The ICJ, Israel and the request for an Advisory Opinion

Why the ICJ should not render an Advisory Opinion on the Israeli Occupation

Introduction

On 30th December 2022, the UN General Assembly adopted a resolution (77/247) requesting the International Court of Justice to render an advisory opinion on the following questions:

- What are the 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 Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?
- How do the policies and practices of Israel referred to in paragraph 18(a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?"

On 3rd February 2023, the Court invited all UN member states to make written submissions to it concerning the request for legal advice, by 25th July 2023.

In this article, we describe some of the highly problematic legal issues raised by this request.

In our view, the Court should not render an Opinion.

A. UN General Assembly Request for Advice

The United Nations General Assembly (UNGA), at its fifty-sixth plenary meeting held on 30 December 2022, under its agenda item 47, adopted a resolution entitled "Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem" (Res 77/247). In this resolution, the UNGA requested the International Court of Justice (ICJ) to render an advisory opinion pursuant to Article 65 of the Statute of the Court on the following questions:

"18. … considering the rules and principles of international law, including the Charter of the United Nations, international humanitarian law, international human rights law, relevant resolutions of the Security Council, the General Assembly and the Human Rights Council, and the advisory opinion of the Court of 9 July 2004:

- What are the 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 Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?
- How do the policies and practices of Israel referred to in paragraph 18(a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?"

B. International Court of Justice call for Submissions by States

In its Order dated 3 February 2023, the ICJ decided that "the United Nations and its Member States, as well as the observer State of Palestine, are considered likely to be able to furnish information on the questions submitted to the Court for an advisory opinion". It fixed 25 July 2023 as the time-limit

within which written statements on the questions may be presented to the Court, and 25 October 2023 as the time-limit within which "States and organizations having presented written statements may submit written comments on the written statements made by other States or organizations".

C. Political Background to PLO Campaign

Even a cursory examination of the history of the Request shows that it is the result of a deliberate campaign driven by the Palestine Liberation Organisation (PLO) since about 2000 to avoid its obligations under international law, and to advance its legal and political attacks on the State of Israel. While it purports to advance international law, in fact the Request attacks Israel, and totally ignores the role and responsibility of the Palestinians in the conflict.

A draft motion prepared by the "State of Palestine" was approved by the Special Political and Decolonization Committee (Fourth Committee) on 11 November 2022. A resolution resolving that the General Assembly should ask the ICJ for an Advisory Opinion was passed by a vote of 98 to 17, with 52 abstentions, and was sent to the UNGA. Nicaragua presented the draft resolution because Palestine is not a full member of the UN. On 30 December 2022, the UN General Assembly adopted the resolution with 87 votes in favor, Israel, the United States and 24 other members against, and 53 abstentions.

Thus, only a minority of States (87 of the total 193 Member States) actually supported the adoption of the UNGA Resolution. This was less than the number of States (98) that had voted in favor of the draft Resolution in the Fourth Committee[1]. In the debates, and through their voting, the majority of UN Member States expressed opposition to or concerns about the Resolution.

All of this is evidence of the highly contentious and politically-motivated nature of the Resolution, as well as divided views on the expediency of adopting the Resolution. In short, the Resolution is only supported by those States that seek to advance the Palestinian narrative, while it is not supported, or is even opposed, by an even greater number of States that seek to advance the Israeli position, or are concerned for a more balanced approach.

Rather than promoting UN Charter values, the rendering of an Opinion by the ICJ on the questions posed in the Request will likely diminish, rather than improve, the possibility of peaceful resolution of the Israel-Palestine conflict.

