

**INTERNATIONAL COURT OF JUSTICE**

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

**(REQUEST BY THE UNITED NATIONS GENERAL ASSEMBLY FOR AN  
ADVISORY OPINION)**

**WRITTEN STATEMENT**

**THE UNITED KINGDOM OF GREAT BRITAIN AND  
NORTHERN IRELAND**

**20 JULY 2023**



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## CHAPTER I

### INTRODUCTION

1. The United Kingdom of Great Britain and Northern Ireland (**‘the United Kingdom’**) submits this Written Statement in accordance with the Court’s Order of 3 February 2023,<sup>1</sup> so as to furnish information on the questions submitted to the Court in General Assembly Resolution 77/247,<sup>2</sup> adopted on 30 December 2022, and to assist the Court.
2. The terms of the General Assembly’s request in Resolution 77/247 (**‘the Request’**) are as follows:

*“(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. There is a long-standing dispute between the Israelis and the Palestinians concerning sovereignty over territory, security, and related issues. The Court has already opined on a very specific aspect of that dispute, nearly 20 years ago, in the *Wall* proceedings.<sup>3</sup> The sponsors of the Request now ask the Court to adjudicate on matters at the very core of the bilateral dispute. As discussed below, this is both the stated intention of the Palestinian delegation and the inevitable result of the drafting of the Request. Its terms expressly invite the Court to consider the *“occupation, settlement and annexation of the Palestinian territory occupied since 1967”*.

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<sup>1</sup> *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Request for an Advisory Opinion)*, Order of 3 February 2023, paras 1-2.

<sup>2</sup> General Assembly Resolution 77/247, 30 December 2022, A/RES/77/247 (**UN Dossier No. 3**).

<sup>3</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136.

4. The United Kingdom's position on the Israeli-Palestinian conflict is well-established. It remains firm in its belief that a negotiated two-State solution, based on 1967 lines with Jerusalem as a shared capital, is the only way to end the Israeli occupation permanently, to deliver Palestinian self-determination and to preserve Israel's Jewish and democratic identity. The United Kingdom's vision of a two-State solution is consistent with both the principles recognised in the relevant Security Council resolutions and with the parties' existing agreements. By those agreements, the parties accept that a comprehensive negotiated settlement is required in order to achieve the end of the Israeli occupation. They nowhere confer jurisdiction on the Court to adjudicate on the core issues on which a permanent negotiated settlement depends.
  
5. The United Kingdom invites the Court to exercise its discretion and decline to respond to the Request by applying its own jurisprudence concerning the principles of judicial propriety and the fundamental rights of parties to a bilateral dispute that arise in relation to advisory opinions.<sup>4</sup> The United Kingdom advances four principal submissions to this effect:
  - 5.1. It is not possible, or likely intended by the sponsors of the Request, for the Court to engage with the Request without adjudicating on the very subject matter of the parties' bilateral dispute. An advisory opinion in response to the Request in the present circumstances "*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>5</sup> (See **Chapter III, Part B, Section 1, below.**)
  
  - 5.2. An answer to the Request would require the Court to make findings on a broad range of contentious and complex factual issues concerning the entire history of the parties' bilateral dispute. This is not an enquiry that the Court can properly undertake in the exercise of its judicial function in advisory proceedings. (See **Chapter III, Part B, Section 2, below.**)

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<sup>4</sup> Considering that the United Kingdom invites the Court to exercise its discretion to decline to answer the Request, the United Kingdom does not address any other issue. It reserves the right to address further issues in later stages of the proceedings.

