palestina por parte de Israel a la luz de la prohibición de la adquisición de territorios por la fuerza, tomando como referencia la opinión consultiva de la Corte Internacional de Justicia de 2024 sobre las Consecuencias Legales que surgen de las Políticas y Prácticas de Israel en el Territorio Palestino Ocupado, incluida Jerusalén Este. Un análisis detallado de los procedimientos en torno a esta opinión consultiva revela que una parte significativa de las alegaciones de los Estados y organizaciones internacionales ante la Corte se dedica a caracterizar la ocupación de Palestina por Israel como una anexión, particularmente como una anexión de facto, un concepto que, hasta ahora, se ha desarrollado principalmente dentro de la literatura jurídica. Por lo tanto, los procedimientos ofrecen una visión única sobre el razonamiento legal empleado por Estados y organizaciones internacionales para sustentar la existencia de una anexión de facto. Cabe destacar que uno de los aspectos más llamativos de estas alegaciones es el papel central que se atribuye a la dimensión temporal de la ocupación en este sentido. A través de un examen exhaustivo de las mismas, este artículo demuestra que la duración sin precedentes de la ocupación de Israel, así como la permanencia de las medidas definitorias implementadas por Israel en el territorio ocupado – principalmente el establecimiento de asentamientos – sirvieron como indicadores clave que llevaron a su clasificación como una anexión de facto.

Questo articolo approfondisce la questione della legalità dell'occupazione israeliana della Palestina alla luce del divieto di acquisizione territoriale con la forza, nel contesto del parere consultivo del 2024 della Corte Internazionale di Giustizia sulle conseguenze giuridiche derivanti dalle politiche e pratiche di Israele nei territori palestinesi occupati, inclusa Gerusalemme Est. Un'analisi dettagliata delle procedure relative a questo parere consultivo rivela infatti che una parte significativa delle memorie presentate dagli Stati

e dalle organizzazioni internazionali alla Corte è indirizzata a qualificare l'occupazione della Palestina da parte di Israele come annessione, in particolare come annessione de facto — un concetto che finora era stato sviluppato principalmente in ambito dottrinale. Le procedure offrono finora un punto di vista unico sulle argomentazioni giuridiche utilizzate da Stati e organizzazioni internazionali per dimostrare l'esistenza di una annessione de facto. Degno di nota è il ruolo centrale attribuito alla dimensione temporale dell'occupazione a tal riguardo. Attraverso un'analisi approfondita delle memorie, questo articolo dimostra che la durata senza precedenti dell'occupazione israeliana cosi come la permanenza di misure precostituite adottate da Israele nel territorio occupato — in particolare l'istituzione di insediamenti — sono state indicatori chiave che hanno portato alla sua qualificazione come annessione de facto.

Dieser Artikel befasst sich mit der Frage der Rechtmäßigkeit der Besetzung Palästinas durch Israel im Licht des Verbots der gewaltsamen Aneignung von Gebieten im Kontext des Gutachtens des Internationalen Gerichtshofs von 2024 zu den rechtlichen Folgen der Politik und der Praktiken Israels in den besetzten palästinensischen Gebieten, einschließlich Ostjerusalem. Eine detaillierte Analyse des Verfahrens im Zusammenhang mit diesem Gutachten zeigt in der Tat, dass ein erheblicher Teil der Erklärungen von Staaten und internationalen Organisationen vor dem Gerichtshof darauf abzielt, die Besetzung Palästinas durch Israel als Annektierung, insbesondere als eine De-facto- Annektierung zu charakterisieren – ein Konzept, das bisher vor allem in der Rechtswissenschaft entwickelt wurde. Das Verfahren bietet somit einen einzigartigen Einblick in die rechtliche Argumentation, mit der Staaten und internationale Organisationen die Existenz einer De-facto-Annektierung begründen. Einer der auffälligsten Aspekte dieser Erklärungen ist insbesondere die zentrale Rolle, die der zeitlichen Dimension der Besetzung in diesem Zusammenhang zukommt. Durch eine umfassende Prüfung der Erklärungen zeigt dieser Artikel, dass die beispiellose Dauer der israelischen Besetzung und der permanente Charakter der von Israel in den besetzten Gebieten ergriffenen Maßnahmen – vor allem die Errichtung von Siedlungen – die wichtigsten Indikatoren waren, die zur Einstufung als De-facto-Annektierung geführt haben.

Keywords: *Prolonged occupation, Annexation, Passage of time, Settlements, Advisory opinion*

1 INTRODUCTION

On 19 July 2024, the International Court of Justice (ICJ or Court) issued its eagerly awaited advisory opinion on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (hereinafter: the *Policies and Practices of Israel* advisory opinion).[1] The matter was referred to the Court by the United Nations General Assembly in 2022. Deploring the prolonged occupation of Palestine by Israel and concerned about systematic human rights violations committed by Israel against the Palestinian population, the General Assembly had requested the Court to rule, on the one hand, on 'legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the

1. ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion of 19 July 2024.

Palestinian territory occupied since 1967' and, on the other hand, on the impact of those policies and practices on the status of the occupation as well as the legal consequences arising therefrom for all States and the United Nations.[2] For the first time, the Court was thus called upon to rule on the *status of* the occupation as such, terms interpreted by the Court as referring to the *legality of* the occupation.[3] This differs from the procedure that took place before this very same Court, 20 years earlier.[4] Indeed, in the *Wall* advisory opinion, the General Assembly had sought the Court's insight on legal consequences arising from the construction of the wall being built by Israel within the Palestinian territory.[5] When it came to this second advisory opinion dealing with the Israeli occupation of Palestine, the stakes were therefore different and quite significant, as States well understood: 54 States and 3 international organizations submitted written statements, 13 States and 2 international organizations submitted written observations in response, and 50 States (including eight that did not participate in the written phase) and 3 international organizations took part in the oral proceedings.

A meticulous analysis of the said submissions reveals that, for the majority of States and international organizations that intervened in this proceeding, Israel's prolonged occupation of Palestine constitutes an annexation,[6] in violation of the customary prohibition of territorial acquisition resulting from the use of force,[7]

2. UN General Assembly Res. 77/247, UN Doc. A/RES/77/247, 30 December 2022.

3. ICJ, *Policies and Practices of Israel* advisory opinion (fn 1) 27–28, para 82. This differs from the Court's advisory opinion on *Western Sahara* (16 October 1975, *ICJ Reports 1975*, 12), in which the Court was requested, *inter alia*, to determine whether legal ties existed between this territory and the Kingdom of Morocco and the Mauritanian entity. The Court answered that no tie of territorial sovereignty existed and framed the question of the Western Sahara as a case of decolonization to which General Assembly's 1960 resolution 1514 (XV) is applicable – but did not apprehend it as an occupation as it is the case in the *Policies and Practices of Israel* advisory opinion. The latter must also be distinguished from the advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (21 June 1970, *ICJ Reports 1971*, 16). First, it is important to recall that South Africa was initially responsible for the administration of the territory as it held a mandate over what was then called South West Africa – a mandate inherited from the League of Nations trusteeship system. Thus, contrary to the situation discussed in this article, South Africa's presence was initially justified based on an internationally recognized title. The mandate was then deemed as terminated by the General Assembly on 27 October 1966 in its resolution 2145 (XXI) due to South Africa's behaviour, and in particular its failure to respect the fundamental rights of the Namibian people, including the right to self-determination. Second, when the Court issued its advisory opinion in 1970, South Africa's presence in Namibia had already been declared as illegal by the Security Council in its resolution 276 (1970). No such explicit resolution exists regarding the Palestinian territory.

4. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, *ICJ Reports 2004*, 136 (hereinafter 'the *Wall* advisory opinion').

5. UN General Assembly Res. ES-10/14, UN Doc. A/RES/ES-10/14, 12 December 2003.

6. The States and international organizations that have considered the occupation to have transformed into annexation are: Algeria, Bangladesh, Belize, Bolivia, Brazil, Chile, Cuba, Djibouti, Egypt, Gambia, Guyana, Indonesia, Ireland, Jordan, Kuwait, Lebanon, Libya, Malaysia, the Maldives, Mauritius, Namibia, Oman, Palestine, Pakistan, Qatar, Saudi Arabia, Senegal, Slovenia, South Africa, Syria, Tunisia, Turkey, Yemen, the League of Arab States, the Organization of Islamic Cooperation and the African Union.

7. It is to be noted that there is an existing debate regarding whether international organizations can contribute the formation or crystallization of customary international law. For

a corollary of the prohibition on the use of force in international relations as enshrined in Article 2(4) of the United Nations Charter.[8] No State explicitly stated that annexation was not taking place,[9] except for Fiji, which refers to '*false assertions* of Israeli annexation throughout the West Bank, and of Palestinian national territory'.[10] As will be discussed later, the State argues that only East Jerusalem is annexed and, even in that case, seems to imply that annexations are not prohibited under all circumstances.

The Court itself upheld the characterization of annexation in its advisory opinion rendered on 19 July 2024.[11] This represents a development compared to previous United Nations Security Council[12] and General Assembly[13] resolutions dealing with the Israeli occupation of the Palestinian territory. Although these bodies have long reiterated the inadmissibility of acquiring territory by force in their resolutions related

instance, concerning the requirement of practice as a constituent element, conclusion 4, para 2 of the International Law Commission Draft Conclusions on the Identification of Customary International Law (2018) recognizes that the practice of international organizations can contribute to the formation or expression of rules of customary international law, but only *in certain cases*, and not as a general rule.

8. Art 2(4) of the Charter of the United Nations, 26 June 1945; UN General Assembly Res. 2625 (XXV), A/RES/2625 (XXV), 24 October 1970, 1(10); ICJ, *Wall* advisory opinion (fn 4) 171, para 87.

9. Regarding the States that did not address the issue of annexation, it is difficult to determine whether they believe that no annexation is taking place as their reasoning does not necessarily concern the substance of the case as such but is rather limited to issues of judicial propriety and/or admissibility. For instance, discussing the grounds based on which it contends that the Court should refuse to answer to the request made by the General Assembly, the United Kingdom insisted on the inappropriate factual enquiry and stated that while the request mentions, among others, annexation, it merely refers to "measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem" without specifically and exhaustively identifying those measures (Written statement of the United Kingdom, ICJ, *Policies and Practices of Israel* advisory opinion, 24 July 2023, 31–32, para 64).

