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**INTERNATIONAL COURT OF JUSTICE**

**LEGAL CONSEQUENCES ARISING FROM THE POLICIES  
AND PRACTICES OF ISRAEL IN THE OCCUPIED PALESTINIAN TERRITORY,  
INCLUDING EAST JERUSALEM**

**(REQUEST FOR AN ADVISORY OPINION)**

**WRITTEN STATEMENT OF THE  
SWISS CONFEDERATION**

**17 July 2023**

*[Translation by the Registry]*

1. On 30 December 2022, the United Nations General Assembly adopted resolution A/RES/77/247, entitled “Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem”. It thereby decided, in accordance with Article 96 of the Charter of the United Nations and pursuant to Article 65 of the Statute of the Court, to request the International Court of Justice to give an advisory opinion on the following questions:

- (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?<sup>1</sup>

2. By an Order of 3 February 2023, the International Court of Justice (hereinafter “the Court”) 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 and may do so within the time-limits fixed in this Order”<sup>2</sup>.

3. The Court fixed 25 July 2023 as the time-limit within which written statements may be presented.

4. Switzerland wishes to avail itself of that possibility and hereby presents to the Court, in due form and within the said time-limit, the following considerations.

## **I. PRELIMINARY CONSIDERATIONS**

### **A. Brief summary of Switzerland’s position**

5. Switzerland supports the vision set forth by the United Nations Security Council<sup>3</sup> of a region where two democratic States, Israel and Palestine, live side by side in peace within secure and recognized borders.

6. Switzerland is convinced that only a two-State solution, negotiated by the two parties, in accordance with international law and with the internationally agreed parameters, including the resolutions of the United Nations Security Council, can lead to a lasting peace between Israelis and Palestinians<sup>4</sup>.

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<sup>1</sup> General Assembly resolution 77/247, *Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem*, A/RES/77/247 (30 Dec. 2022), para. 18.

<sup>2</sup> *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Order of 3 February 2023, para. 1.

<sup>3</sup> See, in particular, Security Council resolution 2334 (2016), S/RES/2334 (2016) (23 Dec. 2016).

<sup>4</sup> To this end, Switzerland recalls the principles incorporated in the United Nations Charter as to the use of force, and their corollary in customary international law entailing the illegality of territorial acquisition resulting from the threat or use of force. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004 (I), p. 171, para. 87; see also Security Council resolution 2334 (2016), S/RES/2334 (2016) (23 Dec. 2016), preamble, second recital.

7. Switzerland calls on all the parties to comply with their obligations under international law, in particular international humanitarian law, and to refrain from any unilateral measure that might compromise the efforts to bring about peace. Israel has legitimate security concerns and also a considerable margin of appreciation in the choice and implementation of the necessary resources. However, its actions in the name of defence and national security must be in keeping with international law, in particular international humanitarian law and human rights. Respect for these is essential to improve the humanitarian condition of those people in a situation of prolonged occupation and in order to achieve a just and lasting peace.

## **B. Jurisdiction of the Court**

8. Under the terms of Article 65, paragraph 1, of its Statute, the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request. The General Assembly's request contained in resolution A/RES/77/247 was made pursuant to Article 96, paragraph 1, of the United Nations Charter, according to which the General Assembly may request the Court to give an advisory opinion on any legal question.

9. The questions submitted by the General Assembly have been framed in legal terms and raise problems of international law, associated in particular with the right to self-determination, international humanitarian law and international law on human rights.

10. In Switzerland's view, the Court has jurisdiction to give an advisory opinion in response to the request made by the General Assembly.

## **C. Propriety of the Court exercising its jurisdiction**

11. According to Article 65, paragraph 1, of the Statute, "[t]he Court *may* give an advisory opinion" (emphasis added). The Court thus has the discretionary power to decide whether or not it wishes to give the advisory opinion requested of it: "[t]he fact that the Court has jurisdiction does not mean, however, that it is obliged to exercise it"<sup>5</sup>. In this respect, the Court has characterized the role of its discretionary power as follows:

"The discretion whether or not to respond 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 (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 156-157, paras. 44-45; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, pp. 415-416, para. 29)."<sup>6</sup>

12. However, this discretionary power is tempered by the very purpose of an advisory opinion:

"The Court is, nevertheless, mindful of the fact that its answer to a request for an advisory opinion 'represents its participation in the activities of the Organization, and, in principle, should not be refused' (*Interpretation of Peace Treaties with Bulgaria,*

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<sup>5</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 113, para. 63.

<sup>6</sup> *Ibid.*, p. 113, para. 64.

*Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44). Thus, the consistent jurisprudence of the Court is that only ‘compelling reasons’ may lead the Court to refuse its opinion in response to a request falling within its jurisdiction (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 416, para. 30).<sup>7</sup>

13. It is right to ask whether such “compelling reasons” exist in the present case. In this instance, the Court could examine whether three potential grounds might be taken into consideration:

- (i) the lack of consent;
- (ii) the complexity and controversial nature of the facts;
- (iii) the role of negotiation in finding a solution.

14. It should first be pointed out that the threshold for this criterion to be applied is a high one. In exercising this discretionary power, the present Court has never declined to reply to a request for an advisory opinion, despite this argument frequently being advanced before it.

15. On the **first ground**, the lack of consent, it has been established that the Court could refuse to give a reply to a request for an advisory opinion if to do so “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”<sup>8</sup>.

16. The General Assembly’s request cannot be reduced to a dispute of purely bilateral dimensions. In particular, it touches on questions concerning the *erga omnes* effect of international obligations. Moreover, not to give a reply to the request for an advisory opinion on the basis of lack of consent would amount to denying that the General Assembly has a rightful interest in obtaining an answer to the questions it has put to the Court. The United Nations has a “permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy”<sup>9</sup>. The General Assembly has given concrete expression to that responsibility by taking the “Palestinian Question” upon itself as long ago as 1947 and by adopting numerous resolutions since then<sup>10</sup>. The advisory opinion has therefore been requested on a matter which is of particular concern to the United Nations in general and specifically

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<sup>7</sup> *Ibid.*, p. 113, para. 65 (emphasis added).

<sup>8</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33.

<sup>9</sup> General Assembly resolution 57/107, Committee on the Exercise of the Inalienable Rights of the Palestinian People, A/RES/57/107 (3 Dec. 2002).

<sup>10</sup> General Assembly resolution 181 (II), *Future government of Palestine*, A/RES/181 (II) (29 Nov. 1947).

to the General Assembly<sup>11</sup>. The reply to the questions put to the Court will therefore be useful to the General Assembly for the proper performance of its functions.

17. In these circumstances, the rendering of an advisory opinion by the Court would not have the effect of circumventing the principle that a State must consent to the judicial settlement of its dispute with another State.

18. A **second ground** that might lead the Court to decline to give a reply to a request from the General Assembly for an advisory opinion is the complexity and controversial nature of the facts. More specifically, the Court has indicated that “the actual lack of ‘materials sufficient to enable it to arrive at any judicial conclusion upon the question of fact’”<sup>12</sup> could prevent it from giving an opinion.

19. In this instance, the situation underlying the request for an advisory opinion has been widely documented, for example by the multiple annual reports of the United Nations Secretary-General and the United Nations High Commissioner for Human Rights.

20. A **third ground** upon which the Court might not give a reply to the request is the role of negotiation in finding a solution to the situation before the Court.

21. The Court has already had occasion to examine this question in the past, notably in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In that context, it observed that

“[i]t is not clear, however, what influence the Court’s opinion might have on those negotiations: participants in the present proceedings have expressed differing views in this regard. The Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.”<sup>13</sup>

22. The Court should exercise its jurisdiction regardless of the possibility that its advisory opinion may have an influence on the negotiations. It is not for the Court to determine whether its advisory opinion might include some kind of political element, but rather whether the questions submitted to it are of a legal character. Hence, “the fact that a question has political aspects does not suffice to deprive it of its character as a legal question”<sup>14</sup>. The Court explained its reasoning thus:

“Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, an assessment of an act by reference to international law. The Court has also made clear that, in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the

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<sup>11</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 118, para. 88.

<sup>12</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 28, para. 46.

<sup>13</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 160, para. 53.

<sup>14</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 415, para. 27.

motives which may have inspired the request or the political implications which its opinion might have.”<sup>15</sup>

23. Consequently, neither the existence of a negotiation process nor the potential political implications of an advisory opinion can lead the Court to decline to exercise its jurisdiction.

24. In the light of the above, there is no “compelling reason” that might lead the Court to refuse to give the advisory opinion requested by the General Assembly.

## II. RIGHT OF SELF-DETERMINATION

### A. Legal status

25. The right of self-determination, also called the right of people to decide their own destiny, is a right recognized in international law. Although it developed in the context of decolonization, it has since found much wider application.

26. The right of self-determination is explicitly mentioned in Articles 1 and 55 of the Charter of the United Nations. According to Article 1, paragraph 2, of the Charter, one of the purposes of the United Nations is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”.

27. Furthermore, Article 1 of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights states that:

“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

.....