<sup>5</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12, at p. 25, para. 33.*

- 5.3. Rendering an advisory opinion in the circumstances of this case would be contrary to the negotiation framework specifically agreed by the parties and endorsed by both the Security Council and the General Assembly, and would be in conflict with the relevant Israeli-Palestinian agreements. (See **Chapter III, Part B, Section 3, below.**)
- 5.4. The Request seeks to require the Court to proceed on the basis of assumed unlawful conduct on the part of Israel, in an attempt to elicit findings aimed at bringing about the end of the Israeli occupation and thus the parties' bilateral dispute. This is not a proper use of the advisory procedure. (See **Chapter III, Part B, Section 4, below.**)
6. If, however, the Court considers that there are certain discrete issues on which it can nonetheless opine in a manner consistent with its judicial function and with the United Kingdom's observations set out below, it is urged to exercise the highest vigilance to ensure that any such issues are carefully circumscribed and do not transgress either the core of the parties' long-standing bilateral dispute or in any way undermine the agreed framework for the resolution of that dispute as described below.
7. Against that background, this Written Statement is structured as follows:
  - 7.1. **Chapter II** reviews in brief the background relevant to the Request.
  - 7.2. **Chapter III** set out the reasons why, in the view of the United Kingdom, the Court should decline to respond to the Request, addressing the four grounds identified above.
  - 7.3. **Chapter IV** states the United Kingdom's conclusions.

## CHAPTER II

### BACKGROUND

#### A. The bilateral dispute

8. The Israeli-Palestinian dispute is long-standing and complex, with deep historic origins. While the parties' dispute is wide-ranging, it has focused on the twin issues of security and the status of territory occupied by Israel since 1967, namely the West Bank (including East Jerusalem) and the Gaza Strip (**'the Occupied Palestinian Territories'**). In the Oslo Accords, considered in more detail below, Israel and the Palestinian Liberation Organisation (**'PLO'**) identified the so-called 'permanent status issues' which include: (i) the status of Jerusalem; (ii) settlements; (iii) refugees; (iv) security arrangements; (v) borders; (vi) relations and cooperation with other neighbours; and (vii) other issues of common interest (**'the permanent status issues'**).
9. Israel and the PLO have agreed a framework for the negotiated settlement of the Israeli-Palestinian conflict, as set out below. This framework aims to implement the principles established in two Security Council Resolutions, 242 (1967) and 338 (1973), with the effect of bringing about the end of Israel's occupation. The Court has no jurisdiction under any existing agreements to determine the permanent status issues.

#### B. Security Council Resolutions 242 (1967) and 338 (1973)

10. The Security Council set down the basic principles for a negotiated peaceful settlement of the Israeli-Palestinian conflict by its Resolutions 242 (1967) and 338 (1973). This is often referred to as the **'land for peace'** formula, as it calls for Israeli withdrawal in exchange for peace and security in the region.
11. The first of those resolutions, Security Council Resolution 242 (1967), followed the so-called "Six-Day War" on 5-10 June 1967. It was the United Kingdom that submitted a draft resolution to the Security Council that was subsequently adopted on 22 November 1967.<sup>6</sup> Resolution 242 (1967) set out the negotiating principles in

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<sup>6</sup> Security Council Official Records, 1379<sup>th</sup> meeting, 16 November 1967, S/PV.1379, paras 13-14 (**Annex No. 1**). It was not a "British text" as such, but a result of close collaboration with both parties to the bilateral



the following terms:<sup>7</sup>

*“1. Affirms that the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:*

*(i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;*

*(ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force ....”*

12. The second resolution, Security Council Resolution 338 (1973), then provided the following:<sup>8</sup>

*“1. Calls upon all parties to the present fighting to cease all firing and terminate all military activity immediately, no later than 12 hours after the moment of the adoption of this decision, in the positions they now occupy;*

*2. Calls upon the parties concerned to start immediately after the cease-fire the implementation of Security Council resolution 242 (1967) in all of its parts;*

*3. Decides that, immediately and concurrently with the cease-fire, negotiations shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East.”*

13. These resolutions reflect *“the key underlying requirements”* which have continued to provide the basis for subsequent attempts to resolve the Israeli-Palestinian dispute, namely that *“Israel is entitled to exist, to be recognized, and to [have] security, and that the Palestinian people are entitled to their territory, to exercise self-determination, and to have their own State”*.<sup>9</sup> This is the essence of the two-State

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dispute and with Security Council Members: see Security Council Official Records, 1382<sup>nd</sup> meeting, 22 November 1967, S/PV.1382, para. 58 (**Annex No. 2**).

