

Madrid, 21 July 2023

H.E. Ms. Joan E. Donoghue

President

International Court of Justice

Peace Palace

The Hague

Mr. President,

I have the honor to respond on behalf of the Spanish Government to the invitation by the International Court of Justice, contained in its order No 186 of 3 February 2023 and transmitted by the letter of the Registrar of 6 February to Member States of the United Nations to furnish information on the questions submitted by the General Assembly of the United Nations in its request for an advisory opinion on the legal consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, including East Jerusalem.

This letter as well as the attached file constitute the national written statement of Spain.

### **INTRODUCTORY REMARKS**

#### **On the competence of the Court**

1.1. The request by the General Assembly contained in resolution 77/247 was made under Article 96, paragraph 1, of the Charter of the United Nations, pursuant to which the General Assembly may request the International Court of Justice to give an advisory opinion on any legal question.

1.2 The Spanish position regarding this matter is consistent with its attitude at the moment of the adoption of Resolution 77/247 whereby the General Assembly decided to request the said advisory opinion. Spain abstained in the vote on the Resolution, which was adopted with 98 States voting in favor, 52 abstaining and 17 against. The Spanish abstention is consistent with the understanding -which underlies Spanish foreign policy since the Madrid Conference in 1991- that the materialization of the two-state solution and its sustainability is a political question that can only be the result of a negotiated process between the parties within the framework of applicable UNSC resolutions. Therefore, Spain does not believe that such a solution can be the outcome of the proceedings before the International Court of Justice or any other international body.

1.3 Nonetheless, Spain joined other United Nations Member States on a Declaration published on 16 January 2023 reconfirming its “unwavering support for the International Court of Justice and international law as the cornerstone of our international order”, as well as Spain’s “commitment to multilateralism”. Furthermore, Spain rejected Israeli “punitive measures in response to a request for an advisory opinion by the International Court of Justice, and more broadly in response to a General Assembly resolution”. By doing so, and through this written

statement, Spain shows its commitment to the central role of the International Court of Justice to guarantee a rules-based international order

1.4. The power granted to the Court to give an advisory opinion derived from Article 65 of the Statute is of a discretionary nature. Therefore, it is for the Court to determine whether it should exercise its power of discretion in the present case by deciding or not to provide the requested opinion. The observations below are submitted for consideration in the event that the Court decides to respond to the questions posed by the General Assembly.

#### **Applicable law and other elements of international law**

- United Nations Charter
- International humanitarian law and particularly the Regulations annexed to the Fourth Hague Convention of 1907; the Fourth Geneva Convention of 1949
- Human rights law and particularly the International Covenant on Civil and Political Rights;
- Relevant United Nations Security Council Resolutions, particularly:
  - *UNSC resolution 242, dated 1967*
  - *UNSC resolution 338, dated 1973*
  - *UNSC resolution 267, dated 1969*
  - *UNSC resolution 289, dated 1971*
  - *UNSC resolution 446, dated 1980*
  - *UNSC resolution 452, dated 1979*
  - *UNSC resolution 465, dated 1980*
  - *UNSC resolution 476, dated 1980*
  - *UNSC resolution 478, dated 1980*
  - *UNSC resolution 484, dated 1980*
  - *UNSC resolution 904, dated 1994*
  - *UNSC resolution 1073, dated 1996*
  - *UNSC resolution 1379, dated 2002*
  - *UNSC resolution 1515, dated 2003*
  - *UNSC resolution 1850, dated 2008*
  - *UNSC resolution 1860, dated 2009*
  - *UNSC Resolution 2334 dated 2016*
- Relevant jurisprudence:
  - *Western Sahara, Advisory Opinion ICJ Reports 1975, p.68, paragraph 162*
  - *East Timor (Portugal v. Australia), Judgement ICJ Reports 1995, p.102, paragraph 29*
  - *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) ICJ Report 1986*
  - *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding UNSC-R 276 (1970), Advisory Opinion ICJ Reports 1971*
  - *Judgement of the International Military Tribunal of Nuremberg, Report 1946,*
  - *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion ICJ Report 1996 (I)*
  - *Gabcikovo-Nagymaros Project (Hungary v. Slovakia) ICJ Report 1997*