The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”

28. The content of the right of self-determination has been defined by the United Nations General Assembly in resolution 1514 (XV) on the Granting of Independence to Colonial Countries and Peoples, adopted on 15 December 1960, and in resolution 2625 (XXV) of 24 October 1970, entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”. The latter states that:

“By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their

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<sup>15</sup> *Ibid.*

economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.”<sup>16</sup>

29. The said declaration further specifies that every State has the duty to promote realization of the self-determination of peoples, in accordance with the provisions of the Charter<sup>17</sup>.

30. Regarding the content of the right of self-determination, it is further recognized by the same declaration that in exercising this right, a people may choose between the establishment of a sovereign and independent State, the free association or integration with an independent State or the acquisition of any other freely determined political status<sup>18</sup>.

31. The Court has pronounced on several occasions on the right of peoples to self-determination. In the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, it recognized the principle of self-determination of peoples as a relevant one in assessing the questions put before it<sup>19</sup>.

32. In its Judgment of 1995 in the *East Timor* case, the Court ruled on the *erga omnes* character of this right, finding that “Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable”<sup>20</sup>. Likewise, in the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, it confirmed that respect for the right of the Palestinian people to self-determination is an obligation *erga omnes*<sup>21</sup>. And lastly, in the 2019 Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the Court recognized that the right to self-determination is a fundamental human right with a broad scope of application going beyond the context of decolonization<sup>22</sup>, and that it represents a customary norm<sup>23</sup>.

33. The legal effects deriving from the *erga omnes* and customary character of the right of peoples to self-determination are also reflected in resolutions of the General Assembly. For example, in the resolution on the Status of Palestine in the United Nations, the General Assembly

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<sup>16</sup> General Assembly resolution 2625 (XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, A/RES/2625 (XXV) (24 Oct. 1970).

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004 (I)*, pp. 171-172, paras. 86-88.

<sup>20</sup> *East Timor (Portugal v. Australia)*, Judgment, *I.C.J. Reports 1995*, p. 102, para. 29.

<sup>21</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004 (I)*, p. 199, para. 155.

<sup>22</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, *I.C.J. Reports 2019 (I)*, p. 131, para. 144.

<sup>23</sup> *Ibid.*, pp. 132-134, paras. 152-158.



“[u]rges all States and the specialized agencies and organizations of the United Nations system to continue to support and assist the Palestinian people in the early realization of their right to self-determination, independence and freedom”<sup>24</sup>.

### **B. Right to self-determination of the Palestinian people**

34. The right of the Palestinian people to self-determination has been recognized regularly by various United Nations bodies. The General Assembly has expressed itself repeatedly on the Palestinian people’s right to self-determination<sup>25</sup>. Since its forty-ninth session in 1994-1995, when it adopted a resolution entitled “The right of the Palestinian people to self-determination”, the General Assembly has reiterated that the Palestinian people has this right<sup>26</sup>.

35. The Court, for its part, observed in the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* that “[a]s regards the principle of the right of peoples to self-determination . . . the existence of a ‘Palestinian people’ is no longer in issue”<sup>27</sup>.

36. It should be noted that, in the same Advisory Opinion, the Court took the view that the right to self-determination was included among the “legitimate rights” of the Palestinian people referred to in the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1999, known as the Oslo II Accord<sup>28</sup>.

37. In connection with the right of the Palestinian people to self-determination, the General Assembly has demanded that Israel cease, amongst other things, all its settlement activities, “all of which, inter alia, gravely and detrimentally impact the human rights of the Palestinian people, including their right to self-determination”<sup>29</sup>. Previously, the Security Council had asserted that the establishment of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace<sup>30</sup>. The General Assembly has likewise reaffirmed that the Israeli settlements are illegal<sup>31</sup>.

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<sup>24</sup> General Assembly resolution 67/19, *Status of Palestine in the United Nations*, A/RES/67/19 (29 Nov. 2012).

<sup>25</sup> See, for example, General Assembly resolution 3236 (XXIX), *Question of Palestine*, A/RES/3236 (XXIX) (5 Nov. 1974), General Assembly resolution 67/19, *Status of Palestine in the United Nations*, A/RES/67/19 (29 Nov. 2012) and General Assembly resolution 77/25, *Peaceful settlement of the question of Palestine*, A/RES/77/25 (30 Nov. 2022).

<sup>26</sup> See, in particular, the General Assembly’s first resolution 49/149, *The right of the Palestinian people to self-determination*, A/RES/49/149 (23 Dec. 1994) and its most recent resolution 77/208, *The right of the Palestinian people to self-determination*, A/RES/77/208 (15 Dec. 2022). The Human Rights Council also regularly adopts resolutions on this subject, e.g. most recently resolution 52/34, *Right of the Palestinian people to self-determination*, A/HRC/RES/52/34 (4 Apr. 2023).

