

# ***The International Court of Justice Advisory Opinion on Israel in Action: Reconstituting Apartheid Frameworks, Unseating from the UNGA and Enforcing State Accountability***

**This paper presents a concise summary of three research papers examining the role of international law in the Palestinian struggle to end the Israeli occupation of Palestinian territories. These summaries were prepared as preparatory material for the webinar of the Jurists for Palestine Forum, entitled “The ICJ Advisory Opinion on Israel in Action: Enforcing State Accountability, Reconstituting Apartheid Frameworks, and Unseating from the UNGA.”**

**This summary was prepared by Shireen Mikkawi and Tareq Ramahi**

**In partnership with**



**December 2024**

**Summary:**

- ❖ The UN General Assembly's credentialing process, used historically to assess the legitimacy of State delegations and unseat apartheid South Africa, faces controversy when applied to single governments like Israel, as it bypasses UN Charter Articles 5 and 6, relies on unclear criteria, and risks being dismissed as politically motivated or antisemitic.
- ❖ The ICJ Advisory Opinion highlights Israel's violations of international law, including the prohibition on territorial acquisition by force and the right to self-determination, drawing parallels with apartheid South Africa and supporting arguments for unseating Israel's government from the UN General Assembly due to its illegitimacy, lack of representation, and systematic racial discrimination.
- ❖ The ICJ Advisory Opinion reaffirms the right to self-determination as a jus cogens norm binding on all States, providing a legal foundation for unseating Israel's government from the UN General Assembly due to its violations of Palestinian self-determination, while addressing concerns about politicisation and conflicts with UN Charter Articles 5 and 6.
- ❖ Namibia's written statement to the ICJ in July 2023 drew on its own history of apartheid to argue that Israel's actions violate international laws prohibiting apartheid and racial discrimination, highlighting the crime against humanity status of apartheid under customary international law, the Apartheid Convention, and the ICC Statute.
- ❖ The Group of Three, a treaty monitoring mechanism under the 1973 Apartheid Convention, previously reviewed apartheid practices, including Israel's policies towards Palestinians, and suggested re-establishing the group to address Israeli apartheid, with support from States Parties to the Convention advocating for action through the UN Human Rights Council or a dedicated mechanism.
- ❖ The U.N. Arms Trade Treaty prohibits arms transfers that may be used in crimes like apartheid, and an ICJ ruling on Israel's actions as apartheid could strengthen legal challenges to arms sales, with implications for countries like the UK and others bound by international law, highlighting the need for re-establishing mechanisms to address Israeli apartheid practices.
- ❖ The escalating sanctions against Russia for its invasion of Ukraine, including asset freezes, financial system blockages, and trade restrictions, highlight the West's selective enforcement of international law, as similar measures are not applied to Israel despite its long-standing violations of Palestinian rights, exposing a double standard in addressing international conflicts.

**The Summary of Article One, Titled: “Unseating the Israeli Government from the UN General Assembly in case of non-compliance with the Advisory Opinion of 19 July 2024” . By Maryam Jamshidi. Published on 15 October 2024.**

The original language of the article is English.

You can read the article [here](#).

Palestinian and international legal experts have long argued that Israel's occupation of the Palestinian Territories (OPT) is illegal. On 19 July 2024, the ICJ issued an Advisory Opinion agreeing with this view and called for action to address Israel's illegal presence. On 13 September 2024, the UNGA passed a resolution demanding that Israel comply with the ICJ's opinion within 12 months. Israel rejected the resolution and is unlikely to comply. The UNGA can review credentials of State delegations, as it did with apartheid South Africa, and potentially unseat Israel's government from the United Nations. The AdvOp provides strong legal grounds, particularly based on the right to self-determination, to unseat Israel until it complies.