D. Reasons Why the Court should Not Give an Advisory Opinion

The ICJ is not obliged to render an Opinion on every question posed to it. First, it must be certain that the question satisfies the conditions set out in the UN Charter, the Court's Statute and its Rules; i.e. it must be certain it has jurisdiction. If it has no jurisdiction, it must not render an opinion. Second, the Court may decline to give an opinion, if it believes it is not appropriate to do so, as a matter of its judicial discretion.[2]

In our view, there are three main reasons why the Court MUST decide NOT to render an Advisory Opinion on the questions posed in the Request:

a. First, the General Assembly has no power to seek the Court's advice, as the Security Council is seised of the matters referred to in the Request. Pursuant to Article 12 of the UN Charter, it is for the Security Council, not the General Assembly, to seek the Court's advice. Accordingly, the COURT DOES NOT HAVE JURISDICTION to give an Opinion to the General Assembly on such matters.

b. Second, the Resolution demonstrates a blatant attempt by the PLO to UNDERMINE THE OSLO ACCORDS and related agreements entered into by the PLO and Israel. The Request refers almost exclusively to alleged *Israeli*infringements of international law. The Request does not even refer to the Oslo Accords, or to Israel's counter party in those agreements – the PLO. To render an opinion on the issues referred to in the Request would thus have "the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent." The Court must thus EXERCISE ITS DISCRETION not to render an Opinion.

c. Third, the questions posed in the Request are based on factual assertions that cannot be proven on the basis of the documentation available to the Court and are based on legal presumptions that have never been the subject of binding judicial determination. The Court is being asked to RUBBER STAMP the legal and factual assertions made in the Request. It is a fundamental misuse of the ICJ to expect the Court to confirm assertions, the veracity of which it is not able to (and is not even being asked to) ascertain. The Request carefully omits mention of important legal and factual matters, evidence of which accordingly will not be presented to the Court, but which would be necessary if the Court were to try to answer the legal questions posed. For these reasons also, the Court must EXERCISE ITS DISCRETION NOT TO NOT TO RENDER AN OPINION.

E. General Assembly had No Jurisdiction to make the Request

Under Article 24 of the Charter the Security Council has "primary responsibility for the maintenance of international peace and security". To be sure, this is not an exclusive competence; "there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security". Nevertheless, Article 12(1) of the UN Charter provides:

"While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

The General Assembly's Request covers certain key aspects of the Israeli-Palestinian situation in relation to which the Security Council is clearly exercising its powers under the Charter.

It is important to note that this request for an advisory opinion is very different from the General Assembly's request in 2003 inthe 2004 *Wall* case. There, the General Assembly requested an opinion of the Court in its Tenth Emergency Special Session, based on Resolution 377A(V) ("Uniting for Peace"), for the very reason that the Security Council had NOT made a decision concerning the Israeli security barrier. The Court accepted that it was appropriate for the General Assembly to ask the Court's advice, given that the Security Council had been unable to adopt a resolution on the relevant issue due to the negative vote of one of its members.

The situation here is completely different. In this case, UNGA Resolution 77/247 was not adopted pursuant to the Tenth Emergency Session, and did not rely on Resolution 377A(V). Rather, the resolution was adopted in General Session, in response to a Fourth Committee report. On the date of its adoption (30 December 2022), the Security Council HAD clearly stated that it is seised of the very issues covered by the Request. In particular, the Security Council made specific pronouncements in Resolution 2334 on the very legal issues that the General Assembly is now asking the Court to render an Opinion about, including: the status of the territories occupied since 1967; the status of "Israeli

settlement activities"; the status of "the 1967 lines"; and Israel's obligations as occupying Power. Furthermore, the Council emphasized the importance of negotiations –

10. *Confirms* its determination to support the parties throughout the negotiations and in the implementation of an agreement;

11. *Reaffirms* its determination to examine practical ways and means to secure the full implementation of its relevant resolutions;

12. *Requests* the Secretary-General to report to the Council every three months on the implementation of the provisions of the present resolution;

13. *Decides* to remain seized of the matter.