<sup>27</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 182-183, para. 118.

<sup>28</sup> *Ibid.*, p. 183, para. 118.

<sup>29</sup> General Assembly resolution 77/247, *Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem*, A/RES/77/247 (30 Dec. 2022).

<sup>30</sup> Security Council resolution S/RES/2334 (2016) (23 Dec. 2016).

<sup>31</sup> See, for example, General Assembly resolution 77/126, *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan*, A/RES/77/126 (12 Dec. 2022).

38. For Switzerland, whose position has been outlined above<sup>32</sup>, any solution to the conflict in the Middle East must be based on a number of elements, including the right to self-determination, so as to enable two democratic States, Israel and Palestine, to live in peace and security. For example, Switzerland considers that the Israeli settlements seriously prejudice the Palestinian people's right to self-determination. It would be appropriate for the Court to pronounce on the question of whether the right to self-determination has been violated and, if necessary, to indicate the legal consequences thereof.

### III. INTERNATIONAL HUMANITARIAN LAW

#### A. General observations

39. The situation between Israel and Palestine constitutes an occupation under the terms of international humanitarian law. The West Bank — including East Jerusalem<sup>33</sup> — and the Gaza Strip are effectively under Israeli control. Israel's unilateral withdrawal from the Gaza Strip in 2005 did not change the status of that territory in international humanitarian law. Israel continues to exercise *de facto* control there which is tantamount to occupation: control of the borders, airspace and maritime areas, the genuine capacity to carry out a land-based military operation, control of electricity and telecommunications, control of the movement of goods and persons<sup>34</sup>.

40. As indicated in its written statement of 30 January 2004 in the context of the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Switzerland takes the view that international humanitarian law is applicable here, more particularly the Hague Convention and its 1907 Regulations and the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War. Together, these form the *law of occupation*.

41. The United Nations<sup>35</sup> has reaffirmed at various levels the *de jure* applicability of the Fourth Convention in the occupied territories, and has expressed the wish on several occasions that it be

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<sup>32</sup> See above, paras. 5-7.

<sup>33</sup> East Jerusalem was annexed by Israel in 1967.

<sup>34</sup> ICRC, "Common Article 2", in *Commentary on the First Geneva Convention*, 2016, paras. 307-313; Conference of High Contracting Parties to the Fourth Geneva Convention, Declaration, 17 Dec. 2014, para. 8; note A/61/470 by the Secretary-General, *Situation of human rights in the Palestinian territories occupied since 1967*, A/61/470 (27 Sept. 2006), paras. 6-7; report A/HRC/34/38 of the Secretary-General, *Human rights situation in the Occupied Palestinian Territory, including East Jerusalem*, A/HRC/34/38 (13 Apr. 2017), para. 10; report A/73/410 of the Secretary-General, *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan*, A/73/410 (5 Oct. 2018), para. 3.

<sup>35</sup> Namely the General Assembly (see in particular General Assembly resolution 77/187, *Permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources*, A/RES/77/187 (22 Dec. 2022)); the Security Council (see in particular Security Council resolutions 2334 (2016), S/RES/2334 (2016) (23 Dec. 2016) and 1860 (2009), S/RES/1860 (2009) (8 Jan. 2009)); the Human Rights Council (see in particular Human Rights Council resolution 49/4, *Human rights situation in the Occupied Palestinian Territory, including East Jerusalem, and the obligation to ensure accountability and justice*, A/HRC/RES/49/4 (11 Apr. 2022)); the Secretary-General (see in particular report A/HRC/34/38 of the Secretary-General, *Human rights situation in the Occupied Palestinian Territory, including East Jerusalem*, A/HRC/34/38 (13 Apr. 2017), to which his subsequent reports refer, the most recent being report A/76/333, *Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem*, A/76/333 (20 Sept. 2021), para. 4); and the High Commissioner for Human Rights (see in particular report A/HRC/8/17 of the High Commissioner for Human Rights, *Human rights situation in Palestine and other occupied Arab territories*, A/HRC/8/17 (6 June 2008), para. 5, and report A/HRC/12/37, *Human rights situation in Palestine and other occupied Arab territories*, A/HRC/12/37 (19 Aug. 2009), para. 9). See also the subsequent reports of the High Commissioner for Human Rights referring to report A/HRC/34/38 of the Secretary-General, the most recent being report A/HRC/52/76, *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan*, A/HRC/52/76 (15 Mar. 2023), para. 4.

applied to the territories occupied by Israel in June 1967, including East Jerusalem. It thus confirms the responsibilities of Israel in this regard. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice likewise found that the Fourth Geneva Convention is applicable in the Occupied Palestinian Territory<sup>36</sup>.