### **Unseating Governments from the UN General Assembly Through the Credentialing Process:**

The UN General Assembly (GA) can evaluate the legitimacy of State delegations through its credentialing process, as outlined in Rules of Procedure of the General Assembly 28 and 29. The Credentials Committee examines delegation credentials and reports its findings to the GA, which votes on whether to seat the delegation. Members of the GA may also directly challenge credentials, prompting a formal review.

Historically, the GA has used this process to determine the legitimate representative among rival governments or to unseat a government deemed illegitimate. The only instance of the latter was apartheid South Africa, unseated due to its failure to represent its Black majority population.

The use of the credentialing process to assess a government's legitimacy has been controversial, particularly when unseating a single, unrivaled government. Similar objections,

raised during the South Africa case, are expected against any attempt to unseat Israel's government.

The first argument against unseating a government through the UN credentialing process is that it effectively suspends or expels a State without following the procedures outlined in Articles 5 and 6 of the UN Charter. These Articles require both Security Council action and a GA vote to suspend or expel a Member State. Israel's persistent violations of UN resolutions and Charter principles, highlighted in the ICJ Advisory Opinion, might technically qualify it for such measures. However, veto power in the Security Council, especially from the US (and potentially the UK), would block such actions. Using the credentialing process instead would be criticised as circumventing the requirements of Articles 5 and 6.

The second argument is that evaluating a government's legitimacy and representativeness through the credentialing process lacks clear guidelines and is largely political. While some past opinions and resolutions suggest criteria, the process remains inconsistent and susceptible to manipulation by powerful States. For Israel, this lack of legal standards could enable it to dismiss such efforts as politically motivated or antisemitic, a common response to unfavorable UN actions.

### **The Gist of the ICJ's Advisory Opinion:**

The ICJ Advisory Opinion provides a legal framework to evaluate Israel's government, highlighting violations of self-determination and the prohibition on territorial acquisition by force. It draws parallels with the UN's unseating of South Africa during apartheid, addressing concerns about potential conflicts with Articles 5 and 6 of the UN Charter and claims of political bias.

The ICJ's Advisory Opinion declared Israel's occupation of the OPT unlawful due to violations of the prohibition on acquiring territory by force and the Palestinian people's right to self-determination. The Court linked territorial integrity to self-determination, noting that Israel's annexation of the OPT undermines the Palestinians' sovereignty and deprives them of representation.

The ICJ Opinion supports unseating Israel's government from the UN General Assembly by

highlighting its illegitimacy and lack of representativeness. It argues that Israel's occupation prevents the establishment of a Palestinian state and denies Palestinians electoral and political rights within Israel's governance. This lack of representation, combined with systematic racial discrimination, renders the Israeli government unfit to represent the people under its control.

The Advisory Opinion draws parallels with South Africa's apartheid regime, which denied self-determination to Black populations through segregation and "Bantu Homelands," similar to Israel's creation of segregated Palestinian "bantustans." These tactics reinforce the argument for unseating Israel's government based on its violations of international norms.

Unseating Israel's government from the UN arguably has a stronger legal basis than the case of South Africa due to the ICJ's Advisory Opinion. The Opinion's interpretation of the right to self-determination and the obligations it imposes strengthens the argument for unseating and counters concerns about politicising the credentialing process or conflicting with Articles 5 and 6 of the UN Charter. These issues are explored further in the next section.

### **Self-Determination and Unseating the Israeli Government:**

The GA's decision to unseat South Africa's government, primarily due to apartheid, was also rooted in the denial of self-determination to Black South Africans, highlighting self-determination's critical role in assessing a government's legitimacy. Recognised as a foundational right in the UN Charter, self-determination underpins other human rights and is central to the UN's mission.

The July 2024 ICJ Advisory Opinion reinforced the right's jus cogens status, confirming it as a peremptory norm binding on all States and the UN. The ICJ also affirmed that self-determination is erga omnes, obliging all States to protect it. These findings underline the duty of States and the UN to ensure Palestinian self-determination in the OPT.

