

INTERNATIONAL COURT OF JUSTICE

REQUEST BY THE UNITED NATIONS GENERAL ASSEMBLY FOR AN ADVISORY OPINION ON
THE QUESTION OF THE "LEGAL CONSEQUENCES ARISING FROM THE POLICIES AND
PRACTICES OF ISRAEL IN THE OCCUPIED PALESTINIAN TERRITORY, INCLUDING EAST
JERUSALEM"

WRITTEN STATEMENT OF THE GOVERNMENT OF CANADA

14 JULY 2023

INTRODUCTION

1. On December 30, 2022, the United Nations (“UN”) General Assembly adopted resolution A/RES/77/247, in which it decided to request the International Court of Justice (“ICJ”) to render an advisory opinion on the following questions:"

“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:

- (a) 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?
 - (b) 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?”
2. On January 19, 2023, the Registrar gave notice of the request for an advisory opinion to all States entitled to appear before the Court pursuant to Article 66(1) of the Statute of the International Court of Justice (the “Statute”), including Canada.
 3. On February 3, 2023, the Court noted that all Member States were likely able to furnish it with information relevant to the request for an advisory opinion, and established July 25, 2023 as the deadline for any interested States to do so.
 4. In response to the invitation from the Registrar, and pursuant to Article 66(2) of the Statute, the Government of Canada wishes to submit comments pertaining to the Request for an Advisory Opinion on the Question of the “Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem.”

NEGOTIATION AS THE APPROPRIATE MEANS OF SETTLING THE DISPUTE

5. Canada remains fully committed to the goal of a comprehensive, just and lasting peace in the Middle East, including the creation of a Palestinian state living side by side in peace and security with Israel. It continues to support the two-state solution as the only viable path towards this goal.
6. Canada's longstanding view is that it is only through direct negotiation between the parties that a lasting peace can be achieved. To this end, Canada continues to recognize UN Security Council resolutions (UNSCR) 242 and 338 as the basis for peace negotiations towards a comprehensive settlement of the conflict.
7. Canada fully supports all efforts to encourage Israel and the Palestinians to return to the negotiating table. These include steps taken to enable the parties to engage in direct dialogue and commit to refraining from unilateral actions. It is important that additional efforts to address the resolution of the dispute are focused on the UN Security Council-mandated negotiating process.

JURISDICTION AND DISCRETION

8. Article 65(1) of the Statute provides that "[t]he Court *may* give an advisory opinion" (emphasis added). The Court thus exercises a discretionary power to decide whether or not to deliver an advisory opinion.
9. This was confirmed by the Court in its *Wall* opinion, where it noted that:

The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that 'The Court may give an advisory opinion . . .', should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met.¹
10. In its *Chagos* opinion, the Court confirmed that once it is seized of a request for an advisory opinion, it "must first consider whether it has jurisdiction to give the opinion requested and if so, whether there is any reason why the Court should, in the exercise of its discretion, decline to answer the request."² The Court stressed that "the fact that the Court has jurisdiction does not mean, however, that it is obliged to exercise it"³ and explained that "the discretion whether or not to respond

¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004 ("Wall"), p. 156, para. 44.

² *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, I.C.J. Reports 2019, p. 95 ("Chagos"), p. 20, para 54.

³ *Ibid.*, p. 22, para 63.

to a request for an advisory opinion exists so as to protect the integrity of the Court's judicial function as the principal judicial organ of the United Nations."⁴ The Court went on to note that in satisfying itself as to the propriety of the exercise of its judicial function, it will "give careful consideration as to whether there are compelling reasons for it to decline to respond to [a] request from the General Assembly."⁵

11. Notwithstanding that Canada did not vote in favour of the resolution requesting the advisory opinion at issue, Canada does not dispute that the UN General Assembly has the competence to request an advisory opinion from the Court on questions of a legal nature, nor does it dispute that the Court has the jurisdiction to consider this request. It is Canada's view, however, that the Court should exercise its discretion *not* to respond to the request made by the UN General Assembly in the present instance, in light of the compelling reasons present in this case.
12. Canada believes that the compelling reasons present in this case are two-fold, the first being the lack of consent to the jurisdiction of the Court by an interested State to the dispute underlying the request for an advisory opinion, and the second being that the UN Security Council is the body with primary responsibility for the overarching issue, not the UN General Assembly.