The Secretary General provided a report to the UNSC pursuant to paragraph 12 on 14 December 2022, only 16 days before the UNGA Resolution, in which he concluded (at para 89):

"There is no substitute for a legitimate political process that will resolve the core issues driving the conflict. Israelis, Palestinians, regional States and the broader international community must take steps to enable the parties to re-engage on the path towards meaningful negotiations and, ultimately, peace."

At its meeting of 19 December 2022, the Council accepted this report, and expressed its active involvement in pursuit of a negotiated solution under UNSC Resolution 2334.[3]

Therefore, at the time the UNGA Request was made (on 30 December 2022), the Security Council was actively pursuing a policy in which it has stated its position on key issues concerning the occupation and settlements, and stated that there is no substitute for a legitimate political negotiation process.

Therefore, it is strongly arguable that the General Assembly did not have authority to ask the Court to opine on the legal consequences of certain factual circumstances, when those circunstances and consequences were the subject of the Security Council's concurrent deliberations and resolutions. Providing advice to the General Assembly on these issues is thus outside the jurisdiction of the Court.

F. UNGA Request Conflicts with Binding Oslo Accords between Parties in a Dispute

The Request is clearly a deliberate attempt to avoid the rights and obligations imposed on the PLO by the agreements it voluntarily entered into. The PLO under Chairman Arafat negotiated and signed the Oslo agreements on behalf of all Palestinians, and thus committed the Palestinin people to a political process for resolving the conflict.

The Peace Process established at the UN-endorsed Madrid conference, convened by the USA and Russia in 1991, led to partial resolution of the conflict between Israel and Jordan concerning the West Bank, and to a series of agreements negotiated and entered into between 1993 and 1997 (the "Oslo Accords") between Israel and the PLO. In these agreements, Israel and the PLO (representing the Palestinian people) agreed to a detailed and comprehensive plan for the gradual redeployment of Israeli military forces, and the transfer of powers, responsibilities and authority from the Israeli military government and its Civil Administration to the Palestinian Self-governing Authority.

While it is true that negotiations are non-existent, the Oslo Accords remain legally binding. These agreements entail ongoing legal rights and obligations not only for the parties to the agreements (Israel and the PLO), but also for the USA, Russia, Egypt, Jordan, Norway and the EU (as signatory witnesses), as well as all Members of the UN with which agreements were deposited.

The UN General Assembly has endorsed the Oslo Accords as the basis for a negotiated political process in Resolution ES-10114 of 8 December 2003. The Court endorsed the importance of the Oslo Accords in the *Wall* case (para.77).

In the Oslo Accords, the parties accepted that the only way to resolve their dispute is through "the agreed political process". According to Article I of the Declaration of Principles (1993) –

It is understood that the interim arrangements are an integral part of the whole peace process and that the negotiations on the permanent status will lead to the implementation of Security Council resolutions 242 (1967) and 338 (1973).

They specifically agreed that, pending a final agreement –

- Israel is entitled to maintain a military government and civil administration in the West Bank and Gaza Strip;
- The West Bank would be divided into three areas – A, B and C. The Palestinians would obtain full control over Area A, Area B would be under joint Israeli/Palestinian control, and Area C would be under exclusive Israeli control;
- "Settlements", "borders", "Jerusalem" and several other issues would be the subject of permanent status negotiations;
- The "realization of the legitimate rights of the Palestinian people and their just requirements" depends on the fulfilment of conditions, including "direct, free and general political elections", establishing "a democratic basis for the establishment of Palestinian institutions".

The Oslo II Interim Agreement (1995) contains current provisions regarding the election of the Authority in its Articles II–IX and Annex 2. It is strongly arguable that it is the non-implementation of these provisions by Palestinian leaders that is currently depriving Palestinians of self-determination.

The Oslo Accords seek to implement principles expressed in UN Security Council Resolution 242. In particular, the Security Council acknowledged Israel's rights to secure and recognized boundaries and territorial integrity, did not require complete Israeli military withdrawal from the territories captured in 1967, and did not recognize or even refer to "Palestinian" rights to that territory. In 2005, Israel withdrew its military administration from the Gaza Strip. In the meantime, the status of the West Bank remains subject of negotiation as between Israel and the PLO.