- *United States Diplomatic and Consular Staff in Tehran, Judgement ICJ 198*
  - *Barcelona Traction, Light and Power Company, Limited, Second Phase Judgement ICJ Reports 1970*
  - *Haya de la Torre, Judgement ICJ 1951, page 82*
  - *Western Sahara, Advisory Opinion ICJ Reports 1975*
  - *East Timor (Portugal v. Australia), Judgement ICJ Reports 1995*
  - *Legal consequences of the construction of a wall in the occupied Palestinian territory. Advisory Opinion ICJ Reports 2004.*
- Relevant United Nations General Assembly resolutions, particularly:
- *UNGA resolution 181 (II), dated 1947;*
  - *UNGA Resolution ES-10/2;*
  - *UNGA Resolution ES-10/13;*
  - *UNGA Resolution 10/14;*
  - *UNGA resolution ES-10/19 "Status of Jerusalem"*
  - *UNGA resolution 2625 (XXV);*
  - *UNGA resolution 377 (V) "Uniting For Peace".*
  - *UNGA resolution 66/225 "Permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and the Arab population in the occupied Syrian Golan over their natural resources"*
  - *UNGA resolution 67/19 "Status of Palestine in the United Nations"*
  - *UNGA resolution 77/208 "The right of the Palestinian people to self-determination"*
  - *UNGA resolution 77/247 "Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem"*
  - *UNGA resolution 77/328 "Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel"*

## **ASSESSMENT**

### **General observations**

2.1. The law of armed conflict strikes a balance between humanitarian demands and military needs attending to the principles of necessity, proportionality and humanity. Therefore, all related measures must be reasonable in terms of intensity, duration and scale. 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 occupied. Any examination of necessity and proportionality in circumstances of prolonged occupation when hostilities have ceased must be more rigorous, since stricter conditions govern the imposition of restrictions on the fundamental rights of protected persons.

2.2. Spain, at the national level but also as a Member of the EU, has repeatedly shown concern over the successive cycles of violence throughout decades of conflict, which have contributed to the failure of negotiations and therefore deferred the implementation of the two-state solution. Spain has repeatedly acknowledged the legitimate concerns of Israel with regard to the



continued terrorist violence, which all Spanish governments have unequivocally condemned in the strongest possible terms, as well as Israel's right to self-defense under international law.

2.3. The EU and Spain have also repeatedly condemned the disproportionate use of violence by the Israeli authorities and increasing settler violence and requested Israel to exercise its right to self-defense in a proportionate manner and according to International Humanitarian Law, as well as to protect civilian population in the Palestinian territories, according to its status as an occupying power. Its actions on the grounds of self-defense or national security must respect international humanitarian and human rights law. Respect for such norms is essential in order to improve the humanitarian situation of persons living under prolonged occupation and to bring about a just and lasting peace.

### **The Spanish national position and the EU consensus**

3.1 The General Assembly of the United Nations adopted Resolution 77/247 presents its request to the Court as follows:

*'18. Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, 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?'*

3.2. The position of Spain regarding the elements included in the questions presented to the Court has long been anchored in EU policy –which Spain has contributed to shape- and particularly, *inter alia*, the Berlin Declaration from 24-25 March 1999; Council Conclusions on the Middle East Peace Process from July 2014, Council Conclusions on the Middle East Peace Process from November 2014, Council conclusions on the Middle East Peace Process from July 2015, Council conclusions on the Middle East Peace Process from January 2016 and, more recently, in the *Statement of the European Union with the European Union's position for the Association Council's 12th meeting* from 3 October 2022 as well as the *Joint Statement of the EU and its Member States* from 8 March 2023. These positions have been mirrored by Spain's own national statements and as a Member of the West Bank Protection Consortium. For ease of reference, all these elements are provided to the Court as attachments to this letter.

### **The right of self-determination and the two-State solution**

4.1. The Heads of State and Government of the European Union reaffirmed in the Berlin Declaration in 1999 *“the continuing and unqualified Palestinian right to self-determination including the option of a state”*. On that understanding, the EU has for decades championed the two-state solution as a central element of its Common Foreign and Security Policy (CFSP).