10. Written statement of Fiji, ICJ, *Policies and Practices of Israel* advisory opinion, 18837, 25 July 2023, 5 (emphasis added).

11. ICJ, *Policies and Practices of Israel* advisory opinion (fn 1) 53, para 179:

> 'The Court has found that Israel's policies and practices amount to annexation of large parts of the Occupied Palestinian Territory. It is the view of the Court that to seek to acquire sovereignty over an occupied territory, as shown by the policies and practices adopted by Israel in East Jerusalem and the West Bank, is contrary to the prohibition of the use of force in international relations and its corollary principle of the non-acquisition of territory by force'.

12. See, amongst others, UN Security Council Res. 242, UN Doc. S/RES/242, 22 November 1967; UN Security Council Res. 252, UN Doc. S/RES/252, 21 May 1968; UN Security Council Res. 267, UN Doc. S/RES/267, 3 July 1969; UN Security Council Res. 298, UN Doc. S/RES/298, 25 September 1971; UN Security Council Res. 476, UN Doc. S/RES/476, 30 June 1980; UN Security Council Res. 478, UN Doc. S/RES/478, 20 August 1980 and UN Security Council Res. 2334, UN Doc. S/RES/2334, 23 December 2016.

13. See, amongst others, UN General Assembly Res. 58/292, UN Doc. A/RES/58/292, 17 May 2004; UN General Assembly Res. 71/23, UN Doc. A/RES/71/23, 15 December 2016; UN General Assembly Res. 75/98, UN Doc. A/RES/75/98, 18 December 2020; UN General Assembly Res. 77/247, UN Doc. A/RES/77/247, 30 December 2022; UN General Assembly 78/78, A/RES/78/78, 11 December 2023.

to the occupation of Palestine, they had never gone so far as to explicitly qualify it as annexation.

The concept of annexation is not defined by the relevant instruments of public international law. Amongst the various definitions developed within legal doctrine, one may cite, for example, that of Jean Salmon, who describes annexation as a 'unilateral act by which a State incorporates into its territory all or part of the territory of another State'.[14] Within the context of the occupation of the Palestinian territory, the Court defines this notion as 'the forcible acquisition by the occupying Power of the territory that it occupies, namely its integration into the territory of the occupying Power'.[15] Annexation involves the combination of two elements: the effective occupation of the territory in question (*corpus*) and the intention to acquire it permanently (*animus*).[16] Since the material manifestation of occupation and annexation overlap, the distinction between the two concepts might seem unclear. Thus, it is the underlying intent behind these material aspects that differentiates annexation – which is meant to be permanent – from occupation, which is by definition meant to be a temporary situation.[17] In its *Policies and Practices of Israel* advisory opinion, the Court emphasized that 'conduct by the occupying Power that displays an intent to exercise permanent control over the occupied territory may indicate an act of annexation'.[18] Accordingly, its analysis of annexation begins with a reminder of the inherently temporary nature of occupation.[19] The temporal dimension of both the occupation and measures taken by the occupying Power thus plays a crucial role in distinguishing annexation from occupation. In that sense, the written statement submitted by Jordan to the Court emphasized that

> [t]he temporary nature of military occupation also results from interpreting and applying the relevant rules of international humanitarian law together with the prohibition of the use of force codified in Article 2(4) of the UN Charter, including the corollary principle of *non-acquisition of territory by force*, the principle of territorial integrity, and the right of peoples to self-determination. In short, any occupation must come to an end within a reasonable time, thereby restoring the territory in question to its sovereign. If occupation were allowed to be indefinite, *the distinction between occupation and annexation would disappear*, contrary to the fundamental principles of international law. Indeed, accepting the proposition that occupation *may be indefinite could be easily abused and amount to de facto annexation*.[20]

Here lies one of the fundamental principles of the concept of occupation: it leaves intact the sovereignty of the occupied State.[21] Thus, when an occupation appears indefinitely prolonged, the occupying Power's presence in the occupied territory is viewed

14. Jean Salmon (ed), *Dictionnaire de droit international public* (Bruylant, Agence Universitaire de la Francophonie, 2001) 65(B) (own translation).
15. ICJ, *Policies and Practices of Israel* advisory opinion (fn 1) 47, para 158.
16. Rainer Hofman, 'Annexation' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP, 2012) 408.
17. Lord McNair et Arthur D Watts, *The Legal Effects of War* (4th edn, CUP, 1966) 370.
18. ICJ, *Policies and Practices of Israel* advisory opinion (fn 1) 48, para 159.
19. Ibid 47, para 159.
20. Written statement of Jordan, ICJ, *Policies and Practices of Israel* advisory opinion, 24 July 2023, 47, para 4.36 (emphasis added).
21. As Oppenheim famously stated: 'There is not an atom of sovereignty in the authority of the occupant' (L Oppenheim, 'The Legal Relations Between an Occupying Power and the Inhabitants' (1917) 33(4) Law Quarterly Review 363, 364).

with greater suspicion. This potential shift from occupation to annexation in the context of a prolonged and seemingly indefinite occupation has been framed in the following terms by Ireland before the Court:

> Prolonged occupation over an *extended period of time,* therefore, unavoidably raises legal questions, in particular whether it constitutes a *disguised form of annexation* and/or a determined effort to deny the people of an occupied territory the exercise of their right to self-determination. In either case, the *legality of the occupying Power's presence in the territory inevitably arises.*[22]

Considering the above, it comes as no surprise that both the duration of the occupation and the permanence of the measures taken by Israel as the occupying Power were recurring elements in the analysis by States and international organizations of the legality of the occupation in light of the prohibition of territorial acquisition resulting from the use of force. This contribution thus examines the impact of the time factor on the characterization of the Israeli occupation as annexation (*de facto*) by States and international organizations within the proceedings related to the International Court of Justice's advisory opinion on the *Policies and Practices of Israel*. Accordingly, the aim is not to assess the legality of the Israeli occupation based on the author's own interpretation of the rules governing the use of force but rather to explore the content of the statements made by States and international organizations on the matter with a focus on the temporal dimension of the said occupation and its conduct. Given that many States and international organizations considered the occupation to be illegal *ab initio* and yet still characterized it as annexation, it is first necessary to clarify the added value of such a qualification (Section 2). The article then explores a distinction frequently made by States and international organizations in their submissions to the Court – between *de facto* and *de jure* annexation – emphasizing the pivotal role of the occupation's temporal dimension in this regard (Section 3). With these theoretical foundations in place, the final section of the article analyses the statements of States and international organizations to illustrate how, in concrete terms, Israel's occupation has been classified by several States and international organizations as a *de facto* annexation due to its prolonged duration and the permanence of the measures characterizing it (Section 4).

2 THE SIGNIFICANCE OF THE ANNEXATION QUALIFICATION: THE LOWEST COMMON DENOMINATOR

Any occupation constitutes an act of aggression if the occupying State cannot justify its presence based on an established exception to the prohibition on the use of force[23] – namely, the exercise of a State's right to self-defence[24] or the authorization to use force by the United Nations Security Council.[25] By way of background, on 5 June 1967, at the outset of the Six-Day War, which opposed Israel to Egypt, Jordan and Syria, the

22. Oral pleadings of Ireland, ICJ, *Policies and Practices of Israel* advisory opinion, CR 2024/9, 22 February 2024, 40, para 23 (emphasis added).
23. Art 3, UN General Assembly Res. 3314 (XXIX), UN Doc. A/RES/3314(XXIX), 14 December 1974, annex, Definition of Aggression.
24. Art 51 of the United Nations Charter.
25. Arts 39 and 42 of the United Nations Charter.

former took control of the West Bank, then under the control of Egypt, and the Gaza Strip, formally annexed by Jordan in 1950. At the time, Israel claimed to be acting in self-defence, in accordance with Article 51 of the United Nations Charter, in response to an alleged aggression by the United Arab Republic.[26] Provided that this claim is valid, it would mean that the Israeli occupation was, at least initially, lawful. The exercise of the right to self-defence is also the ground on which Israel bases itself to justify the continuation of its presence in Palestine.[27]

Still, many States and the three international organizations involved in the proceedings have argued before the Court that the occupation did not result from a lawful exercise by Israel of its right to self-defence, thereby considering the occupation to be unlawful from the outset, asserting that no armed aggression was directed against Israel at that time.[28] Therefore, if one were to follow the reasoning according to which Israel cannot invoke its right to self-defence to justify the establishment of the occupation in 1967, the importance of characterizing the occupation as annexation may, at first glance, appear limited, as the occupation must then be regarded as a violation of Article 2(4) of the United Nations Charter *ab initio*, regardless of its duration or conduct. It is in this sense that, in its oral submissions to the Court, Lebanon described annexation as an aggravating circumstance of what it considers to be an aggression, the latter notion taking precedence over any other qualification – Lebanon nevertheless considered that the Palestinian territory was annexed by Israel:

> I would like to add, on this subject, that many States have mentioned – and I would even say emphasized – in their written and oral submissions, the *prolonged nature* of the Israeli occupation *in order to characterize it as an illegal annexation* of Palestinian territories.
>
> This is a valid and sound argument, Mr President. However, it should be regarded as an *aggravating circumstance of the crime, rather than the crime itself*, which is the crime of aggression.
>
> Indeed, since 1945, the use of force has been strictly regulated under international law, and since 1967, Israel has been committing a crime of aggression *by unlawfully occupying territories prior to annexing them*. In other words, the occupation of territories resulting from the unlawful use of force is itself *illegal, regardless of its duration.* Here we are confronted with the first peremptory norm violated by Israel.[29]

Be that as it may, the analysis of the legality of the occupation of Palestine by Israel in light of the prohibition of territorial acquisition by force constitutes a major part of the presentations of States and international organizations, implying that the participants did not necessarily view annexation as merely an aggravating circumstance, but rather

26. Record of the 1347th meeting of the UN Security Council, UN Doc. S/PV.1347, 5 June 1967, 4, para 32.
27. Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP, 1995) 235.
28. The States and international organizations that have considered the Israeli occupation to be unlawful since 1967 are Belize, Egypt, Gambia, Iran, Indonesia, Kuwait, Lebanon, Libya, Maldives, Namibia, Palestine, Qatar, Saudi Arabia, Syria, Yemen, the African Union, the League of Arab States and the Organization of Islamic Cooperation. This position is also supported by some scholars. See e.g. John Quigley, *The Six-Day War and Israeli Self-Defense* (CUP, 2013). For a more concise presentation by the same author, see John Quigley, 'Israel's Unlawful 1967 Invasion of Palestine' in Nada Kiswanson and Susan Power (eds), *Prolonged Occupation and International Law. Israel and Palestine* (Brill | Nijhoff, 2023) 13.
29. Oral pleadings of Lebanon, ICJ, *Policies and Practices of Israel* advisory opinion, CR 2024/10, 22 February 2024, 23, paras 13–15 (emphasis added) (own translation).

as a violation of international law in its own right. As will be further elaborated, several elements account for the frequent use of this characterization, each highlighting the added value of framing the occupation as annexation.