42. It should also be noted that, in accordance with the recommendation made by the General Assembly in its resolution 64/10 of 5 November 2009, a Conference of High Contracting Parties to the Fourth Geneva Convention was convened for the third time on 17 December 2014. The declaration adopted at that conference reaffirms the validity of the final documents of the two earlier conferences held in 1999 and 2001. It recalls the applicability of international humanitarian law in the Occupied Palestinian Territory, including East Jerusalem. The High Contracting Parties reminded “the occupying Power of its obligation to administer the Occupied Palestinian Territory in a way which fully takes into account the needs of the civilian population while safeguarding its own security, and notably preserve its demographic characteristics”<sup>37</sup>. They also expressed “their deep concern about the impact of the *continued* occupation of the Occupied Palestinian Territory”<sup>38</sup>. In addition, they expressed “their deep concern, from an international humanitarian law standpoint, about certain measures taken by the occupying Power in the Occupied Palestinian Territory, including the closure of the Gaza Strip”<sup>39</sup>. They reaffirmed “the illegality of the settlements in the said territory and of the expansion thereof and of related unlawful seizure of property as well as of the transfer of prisoners into the territory of the occupying Power”<sup>40</sup>.

## **B. Specific features of the law of occupation**

43. In the context of an occupation, international humanitarian law ensures consistency between humanitarian aims and the occupier’s security needs and reduces the risk of a deterioration in relations between the occupying Power and the persons living under occupation. Any examination of necessity and proportionality regarding the restriction of human rights in circumstances of prolonged occupation must be more rigorous, since stricter conditions govern the imposition of restrictions in such circumstances on the fundamental rights of protected persons, under the terms of international law on human rights<sup>41</sup>.

44. The rules of the law of occupation rest on the idea that occupation is only a temporary situation. They are based on four fundamental principles, of which the first two stress the temporary nature of an occupation: (1) the occupying Power does not acquire sovereignty over the territory that it occupies and must administer public property there in accordance with the rules of usufruct<sup>42</sup>; (2) the occupying Power must maintain the *status quo ante* and must not adopt policies or measures that would introduce or result in permanent changes, in particular in the social, economic and demographic sphere; (3) the occupying Power must maintain security and public order in the occupied territory and administer it so as to ensure the protection and well-being of protected persons and to protect, respect and implement their rights; (4) in general terms, the occupying Power must

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<sup>36</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 177, para. 101.

<sup>37</sup> Conference of High Contracting Parties to the Fourth Geneva Convention, Declaration, 17 Dec. 2014, para. 4.

<sup>38</sup> *Ibid.*, para. 8 (emphasis added).

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Written statement of Switzerland in connection with the Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 26.

<sup>42</sup> Hague Regulations of 1907, Art. 55.

not “exercise its authority in order to further its own interests . . . or with a view to using the inhabitants, the resources, or other assets of the territory it occupies for the benefit of its own territory or population”<sup>43</sup>.

### C. Measures taken by Israel

45. In terms of international humanitarian law, the questions posed by the General Assembly in its resolution A/RES/77/247 essentially raise issues connected with the administration of the Occupied Palestinian Territory<sup>44</sup>.

46. The Secretary-General has described the zoning and planning policy implemented by Israel in Area C as restrictive, discriminatory and incompatible with requirements under international law. The United Nations has consistently reaffirmed the principle of the inadmissibility of the acquisition of territory by force, and condemned the Israeli measures aimed at altering the demographic composition, character and status of Jerusalem and the Occupied Palestinian Territory as a whole, in particular by the construction and expansion of settlements, the transfer of Israeli settlers, the confiscation of land, demolition of homes and displacement of Palestinian civilians<sup>45</sup>.

47. Israel has the obligation, as the occupying Power, to ensure public order and safety in the Occupied Palestinian Territory<sup>46</sup>. The zoning and planning policy is contrary to a number of provisions of international humanitarian law<sup>47</sup>. Moreover, it is contributing to the expansion of the Israeli settlements and the creation of a coercive environment, which in some instances may resemble forcible transfer<sup>48</sup>. This policy also prejudices the economic, social, cultural, civil and political rights of the Palestinians<sup>49</sup>.

48. The measures taken by Israel in the Occupied Palestinian Territory are bringing about fundamental changes, especially demographic changes, which may take on a permanent character.