On 19 November 2003, the Security Council adopted resolution 1515 (2003), by which it "Endorse[d] the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict". According to the Road Map:

"A two state solution to the Israeli-Palestinian conflict will only be achieved through an end to violence and terrorism, when the Palestinian people have a leadership acting decisively against terror and willing and able to build a practicing democracy based on tolerance and liberty, and through Israel's readiness to do what is necessary for a democratic Palestinian state to be established, and a clear, unambiguous acceptance by both parties of the goal of a negotiated settlement as described below."

The whole thrust of the Oslo Accords and the Road Map is thus about mutual performance, and good faith negotiation, leading to a consensual outcome reflecting the complex matrix of legal, political and practical interests and concerns.

A request to the ICJ to opine *solely* on (the legal consequences of) Israel's alleged non-compliance with international law, without even referring to the rights and obligations of the PLO under the Oslo Accords, thus contravenes and undermines the delicate balance of rights and obligations referred to in the Oslo Accords.

Israel, a party to those bilateral agreements, has made it clear that it does not consent to the Court's jurisdiction to make a determination in relation to issues the subject of its agreements with the PLO. Thus, to render an Opinion would conflict with the Court's judicial character:

"In certain circumstances . . . the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent." (*Western Suharu, I.C.J. Reports 1975,* p. *25,* paras. 32-33.)

It is important to stress that this Request is very different from the request submitted to the ICJ in 2003. In the *Wall* case, the Court was asked to opine on the legal consequences of a specific, confined action, namely Israel's erection of a security barrier –that the Court noted was not the subject of bilateral agreement.[4] In this case, however, the Court is being asked to opine on the legal consequences of a wide array of presumed infringements of international law, concerning a conflict in relation to which the parties agreed not to take action to resolve outside the framework of negotiations.

A ruling from the ICJ will undermine the Oslo framework, and embolden extremists on both sides, making it far more difficult for the political track to move forward.

The fact that these issues are the subject of binding agreements means the Court must exercise its discretion to decline to give an advisory Opinion.

G. Request Based on Contentious and Erroneous Legal and Factual Presumptions

The first question posed in the Request asks the ICJ to opine on the "legal consequences arising from" a wide range of vaguely described factual and legal matters that are all presumed, but are each excluded from judicial examination because the Request does not actually ask the Court to make a determination in relation to them:

- "ongoing violation by Israel" of "the right of the Palestinian people to self-determination";
- "prolonged occupation, settlement and annexation [by Israel] of the Palestinian territory occupied since 1967";
- "measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem"; and
- "related discriminatory legislation and measures."

The Court is being asked to endorse, without further examination, presumptions of law and fact relating to the Israel-Palestine conflict that are highly contentious. Even a *prima facie* analysis shows that there are strong reasons why each allegation made is at best contentious, and at worst misleading or false.

Moreover, even if the Court were to make an independent assessment of the veracity of these presumptions, the Court will not have before it the information needed to make a judicial determination. If the Court were to address these issues, there is a high risk it would give an opinion

based on false information (as happened in the "Wall" case, as shown by the Israeli Supreme Court in its Alfei Menashe decision).

Some initial observations illustrate this point:

"The ongoing violation by Israel of the right of the Palestinian people to self-determination"

There is no doubt that the Palestinian people have a right to self-determination. But it cannot be assumed that Palestinian self-determination is being denied, or that Israel is violating Palestinian rights to self-determination. For example –

a. The application of a right to self-determination requires the will of the peoples concerned to be fully established.[5] This condition has not been satisfied, as a result of the failure of Palestinian leaders to hold elections to the Palestinian Authority for the last 16 years.