2.1 A qualification that neutralizes the self-defence debate

The claim that the invasion in 1967 constituted an unlawful use of force is not endorsed by all, at least not explicitly. Most States have refrained from expressing a position on the legality of the use of force in 1967 or have done so solely through the international organizations to which they belong, with no Western State supporting this approach.[30] One State did, however, expressly state in its submissions to the Court that Israel acted in self-defence when it gained control over the Palestinian territory: Fiji.[31] Thus, while steering clear of the contentious debate surrounding the interpretation of the events that led to the outbreak of the Six-Day War, several States have reached the same conclusion – the illegality of the occupation – by taking an alternative route: that of annexation. This is exemplified by Chile, which grounded its finding of the occupation's illegality on two main elements: on the one hand, the existence of an annexation and, on the other hand, Israel's systematic violations of a range of its international obligations (including the right to self-determination, international humanitarian law, international human rights law and the prohibition of racial discrimination).[32] A similar reasoning was followed by Guyana, which argued that the legality of Israel's occupation of Palestine should be analysed in light of the principle of non-acquisition of territory by force:

> How then does one determine whether Israel's occupation of Palestinian territory is unlawful? The answer, Guyana submits, is straightforward. It is to be found in the principle that occupation is *inherently and exclusively a temporary* state of affairs, and in the *jus cogens* prohibition on *acquisition of territory by force*.[33]

In the same vein, Japan, which focused exclusively on the principle of non-acquisition of territory by force, insisted on the fact that 'the principle prohibiting acquisition of territory by force precludes any acquisition of territorial title through force, *regardless of whether that force is unlawful or permitted as an exercise of self-defence*'.[34] In adopting this approach,[35] these States effectively circumvented or disregarded discussions

30. See (fn 28). Regarding positions of States in 1967, see John Quigley, 'The Six Day War – 1967' in Tom Ruys and Olivier Corten (eds), *The Use of Force in International Law* (OUP, 2018) 131. The author concludes its study by asserting that contrary to what an important part of the literature might suggest, the Six Day War is in reality an instance of State practice reaffirming that there must be an armed attack for there to be a lawful exercise of self-defence.
31. Written statement of Fiji (fn 10) 5.
32. Oral pleadings of Chile, ICJ, *Policies and Practices of Israel* advisory opinion, CR 2024/6, 20 February 2024, 46, para 30.
33. Oral pleadings of Guyana, ICJ, *Policies and Practices of Israel* advisory opinion, CR 2024/8, 21 February 2024, 39, para 21 (emphasis added).
34. Oral pleadings of Japan, ICJ, *Policies and Practices of Israel* advisory opinion, CR 2024/9, 22 February 2024, 51, para 13 (emphasis added). Nonetheless, Japan then held that, *alternatively*, 'uses of force resulting in the annexation of territory will never be lawful as exercises of self-defence since permanent annexation can never be a proportionate response to an armed attack'.
35. See also, amongst others: Written statement of Brazil, ICJ, *Policies and Practices of Israel* advisory opinion, 18875, 25 July 2023 and Oral statement of Brazil, ICJ, *Policies and*

on the right to self-defence, as such considerations became moot once the illegality of the occupation was framed in terms of annexation – an act prohibited under all circumstances. Indeed, the prohibition on the acquisition of territory by force applies equally to aggressor States and those acting in self-defence, without distinction.[36] In other words, no circumstance, be it a case of self-defence, can override the prohibition of a peremptory norm of international law.[37] Simply put, it matters little whether Israel was acting in self-defence or not when it took control of Palestinian territory in 1967, as the occupation ultimately turned into annexation.

It is worth noting, however, that the Fijian government appears to implicitly endorse the opposing view. Describing the allegations according to which Israel is annexing the Palestinian territory as being 'false assertions', Fiji contends that 'allegations that Israel illegitimately annexed East Jerusalem presume that international law prohibits annexation in any circumstances, including even reunification of a national capital city'.[38] This stance remains entirely isolated and does not warrant further discussion, as all other States that have addressed the issue have unanimously affirmed that the prohibition on the acquisition of territory by force under Article 2(4) of the United Nations Charter admits of no exceptions.[39] Moreover, this interpretation of the norm is firmly rooted in relevant legal instruments,[40] aligns with the prevailing scholarly

Practices of Israel advisory opinion, CR 2024/6, 20 February 2024, 36, para 14; Oral statement of Columbia, ICJ, *Policies and Practices of Israel* advisory opinion, CR 2024/7, 21 February 2024, 15–16, para 29; Oral statement of United Arab Emirates, ICJ, *Policies and Practices of Israel* advisory opinion, CR 2024/7, 21 February 2024, 46, para 43; Written statement of Ireland, ICJ, *Policies and Practices of Israel* advisory opinion, 25 July 2023, 17, para 45.

36. Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Clarendon Press, 1996) 209–14; UN General Assembly Res. 2625 (XXV) (fn 8) 1(10); UN Security Council Res. 242 (fn 12) preamble.

37. Art 26, International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', *Yearbook of the International Law Commission*, 2001, vol II, Part Two; ICJ, *Policies and Practices of Israel* advisory opinion (fn 1) 71, para 254; Declaration of Judge Tladi, ICJ, *Policies and Practices of Israel* advisory opinion (fn 1) 16, para 44.

38. Written statement of Fiji (fn 10) 5–6.

39. See e.g. Written statement of Algeria, ICJ, *Policies and Practices of Israel* advisory opinion, 19048, 24 July 2023, 21; Oral statement of Belgium, ICJ, *Policies and Practices of Israel* advisory opinion, CR 2024/5, 20 February 2024, 68, para 17; Written statement of Bolivia, ICJ, *Policies and Practices of Israel* advisory opinion, 18855, 25 July 2023, 5; Written statement of Egypt, ICJ, *Policies and Practices of Israel* advisory opinion, 18869, 25 July 2023, 41, para 266; Written statement of France, ICJ, *Policies and Practices of Israel* advisory opinion, 18789, 25 July 2023, 19, para 93; Written statement of Gambia, ICJ, *Policies and Practices of Israel* advisory opinion, 25 July 2023, 14, para 1.29; Written statement of Guyana, ICJ, *Policies and Practices of Israel* advisory opinion, 18842, 25 July 2023, 3, para 8; Written statement of Indonesia, ICJ, *Policies and Practices of Israel* advisory opinion, 18881, 25 July 2023, para 41; Written statement of Jordan, ICJ, *Policies and Practices of Israel* advisory opinion, 18864, 25 July 2023, 61, para 4.79; Written statement of Palestine, ICJ, *Policies and Practices of Israel* advisory opinion, 24 July 2023, 282, para 5.41; Written statement of the League of Arab States, ICJ, *Policies and Practices of Israel* advisory opinion, 20 July 2023, 57, para 164; Written statement of the African Union, ICJ, *Policies and Practices of Israel* advisory opinion, 18872, 25 July 2023, 61, para 121.

40. Art 2(4) of the United Nations Charter; UN General Assembly Res. 2625 (XXV) (fn 8) 1(10).

consensus[41] and was upheld by the Court in its recent advisory opinion on the *Policies and Practices of Israel*.[42]

2.2 A qualification that constitutes a subsidiary or additional ground of illegality

The fact that an act is unlawful from the outset does not preclude its subsequent evolution from being subject to distinct, and multiple, legal qualifications. In this regard, Ingrid Brunk and Monica Hakimi argue that there is an added value in examining the situation through the lens of the prohibition of acquisition of territory by force and not merely as an unlawful use of force as the former 'is not fully encompassed by the prohibition on the use of force or by any other international legal norm' and 'addresses sovereign title to territory, an issue not directly regulated by limitations "on the use of force"'.[43] The authors then identify three reasons supporting the approach according to which the prohibition of annexations should be seen as distinct from, rather than subsumed into, the prohibition of the use of force: first, it ensures that annexations are prohibited under all circumstances, regardless of the lawfulness of the initial use of force; second, it would prevent debates regarding whether the threshold for a threat or use of force under Article 2(4) is met; and third, unlike the use of force against a State's political independence, for instance, annexation regulates title to territory.[44]

Accordingly, it comes as no surprise that several States and international organizations that deemed the occupation illegal *ab initio* nonetheless assessed its legality in light of the prohibition on the acquisition of territory by force, likely cognizant that the Court would refrain from engaging in the contentious debate over the legality of the 1967 invasion. In that sense, Judge Charlesworth declared,

> because the rules concerning the use of force remain applicable throughout the occupation, it is *neither necessary nor sufficient to determine whether the use of force that brought about the occupation was lawful*. What matters is whether the legal basis for the use of force – in the present context, the legal basis for the occupation – is valid today. Therefore, I support the decision not to determine whether Israel's use of force in 1967 had a legal basis at the time, *because it is unnecessary*.[45]