The ICJ's AdvOp, while non-binding, carries authoritative weight as an interpretation of international law by the UN's principal judicial body. It provides a robust legal framework for assessing the legitimacy and representativeness of State delegations, rooted in the jus cogens

right of self-determination. This strengthens the argument for denying Israel a seat at the GA via the credentialing process, given its credible violations of Palestinian self-determination.

The opinion also counters claims of "politicization" and conflicts with Articles 5 and 6 of the UN Charter. Refusing to seat a government is distinct from suspending or expelling a State, as it focuses on representation rather than enforcement or punishment. Furthermore, the AdvOp asserts that jus cogens norms, such as self-determination, take precedence over subsidiary treaty rules like Articles 5 and 6. The UN is thus obligated to interpret and implement these Articles in a manner that upholds the right to self-determination, even if conflicts arise.

**Conclusion:**

The ICJ AdvOp, coupled with longstanding Security Council and GA resolutions affirming the Palestinian people's right to self-determination and condemning Israel's annexation and occupation of the OPT, establishes a strong legal foundation for unseating the Israeli government in the GA through the credentialing process. This action would address the Israeli government's illegitimacy and lack of representativeness due to its violations of international law and the jus cogens right to self-determination.

While there has been a noticeable lack of academic debate about this issue, particularly in Western contexts, the GA has both the authority and the obligation to act where the Security Council has failed. Leveraging the credentialing process is not only legally justified but also necessary to uphold international law and bring an end to Israel's prolonged denial of Palestinian self-determination. The GA must assert its role to fulfill these legal and moral imperatives.

**The Summary of Article 2: “The Implications of An ICJ Finding that Israel is Committing the Crime Against Humanity of Apartheid”. By Victor Kattan. Published on March 20, 2024.**

The original language of the article is English.

You can read the article [here](#).

In February 2024, over fifty States participated in hearings before the International Court of Justice (ICJ) to assess the legality of Israel’s occupation of East Jerusalem, the West Bank, and Gaza, following a request from the UN General Assembly in December 2022. A significant portion of the States involved—24 in total—asserted that Israel’s actions amounted to apartheid, claiming that Israel’s policies and practices impose racial discrimination and domination, violating international law prohibiting apartheid and racial discrimination.

This claim is historic, coming 30 years after apartheid ended in South Africa and 53 years since the ICJ’s last ruling on apartheid in Namibia. In its 1971 advisory opinion, the ICJ deemed South Africa’s administration of Namibia illegal and an act of apartheid, violating the UN Charter’s principles. This new assertion before the ICJ marks the first time that States have accused a UN Member State, Israel, of practicing apartheid outside of Southern Africa. Notably, 16 of the States making this claim are parties to the International Convention on the Suppression and Punishment of the Crime of Apartheid.

These States could call on the UN High Commissioner for Human Rights to reactivate its treaty monitoring body, suspended in 1995, or even work towards reinstating the UN Special Committee Against Apartheid. Additionally, a ruling by the ICJ recognizing apartheid could impact States that are parties to the UN Arms Trade Treaty, as apartheid is not only a breach of international law but also a crime against humanity and a grave violation of the Geneva Conventions.

**Apartheid Before the ICJ:**

Apartheid is not a new issue for the International Court of Justice (ICJ), with the Court having dealt with South Africa’s racially discriminatory regime in Namibia from 1946 to 1990, leading to four advisory opinions and a contentious case. This context is significant as Namibia, in its

written statement to the ICJ in July 2023, drew on its own experience of systematic racial discrimination under South Africa to argue that Israel's actions violate the prohibition of apartheid under customary international law and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which Israel is bound by.

Namibia also argued that the definition of apartheid in the 1973 Apartheid Convention aligns with customary international law and that apartheid constitutes a crime against humanity under both the Apartheid Convention and the Rome Statute of the International Criminal Court (ICC Statute). While Israel is not a party to these treaties, 166 States have ratified at least one of them, reinforcing the argument that apartheid is a crime under customary international law. Racial discrimination and apartheid practices also breach peremptory norms of general international law, further strengthening the case against Israel.