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<sup>43</sup> ICRC, “What does the law say about the responsibilities of the Occupying Power in the occupied Palestinian territory?”, 4 Apr. 2023 (available at: <https://www.icrc.org/en/document/ihl-occupying-power-responsibilities-occupied-palestinian-territories#:~:text=IHL%20requires%20that%20an%20Occupying,population%20under%20occupation%20when%20needed>).

<sup>44</sup> Report A/HRC/34/38 of the Secretary-General, *Human rights situation in the Occupied Palestinian Territory, including East Jerusalem*, A/HRC/34/38 (13 Apr. 2017), para. 26. See also reports A/HRC/31/43 of the United Nations High Commissioner for Human Rights, the Office of the High Commissioner and the Secretary-General, *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the Occupied Syrian Golan*, A/HRC/31/43 (20 Jan. 2016), para. 45, referring to report A/HRC/25/38 of the Secretary-General, *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan*, A/HRC/25/38 (12 Feb. 2014), paras. 11-20; see likewise report A/68/513 of the Secretary-General, *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan*, A/68/513 (9 Oct. 2013), paras. 30-34.

<sup>45</sup> See, in particular, General Assembly resolution 77/126, *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan*, A/RES/77/126 (12 Dec. 2022); General Assembly resolution 77/247, *Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem*, A/RES/77/247 (30 Dec. 2022); Security Council resolution 2334 (2016), S/RES/2334 (2016) (23 Dec. 2016); and Human Rights Council resolution 49/4, *Human rights situation in the Occupied Palestinian Territory, including East Jerusalem, and the obligation to ensure accountability and justice*, A/HRC/RES/49/4 (11 Apr. 2022).

<sup>46</sup> Hague Regulations of 1907, Art. 43.

<sup>47</sup> In particular Art. 46 (2) of the 1907 Hague Regulations and Arts. 49 (1), 49 (6) and 53 of the Fourth Geneva Convention.

<sup>48</sup> Fourth Geneva Convention, Art. 49 (1). A broader concept than mere use of physical force, the forcible character of a transfer can derive from a range of circumstances that go to make up a coercive environment: in particular, fear of violence, psychological pressure, the abuse of power, detention and duress.

<sup>49</sup> In particular Art. 11 (1) of the International Covenant on Economic, Social and Cultural Rights, and Arts. 2 (1), 17 (1) and 26 of the International Covenant on Civil and Political Rights.

They are having an adverse effect on the Palestinian population rather than benefiting them and are contributing to the creation of a coercive environment, thereby running counter to the principles of the law of occupation.

49. Any territory annexed continues to be occupied, according to international humanitarian law. The Fourth Geneva Convention provides that protected persons may not be deprived of the benefits of that Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the territory in question, nor by any agreement concluded between the authorities of the occupied territories and the occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory<sup>50</sup>.

50. While no provision of international humanitarian law explicitly prevents the occupying Power from engaging in a prolonged occupation, the fact remains that, according to the fundamental principles of the law of occupation, occupation is understood to be a temporary situation. An extended occupation can create tension between the obligation of the occupying Power to maintain the *status quo ante*, on the one hand, and the need to ensure the well-being of the occupied population, on the other. In situations of prolonged occupation, the occupying Power may indeed become required to take particular measures which, *a priori*, run counter to the obligation to maintain the *status quo ante*, but which could be justified if they are implemented for the benefit of the population of the occupied territory. Such measures could also be justified by the obligations of the occupying Power under international human rights law.

#### **D. Distinction between *ius in bello* and *ius ad bellum***

51. The law of occupation and the lawfulness of occupation are two separate matters. The law of occupation applies regardless of the question of the lawfulness of the occupation. Occupation is a situation governed by international humanitarian law, whereas the lawfulness of it is governed by the Charter of the United Nations. The potentially unlawful character of an occupation must not call into question the fundamental distinction between *ius ad bellum* and *ius in bello*. The law of occupation therefore continues to apply in the Occupied Palestinian Territory, regardless of the question of the lawfulness of the occupation. In this context, it would be appropriate for the Court to pronounce on the consequences of the permanent nature of the measures taken by Israel in the Occupied Palestinian Territory for the status of the occupation in terms of general international law, in particular the United Nations Charter.

#### **E. Obligations of the High Contracting Parties to the Geneva Conventions**

52. All the High Contracting Parties to the Geneva Conventions have the obligation to respect and to ensure respect for international humanitarian law<sup>51</sup>. This obligation has both a positive and a negative side. Third States are thus required not to encourage, aid or assist the violations of international humanitarian law committed in the Occupied Palestinian Territory. In addition, they are required to take all possible steps to put an end to the violations of international humanitarian law, and to prevent, by lawful means, any further violations from being committed in the Occupied Palestinian Territory.