Indeed, the Court was not requested to examine the legality of the 1967 invasion, as the questions submitted for its consideration did not pertain to the absolute status of the occupation but rather to the impact of specific Israeli policies and practices on that status.[46] Notably, amongst the policies and practices identified by the General Assembly in its request for an advisory opinion, the issue of prolonged annexation was explicitly

41. Sharon Korman (fn 36) 209–14; Eric David, *Principes de droit des conflits armés* (6th edn, Larcier-Bruylant, 2019) 701, para 2.421; Ingrid Brunk and Monica Hakimi, 'The Prohibition of Annexations and The Foundations of Modern International Law' (2024) 118(3) American Journal of International Law 417.
42. ICJ, *Policies and Practices of Israel* advisory opinion (fn 1) 71, paras 253–254.
43. Ingrid Brunk and Monica Hakimi (fn 41) 421–22.
44. Ibid 444–45.
45. Declaration of Judge Charlesworth, ICJ, *Policies and Practices of Israel* advisory opinion (fn 1) 5, para 7 (emphasis added).
46. Declaration of President Salam, ICJ, *Policies and Practices of Israel* advisory opinion (fn 1) 9, para 35.

raised, thereby constituting the central matter for examination.[47] In other words, to adequately address the issue at hand, States and international organizations were somehow compelled to engage with the question of annexation. For those States that examined the characterization of annexation despite having already determined the occupation's illegality since 1967, this dual-layered qualification serves a twofold purpose. On the one hand, it functions as a subsidiary ground for illegality, i.e. *regardless* of its illegality as a prohibited use of force. For instance, Belize argued that:

> *Even leaving to one side the illegality of Israel's occupation of the Palestinian territory*, by virtue of Israel's annexation of the territory and its attempt to acquire the territory by force, the same conduct giving rise to the existence of the occupation *is in any event unlawful on a different basis: because it violates the prohibition of the acquisition of territory by force.*[48]

On the other hand, other participants viewed the characterization of annexation as an additional and distinct violation of international law, i.e. *besides* its illegality as a prohibited use of force, separate from the question of the initial use of force. This is particularly the case for Qatar:

> Third, Israel's occupation is illegal because it violates the jus cogens prohibition on the use of force. (…) Fourth, by virtue of its illegal annexation of portions of the Occupied Palestinian Territory, Israel has breached yet another *jus cogens* norm, the prohibition on the acquisition of territory through the use of force.[49]

2.3 A qualification that better grasps the lived experience of the occupied population and the essence of the occupation

More symbolically, the characterization of annexation more accurately captures the lived experience of the population subjected to it. Annexation evokes conquest, earning it the description of an intolerable scourge, akin to the darkest periods of history.[50] Indeed, beyond the issue of the use of force, annexation entails the dispossession of one for the benefit of the appropriation by another, which explains the frequent references to colonization in States' submissions. The experience of the Palestinian population cannot, therefore, be reduced to a singular act of force occurring at a specific moment in time. Thus, even though both the initial invasion and annexation may constitute serious violations of a peremptory norm of *jus cogens*,[51] triggering similar consequences for third States or in terms of reparation, annexation more accurately reflects the reality experienced by both the occupied population and the occupied Power, from 1967 and right up to the present day. As a legal concept, annexation accounts for the

47. For instance, in its oral submissions to the Court, Japan focused exclusively on the question of the acquisition of the territory by force 'in so far as they are relevant to the questions put to the Court by the General Assembly' (Oral pleadings of Japan (fn 34) 45, para 3).
48. Written statement of Belize, ICJ, *Policies and Practices of Israel* advisory opinion, 18886, 25 July 2023, 56, para 78 (emphasis added).
49. Oral pleadings of Qatar, ICJ, *Policies and Practices of Israel* advisory opinion, CR 2024/11, 23 February 2024, 63, paras 57–58.
50. Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *UN General Assembly*, UN Doc. A/73/447, 22 October 2018, 10, para 24.
51. Arts 40 and 41, Articles on Responsibility of States for Internationally Wrongful Acts (fn 37).

unprecedented duration of the Israeli occupation, encapsulating a prolonged and continuous form of control that a mere reference to the events of 1967 fails to convey. It is, therefore, a matter of naming things for what they are. As John Dugard observed, '[i]n politics euphemism is often preferred to accuracy in language […] The word 'annexation' is avoided as it is too accurate a description'.[52] Accordingly, while many States and international organizations have asserted that Israel's 1967 invasion was unlawful, rendering the continuation of the occupation automatically illegal, it is hardly surprising to note that they nonetheless engaged in the analysis of the occupation as concealing an annexation, and more particularly a so-called *de facto* annexation.

3 THE CONCEPT OF ***DE FACTO*** ANNEXATION: WHERE THE TEMPORAL DIMENSION OF THE OCCUPATION COMES INTO PLAY

For the numerous States and international organizations that deemed the term 'annexation' adequate in light of the apparent permanence of the Israeli occupation, the concept of *de facto* annexation has proven to be an even more fitting characterization.[53] Since international law does not define the concept of annexation, the notions of *de jure* and *de facto* annexation remain the result of scholarship and, to some extent, caselaw.[54]

52. Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 1993/2 A, *Economic and Social Council*, E/CN.4/2004/6, 8 September 2003, 6, para 6.

53. Written statement of Algeria (fn 39) 20; Written statement of Saudi Arabia, ICJ, *Policies and Practices of Israel* advisory opinion, 25 July 2023, 8, para 23; Written statement of Bangladesh, ICJ, *Policies and Practices of Israel* advisory opinion, 18865, 24 July 2023, 10, para 31(i); Written statement of Belize (fn 48) 28, para 49; Oral statement of Belgium (fn 39) 66, para 8; Written statement of Bolivia (fn 39) 14; Written statement of Chile, ICJ, *Policies and Practices of Israel* advisory opinion, 24 July 2023, 30, para 95; Written statement of Djibouti, ICJ, *Policies and Practices of Israel* advisory opinion, 18900, 25 July 2023, 3, para 12; Written statement of Egypt (fn 39) 42, para 269; Written statement of Indonesia (fn 39) para 49; Written statement of Ireland (fn 35) 16, paras 40 and 41; Written statement of Jordan (fn 39) 47, para 4.36; Written statement of Malaysia, ICJ, *Policies and Practices of Israel* advisory opinion, 25 July 2023, 13, para 42; Written statement of the Maldives, ICJ, *Policies and Practices of Israel* advisory opinion, 25 July 2023, 8, para 22; Written statement of Oman, ICJ, *Policies and Practices of Israel* advisory opinion, 18848, 25 July 2023, 4, para 3; Written statement of Palestine (fn 39) 111, para 3.147; Written statement of Pakistan, ICJ, *Policies and Practices of Israel* advisory opinion, 25 July 2023, 2, para 3(b)(i); Written statement of Qatar, ICJ, *Policies and Practices of Israel* advisory opinion, 25 July 2023, 186, para 3.11; Written statement of Senegal, ICJ, *Policies and Practices of Israel* advisory opinion, 18750, 28 July 2023, 2; Written statement of South Africa, ICJ, *Policies and Practices of Israel* advisory opinion, 25 July 2023, 23, para 52; Oral pleadings of Tunisia, ICJ, *Policies and Practices of Israel* advisory opinion, CR 2024/12, 23 February 2024, 64, para 4; Written statement of Yemen, ICJ, *Policies and Practices of Israel* advisory opinion, 25 July 2023, 9, para 25; Written statement of the League of Arab States (fn 39) 22, para 54; Written statement of the Organisation of Islamic Cooperation, ICJ, *Policies and Practices of Israel* advisory opinion, 19035, 24 July 2023, 93, para 303; Written statement of the African Union (fn 39) 23, para 52.

54. See ICJ, *Wall* advisory opinion (fn 4) 184, para 121. Still, it is to be noted that not all international actors adopt this distinction between *de jure* and *de facto* annexation; to the best of our knowledge, it is not found, for instance, in the Security Council resolutions addressing cases of acquisition of territories by force.

This distinction between *de jure* annexation and *de facto* annexation was addressed in detail, amongst others, by the Independent International Commission mandated with investigating all alleged violations of international humanitarian law and international human rights law in the Occupied Palestinian Territory and Israel. Regarding *de jure* annexation, the Commission defined it as 'the formal extension of a State's sovereignty into a territory recognized under its domestic law'.[55] Consequently, when claims of sovereignty over the occupied territory are asserted and formalized, that territory is considered subject to *de jure* annexation. In such cases, the time factor holds minimal importance. Israel's annexation of East Jerusalem serves, in this regard, as a textbook example.[56] On 30 July 1980, the Knesset passed the Basic Law on Jerusalem, describing the city as the 'complete and united' capital of Israel.[57] 'Deeply concerned', the United Nations Security Council reacted shortly thereafter by affirming that the enactment of this law violates international law and that it in no way altered the applicability of the Fourth Geneva Convention of 1949[58] – which governs, amongst others, situations of occupation. It further decided not to recognize the law or any actions stemming from it in order to preserve the status of the holy city.[59] While the term annexation was not expressly used, the discussions within the United Nations Security Council and General Assembly[60] have led to a broad consensus that these two bodies condemned the annexation of East Jerusalem, deeming it null and void.[61]

In such cases where annexation is formally assumed by the occupying Power, it is evident that the time factor has little bearing on the qualification of the situation. A particularly illustrative example is the annexation of Kuwait by Saddam Hussein's Iraq in 1990.[62] To put it into context, in the early hours of 2 August 1990, Iraqi forces invaded Kuwait, an invasion that was followed by a seven-month occupation. Within the first resolutions adopted in response to this act, the United Nations Security Council condemned the invasion, but did not use the term 'annexation',[63] with the Iraqi delegate asserting that 'Iraq is pursuing no goal or objective in Kuwait and desires cordial and

55. Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, *UN General Assembly*, UN Doc. A/77/328, 14 September 2022, para 12. See also ICJ, *Policies and Practices of Israel* advisory opinion (fn 1) 48, para 160.

56. For an analysis that incorporates political considerations in the aftermath of annexation, see Samuel Shepard Jones, 'Status of Jerusalem: Some National and International Aspects' (1968) 33(1) Law and Contemporary Problems 169.