<sup>7</sup> Security Council Resolution 242 (1967), 22 November 1967, S/RES/242 (1967) (**UN Dossier No. 1245**).

<sup>8</sup> Security Council Resolution 338 (1973), 22 October 1973, S/RES/338 (1973) (**Annex No. 3**).

<sup>9</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, Separate Opinion of Judge Higgins, at p. 211, para. 18.

solution, which the United Kingdom has long supported as a matter of principle. It was also the basis on which the United Kingdom prepared the draft text of Resolution 242 (1967), which was intended to be “*a sincere and fair and honest attempt both to meet the just claims of both sides and also to discharge the high responsibility of [the Security] Council*”.<sup>10</sup>

### C. The Oslo Accords

14. In late 1991, the United States and the Soviet Union convened the Madrid Peace Conference, with the objective of facilitating direct negotiations between the Israelis and Palestinians on the basis of Resolutions 242 and 338.<sup>11</sup> It proposed a phased negotiating process, starting with interim self-government arrangements and concluding with permanent status negotiations based on the principles set out in those resolutions.
15. On 13 September 1993, Israel and the PLO concluded a “*Declaration of Principles on Interim Self-Government Arrangements*” in Washington DC, witnessed by the United States and the Russian Federation (known as ‘**Oslo I**’).<sup>12</sup> As envisaged by the Madrid Principles, Oslo I established an interim framework, principally through the creation of the ‘Palestinian Interim Self-Government Authority’ (later established as the Palestinian Authority). That framework was intended to operate during an interim transitional period while the parties reached a permanent settlement. The Court is invited to consider, in particular, the following elements of Oslo I:

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<sup>10</sup> Security Council Official Records, 1379<sup>th</sup> meeting, 16 November 1967, S/PV.1379, para. 13 (**Annex No. 1**).

<sup>11</sup> Letters of Invitation to the Madrid Peace Conference, jointly issued by United States and the Soviet Union to Israel, Syria, Lebanon, Jordan and others (with Palestinians invited to attend as part of Jordanian delegation) (**Annex No. 4**) (“*The United States and the Soviet Union are prepared to assist the parties to achieve a just, lasting and comprehensive peace settlement, through direct negotiations along two tracks, between Israel and the Arab States, and between Israel and the Palestinians, based on United Nations Security Council Resolutions 242 and 338. The objective of this process is real peace ... These permanent status negotiations, and the negotiations between Israel and the Arab states, will take place on the basis of resolutions 242 and 338. ...*”).

<sup>12</sup> Declaration of Principles on Interim Self-Government Arrangements signed at Washington DC on 13 September 1993 (**Annex No. 5**) (‘**Oslo I**’).

- 15.1. The parties recorded their intention of achieving “*a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process*”.<sup>13</sup>
- 15.2. They agreed that permanent settlement would be “*based on Security Council resolutions 242 (1967) and 338 (1973)*” and that their negotiations on that subject would “*lead to the implementation of Security Council resolutions 242 (1967) and 338 (1973)*”.<sup>14</sup>
- 15.3. The parties further specifically agreed that the following matters would be the subject of a negotiated settlement between them: “*Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours, and other issues of common interest.*”<sup>15</sup>
- 15.4. They also agreed a specific process for the resolution of disputes arising out of the interpretation or application of Oslo I, or any subsequent interim agreement, which involved negotiation, conciliation and/or arbitration.<sup>16</sup>
16. Following the conclusion of the framework agreement in Oslo I, Israel and the PLO entered into several agreements establishing specific interim arrangements.<sup>17</sup> This culminated in the “*Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip*” (known as ‘**Oslo II**’), signed at Washington DC on 28 September 1995, and witnessed by the United States, the Russian Federation, Egypt, Norway, the European Union and Jordan.<sup>18</sup>

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<sup>13</sup> Oslo I, Preamble.