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<sup>50</sup> Fourth Geneva Convention, Art. 47.

<sup>51</sup> Art. 1 common to the four Geneva Conventions and Additional Protocol (I).

53. In this context, the obligations of States under Articles 146, 147 and 148 of the Fourth Geneva Convention should be recalled.

#### IV. HUMAN RIGHTS

##### A. General observations

54. The simultaneous applicability of international law on human rights and international humanitarian law in a situation of armed conflict or occupation has been confirmed on numerous occasions, including by the Court<sup>52</sup>. It has been established that the scope of application of international human rights law does not depend on the territorial boundaries of a State alone, but also on the exercise of its jurisdiction or its effective control, even outside the sovereign territory of that State<sup>53</sup>. As the Court found in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the territorial jurisdiction exercised by Israel over the Occupied Palestinian Territory, as the occupying Power, justifies it being bound by human rights obligations owed to the population of the Occupied Palestinian Territory<sup>54</sup>. International human rights law is therefore applicable to the whole of the Occupied Palestinian Territory, in view of the effective control and territorial jurisdiction exercised by Israel as the occupying Power<sup>55</sup>. Hence Israel is bound by the obligation to respect and protect the human rights of the population of the Occupied Palestinian Territory. These obligations supplement and reinforce those deriving from the law of occupation as part of international humanitarian law, in particular the obligation to ensure the protection and well-being of the local population. In what is a situation of prolonged occupation, respect for and implementation of the human rights of the population of the Occupied Territories are vitally important.

55. Prominent among Israel's human rights obligations are the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, the Convention on the Elimination of All Forms of Discrimination Against Women, the International

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<sup>52</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 178, paras. 106 *et seq.*

<sup>53</sup> *Ibid.*, p. 179, para. 109.

<sup>54</sup> *Ibid.*, pp. 179-180, paras. 110-113.

<sup>55</sup> The applicability of Israel's obligations under human rights law to the Occupied Palestinian Territory has also been affirmed continuously in the reports of the Secretary-General (see, for example, report A/69/348, *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan*, A/69/348 (25 Aug. 2014), para. 5, and A/HRC/34/38, *Human rights situation in the Occupied Palestinian Territory, including East Jerusalem*, A/HRC/34/38 (13 Apr. 2017), paras. 6-7); in the reports of the High Commissioner for Human Rights (for example report A/HRC/8/17, *Human rights situation in Palestine and other occupied Arab territories*, A/HRC/8/17 (6 June 2008), para. 7, and A/HRC/12/37, *Human rights situation in Palestine and other occupied Arab territories*, A/HRC/12/37 (19 Aug. 2009), paras. 5-6); and by various human rights treaty bodies (General Comment CCPR/C/21/Rev.1/Add.13 of the Human Rights Committee (CCPR), *General Comment No. 31 — The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 10; and see the concluding observations on the periodic reports of Israel: Concluding observations E/C.12/1/Add.90 of the Committee on Economic, Social and Cultural Rights, *Israel*, E/C.12/1/Add.90 (26 June 2003), para. 31; Concluding observations CCPR/C/ISR/CO/4 of the Human Rights Committee, *Concluding observations on the fourth periodic report of Israel*, CCPR/C/ISR/CO/4 (21 Nov. 2014), para. 5; Concluding observations CRC/C/ISR/CO/2-4 of the Committee on the Rights of the Child, *Concluding observations on the second to fourth periodic reports of Israel*, CRC/C/ISR/CO/2-4 (4 July 2013), para. 3; Concluding observations CAT/C/ISR/CO/4 of the Committee against Torture, *Israel*, CAT/C/ISR/CO/4 (23 June 2009), para. 11; Concluding observations CERD/C/ISR/CO/14-16 of the Committee on the Elimination of Racial Discrimination, *Israel*, CERD/C/ISR/CO/14-16 (3 Apr. 2012), para. 10).

Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Rights of Persons with Disabilities. As mentioned above<sup>56</sup>, numerous measures taken by Israel in the Occupied Palestinian Territory interfere with the enjoyment of human rights and are also unlawful in terms of international human rights law unless they meet the strict limitative conditions laid down therein. In particular, the existence of settlements and the zoning and planning policy are having a negative impact on many rights of the Palestinians living in the Occupied Palestinian Territory<sup>57</sup>.

## B. Discrimination

56. The question submitted to the Court also relates to the adoption of laws and measures that may be considered discriminatory. International human rights law declares that all human beings are equal in dignity and rights, and contains a provision on non-discrimination establishing an open list of grounds “such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”<sup>58</sup>. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights both contain an ancillary clause prohibiting discrimination in terms of civil and political rights and economic, social and cultural rights respectively, on the basis of the same open list of grounds. The International Covenant on Civil and Political Rights further includes a separate clause on non-discrimination (Article 26 of the Covenant). The International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women specifically codify the prohibition of racial discrimination and discrimination based on gender.