57. 'Basic-Law: Jerusalem The Capital of Israël' (30 July 1980) para 1 <https://m.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawJerusalem.pdf>. This was followed by the adoption of another law in July 2018, The Jewish Nation-State Law, which reaffirms that all of Jerusalem constitutes the capital of Israel. For further details on this law, see Hassan Jabareen and Suhad Bishara, 'The Jewish Nation-State Law' (2019) 48(2) Journal of Palestine Studies 43.

58. Art 47, IV Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

59. UN Security Council Res. 478 (fn 12).

60. See e.g. Record of the 1582th meeting of the UN Security Council, UN Doc. S/PV.1582, 25 September 1971.

61. Antonio Cassese, 'Legal Considerations on the International Status of Jerusalem' (1986) 3(1) The Palestine Yearbook of International Law 13, 29.

62. For a timeline of events, see Franck Frégosi, 'Golfe: de la crise à la guerre. «Essai» de chronologie' (1991) 61 Revue du monde musulman et de la Méditerranée 30.

63. UN Security Council Res. 660, UN Doc. S/RES/660, 2 August 1990 and UN Security Council Res. 661, UN Doc. S/RES/661, 6 August 1990.

good-neighbourly relations with Kuwait'.[64] However, on 8 August 1990, the Iraqi Revolution Command Council announced the complete merger of Iraq and Kuwait.[65] The following day, the United Nations Security Council convened and unanimously adopted Resolution 662, declaring that 'the *annexation* of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void'.[66] As for the Iraqi government, it reiterated that 'the unity of Iraq and Kuwait is indestructible […] [i]t is an eternal and irreversible unity'.[67]

In sum, in cases of formal recognition, that is to say, *de jure* annexation, the temporal dimension characterizing the occupation is not a relevant factor. That being said, the prevalence of the formal act, while it used to be the traditional method of annexation, diminished since the codification of the prohibition of acquiring territory by force, even though formal annexation has not disappeared entirely as evidenced by the recent annexation of four Ukrainian oblasts by Russia in September 2022.[68] To avoid potential consequences in terms of international responsibility, States thus have 'a strong incentive to obfuscate the reality of their plans'.[69] They might then seek to achieve the same end through other 'subtler' means, more 'clandestinely',[70] avoiding an outright declaration of sovereignty over the territory, but acting as though they have. This shift reflects a broader trend where States favour facts on the ground over formal legal declarations in order to 'annex without annexing', opting for the more discreet alternative of facts on the ground over the excessive transparency of the law. This is nothing but a 'conquête qui ne dit pas son nom'.[71] An occupying Power might thus try to leverage time to its advantage and exploit its presence to ensure its permanence through *faits accomplis*. It is this manoeuvre, i.e. *brandir les faits pour faire plier le droit*, that the concept of *de facto* annexation seeks to counter. Indeed, as Japan noted, very little would remain of the prohibition on the acquisition of territory by force if it were enough for a State to circumvent it by concealing its true intentions and compelling third States to accept the established control achieved through *faits accomplis*.[72] Ireland echoed this reasoning, asserting that whether the process occurs *de jure* or *de facto* does not affect its non-compliance with the prohibition on the acquisition of territory by threat or use of force:

> In Ireland's view, any assertion that this prohibition [the prohibition in international law of the acquisition of territory by threat or use of force] has not been breached because Israel has

64. Record of the 2932nd meeting of the UN Security Council, UN Doc. S/PV.2932, 2 August 1990, 11.
65. Letter dated 8 August 1990 from the Permanent Representatives of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates to the United Nations addressed to the President of the Security Council, S/21470, 8 August 1990.
66. UN Security Council Res. 662, UN Doc. S/RES/662, 9 August 1990, para 1 (emphasis added).
67. Record of the 2934th meeting of the UN Security Council, UN Doc. S/PV.2934, 9 August 1990, 46.
68. Regarding the peculiarity of Russia's invasion of Ukrainian territories in that it is an upfront attack directed at the core of the prohibition on forcible annexations rarely witnessed in the post-World War II global order, see Ingrid Brunk and Monica Hakimi, 'Russia, Ukraine, and the Future of World Order' (2022) 116(4) American Journal of International Law 687.
69. UN Doc. A/73/447 (fn 50) 12, para 30.
70. Christina Luo, 'Creating Strangers in Their Own Land: Settlements as De Facto Annexation in Palestine and Tibet' (2019) 37(2) Boston University International Law Journal 395, 419.
71. Written statement of South Africa (fn 53) 15, para 61 (French version).
72. Oral pleadings of Japan (fn 34) 49, para 8.

> not yet formally declared its annexation of the Occupied Palestinian Territory would deny the prohibition any effect. Such an assertion would amount to an acceptance that Israel can acquire territory simply by declining to declare formally what it is attempting to achieve in reality.[73]

Therefore, as Omar Dajani already pointed out, one must avoid being overly formalistic when analysing potential contemporary annexations.[74] In other words, the official declaration of annexation should not be regarded as a *sine qua non* condition.[75] Ultimately, the form of the intent is of minimal significance, as the representative of Pakistan argued before the Court when he stated that 'Israel's occupation is no longer, if it ever was, a military occupation; it is annexation. In East Jerusalem, the annexation is *de jure*; in the rest of the territory, it is *de facto*. But *the formal characterization matters little*'.[76] In the same vein, Norway, emphasized that 'annexation under any form – whether *de jure* or *de facto* – is illegal under international law. The formal characterization is immaterial'.[77]

In 2004, in its advisory opinion on the *Wall*, the Court considered that the construction of the wall by Israel could amount to a *de facto* annexation, not only in the absence of a formal declaration to that effect but, more significantly, even though Israel maintained that the construction of the wall did not constitute an annexation and that it was temporary.[78] The Court indeed found that the wall and the regime related to it created a *fait accompli* that could – conditionally – amount to a *de facto* annexation if it were to become permanent. However, the Court did not precisely define what constitutes a *de facto* annexation nor did it identify its components or address the question of when this *fait accompli* would become permanent. In its 2024 advisory opinion, the Court acknowledges the distinction between *de facto* annexation and *de jure* annexation but still fails to elaborate further on this point, even though it specifies that the two types of annexation differ 'in terms of the means through which the annexation is carried out'.[79] It merely establishes that Israeli policies and practices in the occupied territory 'are designed to remain in place indefinitely and to create irreversible effects on the ground' and concludes that they 'amount to annexation of large parts of the Occupied Palestinian Territory'[80] – which aligns more with the characterization of a *de facto* annexation.

Since the reasoning of the Court does not provide a precise understanding of the concept of *de facto* annexation, it is necessary to turn to other sources. Based on the premise that *de facto* annexation is inferred from facts – and occupation is a fact – indicating

73. Written statement of Ireland (fn 35) para 41.
74. Omar M Dajani, 'Israel's Creeping Annexation' (2017) 111 American Journal of International Law 51, 53.
75. In its caselaw, the Court has often set aside overly strict formalism when determining the intention of a party. See e.g. ICJ, *Temple of Preah Vihear (Cambodia v. Thailand)*, preliminary objections, 26 May 1961, ICJ Reports 1961, 31 and ICJ, *Nuclear Tests (New Zealand v. France)*, judgment, 20 December 1974, ICJ Reports 1974, 473, para 48.
76. Oral pleadings of Pakistan, ICJ, *Policies and Practices of Israel* advisory opinion, CR 2024/11, 23 February 2024, 37, para 7 (emphasis added).
77. Oral pleadings of Norway, ICJ, Policies and Practices of Israel advisory opinion, CR 2024/11, 23 February 2024, 24, para 19 (emphasis added).
78. ICJ, *Wall* advisory opinion (fn 4) 184, para 121.
79. ICJ, *Policies and Practices of Israel* advisory opinion (fn 1) 48, para 160.
80. Ibid 51, para 173.

permanence, several international actors have underscored the significance of the context of duration in determining its existence. Thus, according to the aforementioned Independent International Commission, *de facto* annexation results from a 'gradual or incremental process'[81] and can be identified from facts aimed at being irreversible and permanent 'while avoiding any formal proclamation in order to evade diplomatic and political repercussions'.[82] While intent is the key element distinguishing occupation from annexation, the form this intent takes differentiates *de facto* annexation from *de jure* annexation.[83] It follows that an intent to annex may be inferred from the duration of an occupation and the practices that characterize it when these practices aim at 'consolidating – often through oblique and incremental measures – the legislative, political, institutional, and demographic facts to establish a future claim of sovereignty over territory acquired through force or war, but without the formal declaration of annexation'.[84] Such practices would then overturn the presumption of temporality of occupation as they render it indefinite or permanent.[85] *De facto* annexation, therefore, constitutes a process 'in which a putative acquisition of territory is undertaken *not in one fell swoop*, but *gradually* through a pattern of oblique and sometimes informal measures'.[86] It is precisely within this context of duration that the time factor plays a particular role, as it is within this timeframe that such *de facto* annexation takes shape. This is a point that Jordan already emphasized in 2004 before the Court in the context of the *Wall* advisory opinion:

> As an international law concept, annexation and other changes of status are *not necessarily instantaneous events*, taking effect, for example, upon the promulgation of a proclamation of annexation: they may occur *as the final outcome of a cumulation of occurrences, spread over time.*[87]

With regard to the identification of such 'occurrences', several scholars have developed lists of factual indicators that assist in determining the existence of annexation, sometimes referring to time considerations.[88] For instance, amongst those identified by Omar Dajani are the prolonged exercise of government functions typically reserved for a sovereign in its territory, the refusal to acknowledge the application of the law of occupation, particularly the rules that distinguish the rights of the occupier