#### **The Significance of the Apartheid Claim:**

The arguments that Israel has imposed an apartheid regime on Palestinians, presented in the ICJ proceedings, could have significant consequences, potentially even more so than the case South Africa brought against Israel under the 1948 Genocide Convention. While advisory opinions are not binding on the UN organ requesting them, the ICJ's ruling could pave the way for revived efforts to address apartheid, drawing on past mechanisms the UN created during the Cold War to combat apartheid, especially when the Security Council was divided.

#### **The U.N. Special Committee Against Apartheid:**

One such mechanism, the UN Special Committee Against Apartheid, was established in 1962 to coordinate efforts to end apartheid in South Africa. Following the dismantling of South African apartheid, the committee was dissolved, but a global consensus has emerged that apartheid continues in Palestine. In 2023, a coalition of 285 civil society organizations called for the re-establishment of the Special Committee to investigate Israeli apartheid. Re-establishing the committee would require General Assembly support and funding, but it could be revitalised if there is sufficient political will. Unlike Security Council resolutions, General Assembly resolutions are not subject to vetoes, and momentum from the ICJ's proceedings and the ongoing situation in Gaza could offer the necessary support for its revival.



**The Group of Three:**

The "Group of Three" was a treaty monitoring mechanism under the 1973 Apartheid Convention, consisting of three representatives from States Parties to the Convention. It operated from 1978 to 1993, reviewing reports on apartheid, particularly in Southern Africa, but also addressing Israel's policies towards Palestinians under Article II of the Convention. Article II defines apartheid as racial segregation and discrimination, including acts like genocide, torture, and restrictions on human rights, when intended to maintain domination by one racial group over another. The Group of Three circulated lists of individuals and entities suspected of committing apartheid, proposed a statute for a permanent international tribunal, and highlighted the role of corporations in sustaining apartheid. Re-establishing this mechanism could help address Israel's apartheid practices against Palestinians.

The Group of Three, like the U.N. Special Committee, aimed to pressure both apartheid-committing governments and those that supported them. Beyond highlighting human rights violations, it sought to hold individuals and institutions accountable for their role in apartheid. Its impact is difficult to measure, but between 1984-1987, there was a global "sanctions juggernaut," including U.S. actions like freezing loans and adopting the Comprehensive Anti-Apartheid Act, which, alongside corporate withdrawals, severely affected South Africa's economy. This led to negotiations with the African National Congress (ANC), eventually resulting in South Africa's democratic elections in 1994. After Nelson Mandela's presidency began in 1995, the Group of Three's work was suspended, acknowledging South Africa's positive developments.

**Re-establishing the Group of Three:**

In 1995, the Chairwoman of the Group of Three suspended its work but noted that the Apartheid Convention applied to any country practicing racial segregation under an apartheid system, leaving the door open for the group's reactivation. Given that 16 States Parties to the 1973 Apartheid Convention have claimed that Israel is practicing apartheid, it would be logical for these States to request the U.N. Office of the High Commissioner for Human Rights (OHCHR) to report on the implementation of the Convention and propose a reconvening of the

Group of Three. Namibia has already suggested the possibility of establishing a dedicated mechanism to address Israeli apartheid practices against Palestinians, urging the Human Rights Council to take action.

Namibia, Palestine, and other supportive States could work together to re-establish a mechanism to address Israeli apartheid practices, potentially through reforming the Group of Three or creating a new body. They could propose appointing independent experts or establishing a special rapporteur on apartheid. These actions could be taken without waiting for the ICJ's advisory opinion, as 16 States Parties to the 1973 Apartheid Convention and 8 others have already expressed concerns about Israel's discriminatory policies. Additionally, these States might seek to amend the Apartheid Convention to specifically involve the Human Rights Council, a process allowed under Article XVII of the Convention.