57. Not all differentiation is necessarily prohibited as discrimination. Hence, being characterized as “discrimination” implies that the rule or practice cannot be justified. Prohibiting discrimination does not mean an unlimited ban on all forms of differentiated treatment, but when the criteria for discrimination are met, prohibition is applied. Inequality of treatment becomes discrimination when the less favourable treatment is directly linked to membership of a certain group or to a particular characteristic of the individual — such as sex, social or ethnic origin, language, religion, political beliefs, age, disability, sexual orientation or gender identity<sup>59</sup>.

58. In the West Bank, Israeli domestic law is applied extraterritorially to Israeli settlers, while Palestinians are subject to Israeli military law in addition to the Palestinian legal system<sup>60</sup>. The application of two different legal systems in the same territory, on the sole basis of nationality or origin, raises concerns as to how the principle of equality before the law can be respected<sup>61</sup>. The

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<sup>56</sup> See above, paras. 46 *et seq.*

<sup>57</sup> See in particular note A/77/328 by the Secretary-General, *Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel*, A/77/328 (14 Sept. 2022), paras. 41 *et seq.*; Concluding observations E/C.12/ISR/CO/4 of the Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth periodic report of Israel*, E/C.12/ISR/CO/4 (12 Nov. 2019), para. 50; Concluding observations CCPR/C/ISR/CO/4 of the Human Rights Committee, *Concluding observations on the fourth periodic report of Israel*, CCPR/C/ISR/CO/4 (21 Nov. 2014), para. 9; and Concluding observations CEDAW/C/ISR/CO/6 of the Committee on the Elimination of Discrimination against Women, *Concluding observations on the sixth periodic report of Israel*, CEDAW/C/ISR/CO/6 (22 Nov. 2017), paras. 32 *et seq.*

<sup>58</sup> Arts. 1 and 2 of the Universal Declaration of Human Rights.

<sup>59</sup> See K. Henrard, “Equality of Individuals”, in *Max Planck Encyclopedia of International Law*.

<sup>60</sup> See report A/HRC/34/38 of the Secretary-General, *Human rights situation in the Occupied Palestinian Territory, including East Jerusalem*, A/HRC/34/38 (13 Apr. 2017), paras. 39 *et seq.*

<sup>61</sup> Arts. 2 and 14 of the International Covenant on Civil and Political Rights.

occupying Power has the obligation to respect the laws in force in the territory it occupies, unless it is absolutely prevented from doing so<sup>62</sup>.

59. In addition to the reports on the discriminatory application of the law, there are also numerous reports on Israel's discriminatory practices with regard to the Palestinian population in the Occupied Palestinian Territory. These concern in particular freedom of movement<sup>63</sup> and the rights to land, housing and the use of natural resources<sup>64</sup>. In this context, it would be appropriate for the Court to pronounce on the question of the violations of human rights associated with the fact of prolonged occupation, especially in connection with the prohibition of discrimination, and equality of treatment before the law.

## V. CONCLUSION

60. Switzerland invites the Court to pronounce, in its advisory opinion, on the questions set out above concerning the right of the Palestinian people to self-determination, international humanitarian law and international law on human rights, and the duties for both parties deriving therefrom.

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<sup>62</sup> Art. 64 of the Fourth Geneva Convention.

<sup>63</sup> See reports A/HRC/50/21 of the United Nations High Commissioner for Human Rights, the Office of the High Commissioner and the Secretary-General, *Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel*, A/HRC/50/21 (9 May 2022), paras. 43 *et seq.*

<sup>64</sup> *Ibid.*, para. 51; see also, in particular, note A/76/433 by the Secretary-General, *Situation of human rights in the Palestinian territories occupied since 1967*, A/76/433 (22 Oct. 2021); report A/HRC/12/48 of the United Nations Fact-Finding Mission on the Gaza Conflict, *Human rights in Palestine and other occupied Arab territories*, A/HRC/12/48 (25 Sept. 2009); report A/HRC/40/73 of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *Human rights situation in the Occupied Palestinian Territory, including East Jerusalem, with a focus on access to water and environmental degradation*, A/HRC/40/73 (30 May 2019), paras. 18-22; and reports A/HRC/49/85 of the United Nations High Commissioner for Human Rights, the Office of the High Commissioner and the Secretary-General, *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan*, A/HRC/49/85 (28 Apr. 2022), paras. 5-49.