81. UN Doc. A/77/328, 59, para 13.
82. Ibid para 13.
83. Valentina Arazova, 'Israel's unlawfully prolonged occupation: consequences under an integrated legal framework' (June 2017) *Conseil européen des relations internationales – Policy Brief*, 7; ICJ, *Policies and Practices of Israel* advisory opinion (fn 1) 48, para 160.
84. UN Doc. A/73/447 (fn 50) para 19.
85. Ronit Levine-Schnur, Tamar Megiddo and Yael Berda, 'A Theory of Annexation' (5 February 2023) 5 <https://ssrn.com/abstract=4330338>.
86. Omar M Dajani (fn 74) 51 (emphasis added).
87. Written statement of Jordan, ICJ, *Wall* advisory opinion, 30 January 2004, para 5.106 (emphasis added).
88. For instance, Eyal Benvenisti and Eliav Lieblich cite economic and legal integration, the issuance of passports by the occupying Power to the occupied population, the appointment of the occupying power's national agents to strategic positions, demographic and infrastructural changes, the establishment of settlements, significant changes to local law (in an effort to align it with the occupying Power's national law), and the direct application of the occupying Power's national law to the occupied territory (see Eyal Lieblich and Eliav Benvenisti, *Occupation in International Law* (OUP, 2022) 30).

from those of the sovereign of the territory, and the establishment of settlements.[89] Building upon Dajani's criteria, the Special Rapporteur on the situation of human rights in the Palestinian territories proposed, in 2018, a set of criteria of various nature aimed at assessing whether the threshold beyond which a State's activities constitute *de facto* annexation has been crossed. Amongst these criteria is the prolongation of occupation:

(a) Effective control. The State is in effective control of territory that it forcibly acquired from another State.
(b) Exercises of sovereignty. The State has taken active measures that are consistent with permanency and a sovereign claim over parts or all of the territory or through prohibited changes to local legislation, including the application of its domestic laws to the territory, demographic transformation and/or population transfer, *the prolonged duration of the occupation* and/or the granting of citizenship.
(c) Expressions of intent. This would include statements by leading political leaders and/or State institutions indicating, or advocating for, the permanent annexation of parts or all of the occupied territory.
(d) International law and direction. The State has refused to accept the application of international law, including the laws of occupation, to the territory and/or is failing to comply with the direction of the international community with respect to the present and future status of the territory.[90]

Similar enumerations have also been put forward by various participants before the Court. For example, Japan cited amongst the measures likely to create *faits accomplis* and thus indicating the intention of the occupier to maintain permanent control over the territory:

> First, large-scale alteration of the demographic composition of the territory, backed by military and other physical power, including through expropriation of land and eviction of the population.
>
> Second, the construction and continued maintenance by an occupying Power of a network of physical infrastructure, particularly where these represent such significant financial investment that they may be deemed to be *intended to subsist over a significant period of time*. This may include, for example, roads, communication systems, healthcare facilities or large-scale military or law enforcement facilities.
>
> Third, the *continuous* forcible seizure and exploitation of the natural resources, including water, by an occupying Power.[91]

These abstract aspects have been applied to the case of the Israeli occupation by States and international organizations within their submissions to the Court in the context of the advisory opinion on the *Policies and Practices of Israel*. An analysis of these submissions, as will be demonstrated below, reveals that the prolonged nature of the occupation and measures indicating Israel's intent to establish itself permanently are elements that have been used by States to conclude, in turn, that Israel is *de facto* annexing Palestinian territory.

89. Omar M Dajani (fn 74) 53.
90. UN Doc. A/73/447 (fn 50), para 31 (emphasis added).
91. Oral pleadings of Japan (fn 34) 50, para 10 (emphasis added).

4 THE TRANSITION FROM OCCUPATION TO ***DE FACTO*** ANNEXATION IN THE DISCOURSE OF STATES: THE RESULT OF THE DURATION OF THE OCCUPATION AND THE MEASURES OF A PERMANENT NATURE CHARACTERIZING IT

At this stage of the analysis, the objective has primarily been to illustrate, from a theoretical standpoint, how the temporal dimension of an occupation can affect its classification as a *de facto* annexation. The procedure related to the advisory opinion on the *Policies and Practices of Israel* provided a pivotal opportunity for States and international organizations to apply this reasoning, until then quite abstract, to a concrete case.[92] This final section specifically seeks to demonstrate that amongst the factors leading States and international organizations to characterize the occupation as a *de facto* annexation in the context of the said advisory opinion are the prolonged duration of the occupation (Section 4.1) and the permanence of certain measures adopted by the occupying Power (Section 4.2).

4.1 The prolonged duration of Israel's occupation as evidence of the *de facto* annexation of Palestinian territory

The protracted nature of Israel's occupation has been cited as evidence of its intention to establish a permanent presence in the occupied territory, effectively amounting to a *de facto* annexation of Palestinian land. Algeria emphasized the significance of duration in this characterizing, asserting that 'it is *permanence* that determines the transition from occupation to *de facto* annexation. And thus, inevitably, it raises the *question of duration* […]'.[93] Applying this reasoning to the specific case, Algeria deemed it essential to 'examine the legal status of the West Bank, with the important observation that its prolonged occupation has lasted for 57 years'.[94] For Algeria, Israel's occupation has evolved into a permanent situation, with its purported temporariness

92. Multiple States and international organizations indeed integrated the time factor in their analysis: Oral pleadings of Algeria, ICJ, *Policies and Practices of Israel* advisory opinion, CR 2024/5, 20 February 2024, 27–28, paras 40–43; Written statement of Belize (fn 48) 26, para 45 and 28–29, para 49; Written statement of Chile, ICJ, *Policies and Practices of Israel* advisory opinion, 24 July 2023, 19, para 72; Written statement of Djibouti (fn 53) 4, para 15; Written statement of Egypt (fn 39) 37, para 249; Written statement of Ireland (fn 35) 16, para 40 and 17, para 44; Written statement of Jordan (fn 39) 47, para 4.36; Written statement of Malaysia (fn 53) 13, para 42; Written statement of the Maldives, ICJ, *Policies and Practices of Israel* advisory opinion, 25 July 2023, 10, para 28; Oral pleadings of Norway, ICJ, *Policies and Practices of Israel* advisory opinion, CR 2024/11, 23 February 2024, 23 and 26, paras 11 and 29; Written statement of Oman (fn 53) 2–3, para 2; Written statement of Palestine (fn 39) 111, para 3.147; Written statement of Pakistan, ICJ, *Policies and Practices of Israel* advisory opinion, 25 July 2023, 30, para 114(4); Written statement of Qatar (fn 53) 186, paras 3.10(2) and 3.11 and 187, para 3.14; Written statement of Saudi Arabia (fn 53) 6, para 23; Written statement of Senegal (fn 53) 2; Written statement of South Africa + (fn 53) 26, para 61; Written statement of Yemen, ICJ, *Policies and Practices of Israel* advisory opinion, 25 July 2023, 11, para 32; Written statement of the League of Arab States (fn 39) 21, para 50; Written comments of the Organisation of Islamic Cooperation, ICJ, *Policies and Practices of Israel* advisory opinion, 24 October 2023, 8, para 38; Written statement of the African Union (fn 39) 39, para 91(c).
93. Oral pleadings of Algeria (fn 92) 27, para 40 (own translation) (emphasis added).
94. Ibid 28, para 43 (own translation).

serving merely as a legal fiction.[95] Norway adopted a similar line of reasoning in its oral statement:

> A military occupation cannot be permanent. If an occupation is allowed to be indefinite, then the distinction, under *jus ad bellum*, between occupation and annexation dissolves. (…) Such developments give reason to ask whether the situation is turning into a *de facto* annexation (…) Norway looks forward to the determination by the Court whether the occupation may have become tantamount to *de facto* annexation.[96]

Norway, however, refrains from drawing definitive conclusions from its reasoning, instead deferring to the Court to address the issue raised. Nevertheless, Norway's acknowledgment of such a hypothesis constitutes an implicit recognition that Israel's prolonged presence in Palestine at the very least raises critical questions regarding the underlying motivations for its continued occupation. These questions, in turn, challenge the very legality of the occupation. This concern is particularly evident in the written statement submitted by Bolivia:

> There is no such thing as 'permanent occupation' or 'settler occupation' in international law. […] Therefore, the conclusion is inescapable that Israel has used its *protracted occupation as a pretext to pursue its illegal objective of annexing* the Occupied Palestinian Territories, in violation of the UN Charter, and that, consequently, the Israeli occupation as a whole must be considered illegal.[97]

In the same vein, in its written comments, Palestine argued that the intention to establish a permanent presence could be inferred, but not necessarily fully determinatively, from the fact that the occupation 'has lasted for more than 56 years with no end in sight is indicative'.[98] Senegal similarly contended in its written statement that 'the Israeli occupation, which is no longer temporary, has *de facto* become a creeping *annexation*'.[99] South Africa's written statement aligns with this reasoning:

> It has been submitted that *the long-term occupation* by Israel of the Occupied Palestinian Territory is in fact a disguised form of conquest, in other words, a permanent occupation of Palestinian territory *going beyond a temporary occupation* and therefore a *de facto annexation* and consequently the acquiring of the territory by means of force.[100]

In its written statement, Qatar equally held that:

> Israel has clearly demonstrated the permanency of its occupation and its effective claim of sovereignty over the Area C of West Bank *by maintaining that occupation of the territory for over 55 years* – among the longest-running military occupations in modern history.[101]

Belize also emphasized that the occupation has persisted for 57 years and pointed out that there is no 'plan for withdrawal or acknowledgment of any need or intention

95. Written statement of Algeria (fn 39) 29.
96. Oral pleadings of Norway (fn 77) 23 and 26, paras 11 and 29.
97. See e.g. Written statement of Bolivia (fn 39) 13–14 (emphasis added).
98. Written comments of Palestine, ICJ, *Policies and Practices of Israel* advisory opinion, 18888, 25 October 2023, 36, para 1.46.
99. Written statement of Senegal (fn 53) 2.
100. Written statement of South Africa (fn 53) para 61 (emphasis added).
101. Written statement of Qatar (fn 53) 186 and 187, para 3.14 (emphasis added).