b. Contrary to unsubstantiated frequent assumptions, opinion polls (e.g. by a Palestinian media organization in December 2021) show that an overwhelming majority of Arabs in East Jerusalem prefer a continuation of Israeli rule.[6]

c. Self-determination is a relative right[7] that must be respected together with other rights, including the rights of other peoples (in this case the Jewish people) to self-determination, and the rights of existing states to security, territorial integrity and political inviolability. This is why a solution to the conflict can only be found through a political process, as the international community has repeatedly recognized.

d. While it is true that a final status agreement has not been reached, it is absurd to assert that the Palestinian self-determination is being completely denied. The arrangements made under the Oslo Accords have greatly advanced Palestinian self-determination. If anything, Palestinians living in Areas A and B enjoy far more autonomy today (as a result of the Oslo Accords) than at any time in history, including during the Jordanian occupation of 1948-1967.

"Prolonged occupation"

While it is clear that, as a matter of fact, Israel is occupying the remainder of the territories over which it gained control in self-defense in June 1967, the mere fact of occupation does not entail illegality. Nor does international law impose any constraint on the duration of occupation.

"Palestinian Territory"

The term "Palestinian Territory" is a political concept that is devoid of legal specificity. The legal status of the West Bank occupied by Israel is disputed and has never been judicially determined. Security Council Resolution 242 (1967) recognized that Israel has legitimate territorial claims with respect to some of those territories because it did not recommend withdrawal from all of those territories. None of the documents referred to in the Request establish that the territory has become "Palestinian" since 1967, and the Court cannot be asked to assume that "the Palestinian people" have sovereignty over all of the territories occupied since 1967.

It should be noted that the Court was careful, in its 2004 *Wall* opinion, to avoid opining on the sovereign status of these territories, except to determine that they are not, at present, part of the sovereign territory of Israel. To decide this issue in this case would require the Court to examine the complex history of the region from 1920 onwards, an exercise that would take the Court well beyond the scope of the UNGA Request, which does not even mention key international law documents

concerning the status of the territories prior to 1967, such as the Mandate for Palestine and the 1949 Israel-Jordan Armistice Agreement.

A proper examination of the sovereign status of the territories occupied since 1967 would reveal for example that, following the establishment of Trans-jordan in 1921, the Mandate for Palestine envisaged establishment of the Jewish homeland in the whole of the territory west of the Jordan River. Further, prior to 1968, the Arab Palestinians have never claimed sovereignty over any of this territory:

- Following World War I and during the Mandate years, Palestinian leaders repeatedly denied the very existence of "Palestine" as a separate political entity, arguing instead that the area known colloquially as "Palestine" was in fact part of Syria. After initially rejecting the existence of Palestine as a political entity, the Arab Palestinian population subsequently rejected and renounced multiple offers of statehood – most importantly, the Peel Commission's July 1937 two-state solution, and the May 1939 British White Paper's one-state solution.

- In November 1947 they rejected the United Nations General Assembly's two-state solution embodied in Resolution 181(II).

- Between 1948 and 1967 Jordan occupied and purported to annex the West Bank and East Jerusalem, while Egypt occupied the Gaza Strip. During those nearly two decades, the Arab Palestinian population never sought or demanded statehood in the West Bank and Gaza. In December 1948 (at the Jericho Conference) they reaffirmed their rejection of the two-state solution, pledging their loyalty to King Abdullah and expressly waiving West Bank sovereignty in favor of Jordan. In May 1964 the Palestinians again rejected the two-state solution, proclaiming in Article 24 of the original PLO Charter, "This Organization does not exercise any regional sovereignty over the West Bank in the Hashemite Kingdom of Jordan, [or] the Gaza Strip." Nor did the Arab League (likewise focused on Israel's destruction) or the United Nations during those two decades ever call for Palestinian statehood in the West Bank, East Jerusalem and the Gaza Strip.

- Israel's mere replacement of Jordan and Egypt in June 1967 as the occupant changed nothing under international law for purposes of determining the legal status of the West Bank, Gaza and East Jerusalem.