#### **The U.N. Arms Trade Treaty:**

The U.N. Arms Trade Treaty prohibits the transfer of arms if there is knowledge they will be used in the commission of crimes like genocide or crimes against humanity. If the ICJ were to rule that Israel's policies in Palestine amount to apartheid, it could provide a legal basis to challenge arms transfers to Israel under the Treaty. A recent Dutch court ruling that suspended F-35 parts shipments to Israel, based on the Geneva Conventions, set a precedent for restricting such transfers. Although previous cases focusing on genocide, such as the UK's arms trade to Israel, have been unsuccessful, an opinion from the ICJ that Israel's actions constitute apartheid could provide stronger grounds to halt arms transfers.

Unlike genocide, which requires proving specific intent to destroy a protected group, the crime of apartheid under the Rome Statute is easier to establish because it focuses on a regime of systematic oppression and domination by one racial group over others, with the intent to maintain that regime. This intent can be demonstrated through official documents, laws, and policies. The ICJ, as demonstrated in past rulings, is well equipped to assess such intent. Although the UK is not a party to the 1973 Apartheid Convention, it is bound by the Geneva Conventions and the Rome Statute, which define apartheid as a crime against humanity. If the ICJ determines Israel is committing apartheid, it could have significant implications for UK legal

decisions regarding arms sales to Israel and for courts in other countries addressing similar issues.

### **Enforcing International Law in a Divided World:**

The enforcement of international law during the Cold War saw the United States, the U.K., and the European Economic Community protect South Africa's government, much as they currently protect Israel. Given the deadlock in the U.N. Security Council during that era, the Socialist Bloc and Third World States created ad hoc institutions, like the U.N. Special Committee Against Apartheid and the Group of Three, to enforce international law against South Africa's government. In today's divided world, there is a case for re-establishing these bodies to address Israel's alleged perpetration of apartheid against Palestinians. States that have already made an apartheid claim before the ICJ should take concrete steps to create U.N. mechanisms to address the situation. Additionally, States must ensure they do not violate the U.N. Arms Trade Treaty by providing arms to Israel if there is a clear risk they will be used in the commission of international crimes.

**Summary of Article three: "A Watershed Moment for Sanctions? Russia, Ukraine, and the Economic Battlefield" by Elena Chachko and J. Benton Heath published on 23 May 2022**

The original language of the article is English.

You can read the article [here](#).

**International Sanctions against Russia:**

The sanctions imposed on Russia due to its invasion of Ukraine have escalated significantly. Initially, there were existing sanctions related to issues like Crimea and human rights violations, but these have expanded to include six main categories.

First, sanctions targeting Russia's leadership and elite have included asset freezes, or "blocking" sanctions, applied to individuals like President Putin. The U.S. has also considered secondary sanctions, which could limit foreign companies' access to U.S. markets if they engage with sanctioned Russian entities. A taskforce was created to track and seize the assets of Russian individuals and entities, addressing the challenge of accessing these assets.

Second, the financial system in Russia has been hit hard, with major banks and financial institutions facing blocking sanctions, as well as limitations on transactions. The Central Bank of Russia has been banned from trading with the U.S. and EU, preventing the use of foreign reserves and sovereign debt, which has severely impacted Russia's ability to meet financial obligations and raised the risk of default.

The sanctions imposed on Russia since its invasion of Ukraine can be divided into six categories. The first targets the Russian elite, freezing assets of key figures such as President Putin. The second category focuses on Russia's financial system, blocking major banks and removing certain institutions from the SWIFT messaging system, alongside a ban on transactions with the Russian central bank, impairing its access to foreign reserves.

The third category addresses energy sanctions. Initially, the U.S. allowed exceptions to maintain energy market stability but later banned Russian oil, gas, and coal imports. The EU,

despite initial hesitations, began considering similar sanctions after mounting evidence of atrocities in Ukraine.