to ever withdraw'.[102] According to Belize, the mere prolongation of the occupation, as a continuous fact, is sufficient evidence of Israel's intention to maintain a permanent presence. Moreover, interestingly, Belize is the only State, to our knowledge, that has explicitly explained why the Gaza Strip should be considered as annexed as well[103] – despite Israel's unilateral disengagement in 2005. It argued that 'Israel has also manifested the intention *permanently to exercise control over Gaza akin to the control it exercises over any part of its own territory*, and in that way hold the territory of Gaza *indefinitely under its dominion, which constitutes de facto annexation*'.[104] As it compared the nature of Israel's control over Gaza to the one it exercises in its own territory, and adopted a lexicon suggestive of sovereignty ('dominion'), this approach echoes that of Omar Dajani, who, as previously stated, identifies amongst the criteria for determining the existence of annexation, the prolonged exercise of governmental functions typically reserved for a sovereign in its territory.[105] It also corresponds to the view of the Special Rapporteur on the situation of human rights in the Palestinian territories, who cites the prolongation of the occupation as an example of measures reinforcing the occupier's permanent presence[106] – the Rapporteur cited effective control of the territory as a condition as well, but as the Court has noted, effective control can exist without a physical military presence on the ground.[107]

4.2 The intent of permanence in measures characterizing the occupation as evidence of the *de facto* annexation of Palestinian territory

In addition to the duration of the occupation, various States and international organizations have also referred to certain *faits accomplis* intended to be permanent as elements evidencing the existence of a *de facto* annexation of the Palestinian territory. Here, the participants are pointing not only to the temporal dimension of Israel's presence as such but also to concrete measures characterizing the occupation and implemented by Israel as the occupying Power to consolidate its presence in a lasting manner. In this regard, after listing a series of such measures adopted by Israel, Djibouti concluded that 'the Israeli occupation unquestionably presents a "permanent" effect aimed at the appropriation of as much Palestinian territory as possible for the benefit of Israel's Jewish population, resulting in *de facto* annexation'.[108]

Amongst the measures identified by States and international organizations are the extension of Israeli domestic legislation to the occupied territory, the exploitation of

102. Oral pleadings of Belize, ICJ, *Policies and Practices of Israel* advisory opinion, CR 2024/6, 20 February 2024, 21, para 23.
103. Written statement of Belize (fn 48) 31, para 52; Written comments of Belize, ICJ, *Policies and Practices of Israel* advisory opinion,18879, 25 October 2023, 25, fn 101.
104. Written statement of Belize (fn 48) 31, para 52 (emphasis added).
105. Omar M Dajani (fn 74).
106. UN Doc. A/73/447 (fn 50) 14, para 31 (condition b).
107. ICJ, *Policies and Practices of Israel* advisory opinion (fn 1) 30, para 91. This interpretation is however not unanimous. The European Court of Human Rights for instance stated that 'occupation is not conceivable without "boots on the ground'" (*Chiragov and other v. Armenia*, No 13216/05, 16 June 2015, para 96). For authors contending that ground presence in the territory is required, see M Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (2nd edn, Edward Elgar Publishing, 2024) 329–31, paras 8.196–8.199.
108. Written statement of Djibouti (fn 53) 4, para 15.

natural resources, the imposition of restrictive and discriminatory construction regulations on Palestinians, and the establishment of settlements and outposts, amongst others. This section, however, focuses exclusively on the latter – namely, the settlement policy – not merely for reasons of scope, but more importantly because it allows to better grasp how the permanent nature of the settlements has shaped the legal characterization of the occupation as amounting to *de facto* annexation. What is more, the establishment of settlements is not specific to the occupation discussed here. It constitutes an important feature of prolonged occupations where the occupying Power has exhibited a clear intent to maintain an indefinite presence in the territory. A salient example is the case of Western Sahara, occupied by Morocco since 1975, where the settlement policy, implemented by the occupying Power with the intent to permanently alter the demographic composition of the population, has been long invoked and condemned before international bodies.[109]

Regarding the Israeli occupation, the establishment of settlements, described as a 'defining feature of Israel's presence in the Occupied Palestinian Territory'[110] by Ireland, represents one of the most recurrent elements.[111] For instance, Algeria addressed the colonization of East Jerusalem and the West Bank, as well as the situation in the Gaza Strip, as components of a unified policy of 'faits contre le droit',[112] identifying a recurring two-step process: first, the creation of *faits accompli*, followed by Israeli legal rules that legitimize these facts.[113] Saudi Arabia also emphasized the establishment of settlements in its written statement:

> The Israeli occupation of the Occupied Palestinian Territory, including East Jerusalem, which began in June 1967, has *now lasted more than five and a half decades*. During that time, Israel has *established and expanded numerous settlements* in that territory in which, currently, approximately 700,000 Israeli settlers reside. *Other acts of de facto,* and in the case of East Jerusalem and its environs, *de jure,* annexation have been implemented by Israel throughout the Occupied Palestinian Territory […].[114]

In analysing how States and international organizations have approached the issue of settlements as an indicator of a *de facto* annexation, two types of reasoning appear to emerge. The first perspective is that the mere existence of the settlements, due to their non-temporary nature, is sufficient to demonstrate that Israel's presence is not intended to be provisional. Ireland, for instance, notes that the settlements are clearly intended to be permanent[115] and regrets to conclude that 'Israel's settlement practices amount to an attempt to transform a temporary, albeit prolonged, occupation into an exercise

109. See e.g. Summary record of the 5th meeting of the Fourth Committee (55th session), UN Doc. A/C.4/55/SR.5, 27 September 2000, para 49; Summary record of the 4th meeting of the Special Political and Decolonization Committee (Fourth Committee) (74th session), UN Doc. A/C.4/74/SR.4, 23 December 2019, para 101.
110. Written statement of Ireland (fn 35) 6 and 16, para 18.
111. For a brief history of the settlements up until the early 2000s, see Karen Tenenbaum and Ehud Eiran, 'Israeli Settlement Activity in the West Bank and Gaza: A Brief History' (2005) 21(2) Negotiation Journal 171.
112. Oral pleadings of Algeria (fn 92) 25, para 22.
113. Ibid para 26.
114. Written statement of Saudi Arabia (fn 53) 6, para 23 (emphasis added).
115. Written statement of Ireland (fn 35) 15, para 38.

in permanently acquiring territory by a gradual process of annexation'.[116] The same reasoning is echoed by Belize, which similarly contends that

> By virtue of these measures, and in particular Israel's longstanding settlement activities carried out across the West Bank, Israel has manifested the *intention to permanently hold the whole of the West Bank*. As observed by the Special Rapporteur, *'[n]o country creates civilian settlements in occupied territory unless it has annexationist designs'*.[117]

Syria appears to adopt a similar line of reasoning, concluding that the territory of Palestine is subject to annexation, which is manifested through a gradual and continuous process inferred from the 'settlements' size, infrastructure, and location, which indicate the purpose of making them *sustainable*'[118] – the reference to the location of the settlements points to the strategic choice of where the settlements are established.[119] In sum, it is due to their very nature that Israeli settlements serve as tangible manifestations of the permanence of Israel's presence.

For other participants, it is the persistence and continuation of the settlement policy that substantiate the qualification of *de facto* annexation. In this second perspective, it is the repetition and maintenance of the settlements within a prolonged context that serves as key evidence. Citing the Secretary-General of the United Nations, Palestine, for example, argued that 'the establishment *and maintenance* of the settlements amount to a slow, but steady annexation of the occupied Palestinian territory'.[120] Similarly, Malaysia contended that Israel engages in acts that could be qualified as *de facto* annexation through the '*continued establishment* and facilitation of settlements'.[121]As for Oman, which also concluded that the Israeli occupation of Palestine constitute a *de facto* annexation contrary to the United Nations Charter, emphasised the '57 year duration of Israeli presence in the occupied Palestinian territories and the persistent policy of settlement'.[122] In likewise considering the West Bank as subject to *de facto* annexation, Djibouti referred to Israel's maintenance of a *prolonged* occupation aimed at *permanence*, coupled with '*actively pursuing* a policy of settlement'.[123] In the same vein, Brazil regarded the *prolonged* occupation, together with the *continuing* construction of settlements, as an unlawful acquisition of territory by force.[124]

In any case, the establishment of civilian settlements by the occupying Power within the occupied territory constitutes a clear violation of Article 49(6) of the Fourth Geneva Convention.[125] This provision is specifically designed to counter 'attempts at

116. Ibid 17, para 44 (emphasis added).
117. Written statement of Belize (fn 48) 26, 30, para 51 (emphasis added).
118. Oral pleadings of Syria, ICJ, *Policies and Practices of Israel* advisory opinion, CR 2024/12, 23 February 2024, 58, para 20 (emphasis added).
119. See also Oral pleadings of Egypt, ICJ, *Policies and Practices of Israel* advisory opinion, CR 2024/7, 21 February 2024, 32, para 29.
120. Oral pleadings of Palestine, ICJ, *Policies and Practices of Israel* advisory opinion, CR 2024/4, 19 February 2024, 67, para 11 (emphasis added).
121. Written statement of Malaysia (fn 53) 13, para 42 (emphasis added).
122. Written statement of Oman (fn 53) 2, para 3.
123. Written statement of Djibouti (fn 53) 6, para 19 (emphasis added).
124. Written statement of Brazil (fn 35) 8, para 42. Note that Brazil did not use the terms *de facto* annexation.
125. Art 49(6) IV Geneva Convention. It should be noted that Israel argues that this provision is not applicable, as it only prohibits forcible transfers, see 'Israel's Settlements – Their Conformity with International Law' *Israeli Missions around the World* (1 December 1996) <https://embassies.gov.il>. That being said, it is accepted that art 49(6) also prohibits 'indirect' transfers

de facto annexation'.[126] It is noteworthy that beyond being specific violations of the law of occupation, the fact that these settlements occur within the context of a prolonged occupation and are intended to be permanent elevates them to a violation of *jus contra bellum*. Thus, it is not only the legality of the conduct of occupation that is at stake, but the legality of the occupation itself. It is precisely in reference to Israel's settlement policy that Arde Imseis has argued that prolonged occupation 'can lead to the collapse of the *in bello*/*ad bellum* distinction'.[127] Ultimately, the temporal narrative of settler colonialism 'posits an inevitable future of sovereign completion […], and works in the present to bring about that future',[128] by extending a *de facto* situation until it becomes a *de jure* one.[129] This process corresponds to an old – and supposedly outdated – conception of the phenomenon of occupation, where the latter could serve as a prelude to conquest.[130] It is precisely this type of endeavour – not exclusive to the occupation by Israel of the Palestinian territory – that States and international organizations have sought to condemn in their submissions to the Court.