Since 1967, nothing has happened to change the sovereign status of the territories except potentially the Oslo agreements, which were very careful in the allocation of rights and obligations. While certain powers and responsibilities were transferred to the Palestinian Authority, the Oslo Accords did not transfer sovereignty to the PA, the PLO or the Palestinian people; rather, issues such as borders and the status of Areas A, B and C were reserved for final status determination.

"Settlement of Palestinian territory"

Similarly, the concept of "settlement" as used in the Request is political, not legal. International law prohibits the forced movement of civilian population into occupied territory, but does not prohibit civilian migration *per se*.

"Annexation"

Allegations that Israel is illegitimately "annexing" territory presume that international law prohibits annexation in any circumstances. However, the situation concerning the West Bank, which was

illegally invaded by Jordan in 1948, is complex and the Court cannot make a determination on this issue unless it is presented with the extensive legal and historical facts.

"Holy City of Jerusalem"

The legal status of West Jerusalem is without doubt: having been part of Israeli jurisdiction and control since 1948, it comes under the territorial sovereignty of Israel. This was recognized in Security Council Resolution 242, which referred only to territories occupied by Israel in the Six Day War. Although the Security Council in 1980 referred to the "Holy City of Jerusalem", and asserted that Israel's reunification of the city was an infringement of its obligations as the occupying power, these Resolutions concerned "East Jerusalem" only. They provide no basis for the General Assembly to seek advice on the status of Jerusalem as a whole.

"Discriminatory legislation and measures"

Vague reference to Israel's alleged "adoption of related discriminatory legislation and measures" is unacceptably indeterminate and prejudicial. It is impossible to know which "legislation and measures" are being referred to. It is incompatible with the judicial function for the Court to make a selection and then ascertain whether they are "discriminatory" (according to which standards?).

Photo ID 507871. 26/08/2005. The Hague, Netherlands. UN Photo/ICJ/Jeroen Bouman. www.unmultimedia.org/photo/

---

[1] https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/690/18/PDF/N2269018.pdf?OpenElement

[2] Under Article 65 of the Statute, the Court has discretion to decline to give an opinion falling within its jurisdiction. The Court may do so to protect the integrity of its judicial function (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, paras. 44-45). Yet, the Court has characterized advisory opinions as its "participation in the activities of the Organisation [the UN]"; thus, "in principle", the Court should not refuse such participation (p. 71) unless there are "compelling reasons" to do so (para. 44). One such reason is "lack of consent of an interested State", which "may render the giving of an advisory opinion incompatible with the Court's judicial character" (para. 33). This is the case when "to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent". It should be noted that this would be the first case in which the Court has declined to respond to a request for an advisory opinion based on considerations of judicial impropriety. In all previous requests, including when the request arguably related to existing disputes (*Interpretation of Peace Treaties*, *Namibia*, *Western Sahara*, *Mazilu*, *Wall*, *Kosovo*, or *Chagos*), the Court has decided to render an advice. Only on one occasion did the PCIJ, in 1923, decline to issue an advisory opinion on a question "concern[ing] directly the main point of the controversy between [the parties, Finland and Russia]" in *Status of Eastern Carelia*.

[3] https://documents-dds-ny.un.org/doc/UNDOC/PRO/N22/758/43/PDF/N2275843.pdf?OpenElement

[4] *Construction of a Wall (Advisory Opinion),* 2004, I.C.J. Reports, p. 158, para 49.

[5] See para 4 of Opinion No. 4 of the Badinter Commission (Arbitration Commission of the Conference on Yugoslavia), English translation published by the University of Ljubljani at https://www.pf.uni-lj.si/media/skrk_mnenja.badinterjeve.arbitrazne.komisije.1_.10.pdf.

[6] https://www.shfanews.net/post/102082

[7] It is important to note that Israel/Palestine is a case is not one of decolonization, as was the case, for example, in *Chagos*.