<sup>14</sup> Oslo I, Article 1.

<sup>15</sup> Oslo I, Article V(3).

<sup>16</sup> Oslo I, Article XV (“*Resolution of Disputes*”). See also Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip signed at Washington DC on 28 September 1995 (**Annex No. 11**) (‘**Oslo II**’), Article XXI (“*Settlement of Differences and Disputes*”).

<sup>17</sup> See e.g., Agreement on the Gaza Strip and Jericho Area signed at Cairo on 4 May 1994, 33 ILM 626 (1994) (**Annex No. 6**); Agreement on Preparatory Transfer of Powers and Responsibilities signed at Erez on 29 August 1994, 34 ILM 457 (1995) (**Annex No. 7**); Protocol on Further Transfer of Powers and Responsibilities signed at Cairo on 27 August 1995 (**Annex No. 8**); Protocol Concerning the Redeployment in Hebron signed at Jerusalem on 17 January 1997, 36 ILM 653 (1997) (**Annex No. 9**). As regards broader cooperation between Israeli and the PLO, see e.g., Annex IV, Protocol on Economic Relations between the Government of the State of Israel and the PLO signed at Paris on 29 April 1994, 33 ILM 696 (1994) (**Annex No. 10**).

<sup>18</sup> **Annex No. 11**.

17. Oslo II provided for a phased withdrawal by the Israeli military from the Occupied Palestinian Territories with a simultaneous transfer of security responsibilities to the Palestinian authorities.<sup>19</sup> It also reiterated the parties' commitment to enter into "*permanent status*" negotiations based on Resolution 242 (1967) and 338 (1973),<sup>20</sup> with the very same scope, i.e., "*Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest*".<sup>21</sup> This commitment to a negotiated settlement of these issues was reinforced by the parties' express agreement that:

*"Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations."*<sup>22</sup>

*"The two Parties view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which will be preserved during the interim period."*<sup>23</sup>

18. Israel and the PLO have reiterated this commitment in later memoranda between them.<sup>24</sup>
19. The United Kingdom recognises the importance of the obligation to refrain from taking any action to change the status of the Occupied Palestinian Territories. This is an obligation that applies with equal force to Israel and the PLO. It not only precludes the parties from taking unilateral steps to resolve the permanent status issues in another forum without agreement, but also from taking steps to interfere with the territorial integrity of the West Bank and the Gaza Strip. The United Kingdom's opposition to Israeli settlements, evictions and demolition in the Occupied Palestinian

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<sup>19</sup> See, in particular, Oslo II, Articles I(1), XI(2), XII and XIII.

<sup>20</sup> Oslo II, Preamble.

<sup>21</sup> Oslo II, Article XXXI(5).

<sup>22</sup> Oslo II, Article XXXI(7).

<sup>23</sup> Oslo II, Article XXXI(8). See also Oslo II, Article XI(1) and Oslo I, Article IV.

<sup>24</sup> Wye River Memorandum signed at Washington DC on 23 October 1998, 37 ILM 1251 (1998) (**Annex No. 12**), para. V ("*Recognizing the necessity to create a positive environment for the negotiations, neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip in accordance with the Interim Agreement*"); The Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations signed at Sharm el-Sheikh on 4 September 1999, 38 ILM 1465 (1999) (**Annex No. 13**), para. 10 ("*Recognizing the necessity to create a positive environment for the negotiations, neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip in accordance with the Interim Agreement*").

Territories is well-known.<sup>25</sup> It continues to call on both the Israelis and the Palestinians to engage in good faith and resolve the dispute through the established legal framework endorsed by the Security Council.