Lack of consent to jurisdiction

13. It is a fundamental principle of the ICJ that the settlement of contentious cases by the Court requires the consent of the States involved. Canada believes strongly that this principle is key to the effectiveness and credibility of the Court. It is one which the Court has affirmed in its Advisory opinion on Western Sahara:

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. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction.⁶

⁴ *Ibid.*, p. 22, para 64.

⁵ *Ibid.*, p. 22, para 66.

⁶ *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p.25, para. 33.

14. In its *Chagos* opinion, the Court observed that “there would be a compelling reason for it to decline to give an advisory opinion”⁷ when such an opinion would have the effect of circumventing the need for a State to give its consent to have its disputes submitted to judicial settlement. The Court determined in *Chagos* that the questions put to it did not pertain to the bilateral dispute between the parties, but rather to questions pertaining to the decolonization of Mauritius, which could be of assistance to the UN General Assembly in fulfilling its functions related to decolonization.⁸ There were thus no compelling reasons to decline jurisdiction.
15. In the present instance, however, it is clear that the questions posed to the Court – while notionally aimed at eliciting the overall legal consequences including “for all States and the United Nations” as a result of the policies and practices of Israel in the occupied Palestinian Territories – lie at the heart of the issues to be resolved between Israel and the Palestinians.
16. It is Canada’s understanding that Israel, which has a direct interest in this case, has not provided consent for the ICJ to be seized of this matter.

Primary responsibility of the UN Security Council

17. In the *Chagos* case, the Court considered the argument that it should exercise its discretion to decline the request for an advisory opinion on the basis that the Court’s response would not assist the UN General Assembly in the performance of its functions. It noted, however, that it was not for the Court to determine the usefulness of its advisory opinion, but rather for the requesting body.⁹ The Court instead focused its decision not to decline jurisdiction on the basis of the functions of the UN General Assembly, and the fact that the questions posed corresponded with these functions.
18. The Court determined in *Chagos* that the questions posed to it pertained to the broader issue of decolonization, and emphasized in this regard the “long and consistent” record of the UN General Assembly in trying to bring colonialism to an end.¹⁰ It concluded that:

the opinion has been requested on the matter of decolonization which is of particular concern to the United Nations. The issues raised by the request are located in the broader frame of reference of decolonization, including the

⁷ *Chagos*, p. 26, para 85.

⁸ *Ibid.*, p. 26, para 86.

⁹ *Ibid.*, pp 24-25, paras 75-78.

¹⁰ *Ibid.*, p. 27, para 87.

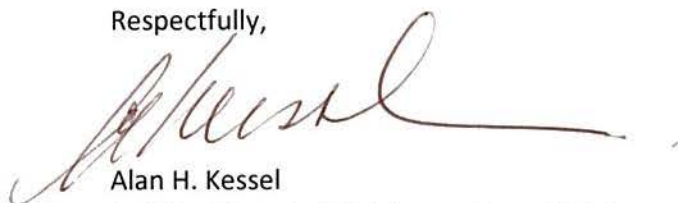
General Assembly's role therein, from which those issues are inseparable.¹¹

19. In the present instance, however, it is not the UN General Assembly that has primary carriage of the issue at hand, but rather the UN Security Council, which has established a framework to allow for the resolution of the dispute through negotiations between the parties.
20. While this issue also arose in the context of the *Wall* opinion, where the Court elected to assume jurisdiction to address a distinct measure taken by Israel, the Court also observed that the questions concerning the "greater whole" of the dispute were to be left to the parties to negotiate.¹²

CONCLUSION

21. Notwithstanding the challenges involved, Canada believes direct dialogue between the parties themselves is the best path to create the conditions for peace. Canada is concerned that the issuance of an advisory opinion on Israeli practices in the occupied territories may contribute to a polarization of positions that risks moving the parties further away from a just and lasting resolution to the conflict. While not legally binding, an advisory opinion could impact the outcome of the negotiation framework established by the UN Security Council.
22. In light of the fact that the questions posed pertain to the resolution of a bilateral dispute, where an interested State has not accepted the jurisdiction of the Court, and given that the UN Security Council has established a framework for the parties to resolve the dispute through negotiations, Canada is of the view that there are compelling reasons for the Court to exercise its discretion to decline the request of the UN General Assembly for an advisory opinion with respect to the questions posed in its resolution A/RES/77/247 dated December 30, 2022.

Respectfully,



Alan H. Kessel
Assistant Deputy Minister and Legal Adviser,
Agent of the Government of Canada
Global Affairs Canada

¹¹ *Ibid.*, p. 27, para 88.

¹² *Wall*, p. 160, para 52, and p. 201, para 162.