The fourth category includes trade controls, such as export bans to limit Russia's access to necessary commodities and technology, along with revoking its most-favored-nation status in the WTO and imposing investment restrictions.

The fifth category targets transportation, banning Russian airlines from many airspaces and requiring the repossession of planes leased to Russian airlines, prompting Russia to seize jets owned by Western companies in return.

Finally, private companies like BP, Apple, and McDonald's suspended operations in Russia, a result of sanctions, legal risks, and ethical considerations.

#### **Economic Sanctions Unrestrained:**

The use of economic sanctions as a tool in international relations has become a central aspect of post-1945 legal order, with a "laissez-faire" approach to their application. Sanctions are viewed as a non-violent method to influence state behaviour and punish legal violations, in contrast to the older laws of neutrality that viewed trade restrictions as hostile acts. The legal distinction between economic sanctions and warfare is widely accepted today, and sanctions are seen as a way to avoid military escalation.

However, there are minimal legal constraints on the deployment of sanctions. The International Court of Justice has stated that even a comprehensive embargo does not breach customary international law unless it violates a commercial treaty. Domestic institutions in key sanction-imposing countries, particularly the United States, have accepted sanctions as legitimate statecraft tools. The U.S. Supreme Court decisions in the 1980s empowered the president to conduct widespread economic warfare by declaring national emergencies, bypassing congressional oversight.

While economic treaties like investment agreements and WTO regulations could limit sanctions, they often include exceptions for actions deemed necessary for national security. In

practice, these exceptions allow states to justify imposing sanctions, such as suspending trade with Russia and Belarus.

Although international and domestic law has started to play a more significant role in regulating sanctions, the legal framework remains unsettled and fragmented. There is, however, a growing trend toward the adoption of due process norms such as reason-giving, non-arbitrariness, and good faith.

The war in Ukraine has demonstrated the effectiveness of sanctions in responding quickly to violations of international law, with an immediate goal of pressuring Russia to end the violence. Despite this, the long-term consequences of sanctions on ordinary Russians and the global economy are significant, and many countries, particularly in the Global South, have remained neutral. As the economic impact of prolonged sanctions becomes clearer, questions may arise about their selective application by Western powers and the strategic costs involved.

### **Toward a Working Sanctions Regime Complex?**

The growing use of economic sanctions, particularly in response to the Ukraine crisis, has highlighted the need for closer scrutiny and regulation. The current legal framework for sanctions is not a coherent international regime but rather a complex, disaggregated collection of domestic rules. While sanctions are seen as a tool for enforcing international order and preventing military escalation, their widespread use raises concerns about their impact on global trade, law, and human rights. The increasing role of courts and tribunals in scrutinising sanctions, along with demands for due process, is pushing for more regulation. However, this procedural review is unlikely to reduce the overall appeal of sanctions or their macroeconomic effects.

Proposals for stricter limitations on sanctions include clearer boundaries between military security issues and ordinary policy matters, although such discussions often conflict with international commitments to liberalized trade. In the U.S., the role of Congress has been primarily to escalate sanctions, but there is room to reconsider its power in shaping such policies, possibly through a national security charter to promote deliberation. Some more transformative proposals suggest using sanctions as a catalyst for global reforms, such as

financial transparency or a shift to renewable energy, in response to issues exposed by the sanctions, including financial secrecy and the dependence on Russian energy. Additionally, there are calls for state-led efforts to mitigate the economic impacts of sanctions, balancing them with positive forms of aid.

**Conclusion:**

In conclusion, while the current economic war sparked by the Ukraine conflict brings attention to the use of sanctions, it is unlikely to lead to immediate or significant legal reforms in the international legal system. Rather than a grand regulatory shift, the situation presents multiple, competing perspectives that will be shaped by the diverse institutions managing economic warfare. Despite this, there is hope that the heightened focus on economic sanctions will foster a greater sense of responsibility and inspire the development of new approaches, which may evolve and be tested as international politics continue to face various crises.