4.2. On the occasion of the 12<sup>th</sup> meeting of the EU-Israel Association Council, the EU reaffirmed this long-standing position on the Middle East Peace Process:

*“12. The EU is united in its commitment to achieving a two-state solution –based on the parameters set out in the Council conclusions of July 2014 that allows the State of Israel to live side by side in peace, security and mutual recognition with an independent, democratic, contiguous, sovereign and viable State of Palestine, with Jerusalem as the future capital of both states”*.

### **Annexation and settlement policy**

5.1. The EU and its Member States in the recent Statement of 8 March 2023 –and the Government of Spain at the national level– have repeatedly rejected expansion of Israeli settlements in the Palestinian occupied territories and particularly all recent measures aiming at an accelerated expansion thereof, and considered them as contrary to international law, and an obstacle to peace and to the materialization of the two-state solution. This assessment is based in UNSC Resolution 465 (1980) and particularly UNSC Resolution 2334 (2016), in which the Security Council:

*“1. Reaffirms that the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace;*

*2. Reiterates its demand that Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem, and that it fully respect all of its legal obligations in this regard.*

*3. Underlines that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations;*

*4. Stresses that the cessation of all Israeli settlement activities is essential for salvaging the two-State solution, and calls for affirmative steps to be taken immediately to reverse the negative trends on the ground that are imperiling the two State solution.”*

5.2. The EU has consistently rejected the continued settlement expansion and all measures that may be tantamount to a *de iure* or *de facto* annexation of the Palestinian territories. In its Statement on the 12<sup>th</sup> meeting of the EU-Israel Association Council,

*“16. The EU calls on Israel to halt continued settlement expansion, which have reached record highs in the past years, evictions, demolitions and forced transfers”*.



5.3. In the context of the current escalation of tensions, the aforementioned EU statement and Spanish national statements have condemned constant and increasing settler violence and reminded Israel of its obligations as the occupying power under international law, calling for accountability. In this line, the Statement of the EU and its Member States from 8 March 2023 states that *“Israel must stop settlement expansion, prevent settler violence and ensure the perpetrators are held accountable”*.

### **Israeli continued occupation**

6.1. Spanish and European efforts towards peace are rooted in the firm belief that the occupation is a temporary solution that must preserve the viability of a future Palestinian state until the negotiation process brings about a definitive solution to the conflict. In this regard, on 3 October 22, on the occasion of the 12<sup>th</sup> meeting of the EU-Israel Association Council the EU stated that:

*“12. (...) The EU is gravely concerned that the occupation of the Palestinian territory that began in 1967 continues to this day”*.

### **Measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem**

7.1. The EU has constantly opposed measures that are intended to alter the situation in favor of the Occupying Power, including in Jerusalem. On 3 October 2022, on the occasion of the 12<sup>th</sup> meeting of the EU-Israel Association Council, the EU stated that:

*12. “(...) The EU and its Member States will continue to respect the international consensus on Jerusalem embodied in the relevant United Nations Security Council Resolutions until the final status of Jerusalem is resolved”*.

*(...)*

*18. The EU recalls the specific significance of the Holy Sites and makes a strong call for upholding the status quo put in place in 1967 for the Temple Mount/Haram al-Sharif in line with previous understandings and with respect to Jordan’s special role. Underlining the necessity to respect the status quo also for the Christian holy sites, which are under increasing pressure, the EU reiterates the importance of maintaining peaceful coexistence of all three monotheistic religions and their practitioners.*

### **CONCLUSION**

8.1. Spain firmly believes in the need to materialize the two State-solution through a negotiated process, as it is the only answer to the legitimate national aspirations of Palestinians and Israelis. The result of this process needs to be a State of Israel and a State of Palestine living side by side in peace, security and mutual recognition, with Jerusalem as the future capital of both states, according to relevant UNSCR resolutions.

8.2. The Israeli occupation of Palestinian territories is subject to International Law, which it must fully respect, in particular International Humanitarian law and the International Human Rights

Law. Any practice conducive to *de iure* or *de facto* annexation of the Palestinian occupied territories would render such an occupation illegal.

Respectfully yours,

A handwritten signature in blue ink, appearing to read 'José Albares', with a long horizontal flourish extending to the left.

Signed: José Manuel Albares Bueno  
Minister of Foreign Affairs of the Kingdom of Spain