5 CONCLUSION

There exists a plethora of legal concepts that can be invoked to characterize Israel's occupation of Palestine, many of which have been mobilised before the International Court of Justice in the advisory proceeding on the *Policies and practices of Israel*. This article has addressed one such qualification: *de facto* annexation, a recurrent theme in the submissions of States and international organizations, thereby shedding light on one of the most distinctive and singular aspects of the occupation; its temporal dimension. As stated at the outset, the aim was not to confirm, nuance, or contradict the claim that Israel's occupation has evolved into annexation. Instead, the aim was to leverage this new legal proceeding, along with recent State positions, to assess the added value of interpreting the legality of the occupation through the lens of the principle of non-acquisition of territory by force, in comparison to an approach based on the (il) legality of the initial use of force leading to the occupation. It has been demonstrated that this interpretation serves as a lowest common denominator, uniting three distinct positions: first, those who have refrained from addressing the legality of Israel's

resulting from a policy encouraging or organizing such transfers, even if they are not 'forcible' *sensu stricto* (see Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (2nd edn, Edward Elgar Publishing, 2024) 362, para 8.264; Christina Luo (fn 70) 421). What is more, the Rome Statute criminalizes both direct and indirect transfers (see art 8(2)(b)(viii) of the Rome Statute, signed on 17 July 1998 and entered into force on 1 July 2002).

126. Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, *UN General Assembly*, UN Doc. A/70/351, 31 August 2015, 5, para 17.

127. Ardi Imseis, 'Prolonged Occupation: At the Vanishing Point of the Jus ad bellum/Jus in Bello Distinction' (2023) 58(3) Texas International Law Journal 33, 45.

128. Elizabeth Strakosch, 'Beyond Colonial Completion: Arendt, Settler Colonialism and the End of Politics' in Sarah Maddison, Tom Clark and Ravi de Costa (eds), *The Limits of Settler Colonial Reconciliation: Non-Indigenous People and the Responsibility to Engage* (Springer, 2016) 21.

129. Record of the 1059th meeting of the UN Security Council, UN Doc. S/PV.1059, 28 August 1963, para 48 (Syria).

130. Eyal Lieblich and Eliav Benvenisti (fn 88) 15.

territorial control over Palestine in 1967 and thus viewed the annexation framework as a viable alternative; second, those who consider the occupation unlawful *ab initio* but regard the prohibition on territorial acquisition by force as a subsidiary or additional violation; and third, those who argue that Israel acted in accordance with Article 51 of the United Nations Charter in 1967, as framing the situation as annexation precludes the invocation of any legal justifications that might otherwise exclude wrongfulness.

The article then revisited a well-known distinction within the scholarship between *de jure* annexation and *de facto* annexation. While this distinction has limited practical impact when it comes to the legal consequences that each entails, the analysis primarily underscored the significant role played by the time factor, and more specifically, the context of duration within which the occupation is engulfed, in the qualification of annexation in the absence of a formal declaration of annexation is issued by the occupying Power. These theoretical clarifications provided the foundation for analysing the discourse of States and international organizations, many of which have characterized the Israeli occupation as *de facto* annexation, thereby concluding that the occupation is unlawful under *jus contra bellum*, as it contravenes the prohibition on acquiring territory by force. Through a careful examination of various excerpts reproduced above, this final section thus demonstrated how, in practice, the temporal dimension of Israel's presence in the Palestinian territory has prompted the said participants to classify the occupation as *de facto* annexation. In sum, be it the unprecedented duration of the Israeli occupation or the permanence characterizing a series of typical measures of this occupation – primarily the settlements – these are all elements mobilized by States and international organisations to evidence their view according to which the Israeli occupation is far from temporary and that Israel not only acts as a sovereign over the territory it occupies but also does not intend to withdraw from it.

There are still many aspects related to the classification of the occupation at hand as an annexation that deserve further examination. For instance, one could delve into the consequences of such a qualification for third States.[131] However, the author wishes to conclude this article with some broader conceptual reflections, that emerged from the observation that, while it is well known that Israel opposes any two-State solution[132] and considers its claims over the Palestinian occupied territory to be valid,[133] Israel did not take advantage of the present legal proceedings to present legal arguments contesting the characterization of its presence as annexation. This is particularly notable given that, as previously discussed, such an analysis of the legality of the occupation in light of the prohibition of territorial acquisition resulting from the use of force was a central theme in the submissions submitted to the Court. Therefore, to gain a deeper understanding of Israel's legal approach to its settlement policies, one must momentarily step away from the Peace Palace. According to the Israel's Ministry of Foreign Affairs,

> it should be noted that Israeli settlements in the West Bank have been established only after an exhaustive investigation process, *under the supervision of the Supreme Court of Israel,*

131. See e.g. Mais Qandeel, 'Territorial Annexation of Palestine: Illegality, Third States Obligations and the ICJ's 2024 Advisory Opinion' (28 February 2025) <https://www.ejiltalk.org/territorial-annexation-of-palestine-illegality-third-states-obligations-and-the-icjs-2024-advisory-opinion/>.
132. 'Rejection of two-State solution by Israeli leadership "unacceptable", says Guterres' *UN News* (23 January 2024) <https://news.un.org/en/>.
133. 'Israel Settlements and International Law' (*Israel Ministry of Foreign Affairs*, 30 November 2015) <https://www.gov.il/en>.

> and subject to appeal, which is designed to ensure that no communities are established illegally on private land.[134]

The jurisprudence of the Supreme Court of Israel proves particularly useful in understanding the legal rationale behind Israel's justification of its settlement policy. A closer examination of its caselaw reveals a troubling conclusion: it is the very law of occupation that is invoked to legally justify and, thus, legitimize what would otherwise appear to be a violation of *jus contra bellum*, i.e. measures that contravene the prohibition on acquiring territory by force. Indeed, while the establishment of Israeli civilian settlements has been cited by numerous states as evidence of Israel's intention to maintain a permanent presence in the occupied Palestinian territory, Israel presents these settlements as merely an exercise of the prerogatives granted under *jus in bello*. After all, the law of occupation recognizes that an occupying Power is endowed with various powers necessary to ensure its security. And according to Israel, the establishment of the settlements is primarily driven by security concerns.[135] Thus, when the Supreme Court of Israel evaluates the legality of specific settlements brought to its attention, it does so by invoking provisions of the law of occupation, particularly the Hague Regulations – an instrument Israel recognizes as applicable due to its customary nature.[136] It is based on an extensive interpretation of these provisions that the Israeli Supreme Court has justified the legality of certain settlements,[137] although it generally prefers not to rule on this matter.[138] In this context, the law of occupation is instrumentalized to entrench the permanence of Israel's presence and to justify measures that, in reality, constitute, amongst other things, violations of *jus contra bellum*. The *Beit El-Toubas* case provides a striking illustration in this regard.[139] In the said case, the Court upheld the requisition of private Palestinian properties in the West Bank for the purpose of building Jewish settlements, justified by purportedly urgent military needs, relying on Article 52 of the Hague Regulations which permits requisitions for the needs of the occupying army.[140] This misuse of international humanitarian law (of occupation) ultimately undermines the very credibility of international law itself. It is therefore unsurprising

134. Ibid (emphasis added).
135. Michael Galchinsky, 'The Jewish Settlements in the West Bank: International Law and Israeli Jurisprudence' (2004) 9(3) Israel Studies 115, 116; François Dubuisson, 'La construction du mur en Territoire palestinien occupé devant la Cour suprême d'Israël: Analyse d'un processus judiciaire de légitimation' in *Mélanges offerts au professeur Jean Salmon* (Bruylant, 2007) 889, 907.
136. ICJ, *Wall* advisory opinion (fn 4) 172, para 89; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion, 8 July 1996, *ICJ Reports 1996*, 256, para 75; International Military Tribunal at Nuremberg, *The Trial of German Major War Criminals*, 'Judgment and sentences' (1947) 41(1) American Journal of International Law, 248 and 249; Department of the Army Field Manual, *The Law of Land Warfare*, FM no 27–10, July 1956, foreword); Supreme Court of Israel, *Beit Sourik Village Council v. The Government of Israel*, HCJ 2056/04, 30 June 2004, 23.
137. Michael Galchinsky (fn 135) 122.
138. David Kretzmer, 'Settlements in the Supreme Court of Israel' (2017) 111 American Journal of International Law 41, 42.
139. Supreme Court of Israel, *Saliman Tawfiq Ayub* et al *v. Minister of Defense* et al et *Jamil Arsem Mutawe'a* et al *v. Minister of Defense* et al., HCJ 606/78 and HCJ 610/78, 15 March 1979. See also Supreme Court of Israel, *Sheikh Suleiman Hsein 'Odeh Abu Hilu* et al *v. Government of Israel*, HCJ 302/72, 23 May 1973.
140. Art 52, Regulations concerning the Laws and Customs of War on Land, annex to the Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907.

that an analysis of the occupation of Palestine from a TWAIL perspective concluded that international law 'is today employed by Israel as a state-sanctioned tool of colonization'.[141] This deliberate distortion of the concept of occupation and the prerogatives granted to the occupying Power under the law of occupation was explicitly condemned by Palestine before the International Court of Justice in the following terms:

> *Under the umbrella of its prolonged military occupation*, Israel has been steadily annexing the Occupied Palestinian Territory, and it continues to do so. Its *undisguised objective is the permanent acquisition of this territory*, and the exercise of sovereignty over it, in defiance of the prohibition on acquisition of territory by force.[142]

141. Ray Murphy, Anita Ferrara and Susan Power, 'The Occupation of Palestine from a TWAIL Lens' in Nada Kiswanson and Susan Power (eds), *Prolonged Occupation and International Law. Israel and Palestine* (Brill | Nijhoff, 2023) 52, 57.
142. Oral pleadings of Palestine (fn 120) 75–76, para 38 (emphasis added).