#### **D. The Roadmap**

20. In 2002, the Quartet on the Middle East (the United States, the European Union, the United Nations, and the Russian Federation) was formed in order to assist the parties in establishing the conditions necessary to resume negotiations.
21. The United Kingdom, alongside other Security Council Members, specifically endorsed the ‘two-State solution’ and the Quartet’s diplomatic efforts in, *inter alia*, Resolution 1397 (2002). That Resolution provides, in relevant part, as follows:<sup>26</sup>

*“... Affirming a vision of a region where two States, Israel and Palestine, live side by side within secure and recognized borders, ...*

*Welcoming and encouraging the diplomatic efforts of special envoys from the United States of America, the Russian Federation, the European Union and the United Nations Special Coordinator and others, to bring about a comprehensive, just and lasting peace in the Middle East ...”.*

22. As part of those diplomatic efforts, the Quartet prepared a ‘Roadmap for Peace’ (**‘the Roadmap’**). This document provides for a phased diplomatic framework aiming to achieve a full and final resolution of the Israeli-Palestinian dispute in accordance with the agreed framework set out above. The Roadmap explains its objective as follows:<sup>27</sup>

*“The settlement will resolve the Israel-Palestinian conflict, and end the occupation that began in 1967, based on the foundations of the Madrid Conference, the principle of land for peace, UNSCRs 242, 338 and 1397, agreements previously reached by the parties, and the initiative of Saudi Crown Prince Abdullah – endorsed by the Beirut Arab League Summit –*

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<sup>25</sup> See, e.g., the statement of the Rt Hon. James Cleverly MP, Foreign Secretary (in his previous capacity as the Minister for the Middle East and North Africa) before UK Parliament on 14 June 2021 (see Hansard, House of Commons Debate, 14 June 2021, volume 697, no. 16, column 21WH, **Annex No. 14**): *“the UK position on evictions, demolitions and settlements is long-standing, public and has been communicated directly to the Government of Israel. That position is that we oppose those activities”.*

<sup>26</sup> Security Council Resolution 1397, 12 March 2002, S/RES/1397 (2002) (**UN Dossier No. 1316**).

<sup>27</sup> Letter dated 7 May 2003 from the Secretary-General to the President of the Security Council, S/2003/529 (**UN Dossier No. 1333**), Annex, p. 1; see also p. 8.

*calling for acceptance of Israel as a neighbor living in peace and security, in the context of a comprehensive settlement.”*

23. As the Prime Minister of the Palestinian Authority observed at the time, the agreed process is “*one of direct negotiations to end the Israeli-Palestinian conflict and to resolve all the permanent status issues and end the occupation that began in 1967 under which Palestinians have suffered so much*”.<sup>28</sup>

24. The Roadmap therefore:

24.1. establishes a negotiating process between the Israelis and the Palestinians to be conducted on the basis of both existing agreements between Israel and the PLO and Security Council Resolutions 242 (1967) and 338 (173); and

24.2. accepts that a comprehensive peace settlement between the parties is required in order to bring the occupation to an end.

25. Importantly, Security Council Resolution 1515 (2003), after recalling its previous resolutions:<sup>29</sup>

*“1. Endorses the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict (S/2003/529);*  
[and]

*2. Calls on the parties to fulfil their obligations under the Roadmap in cooperation with the Quartet and to achieve the vision of two States living side by side in peace and security.”*

#### **E. Continued endorsement by the Security Council and General Assembly of the two-State solution**

26. Since 2003, the Security Council has on a number of occasions reiterated its vision of a two-State solution.<sup>30</sup> It has called upon the parties to adhere to their obligations under the Roadmap, while calling upon all States and international organisations “*to*

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<sup>28</sup> Speech on the roadmap, Prime Minister Mahmoud Abbas, 4 June 2003, published in [The Guardian \(Annex No. 15\)](#).

<sup>29</sup> Security Council Resolution 1515 (2003), 19 November 2003, S/RES/1515 (2003) (UN Dossier No. 1337).

<sup>30</sup> E.g., Security Council Resolution 1850 (2008), 16 December 2008, S/RES/1850 (2008) (UN Dossier No. 1354), recitals; Security Council Resolution 2334 (2016), 23 December 2016, S/RES/2334 (2016) (UN Dossier No. 1372), recitals.

contribute to an atmosphere conducive to negotiations”.<sup>31</sup> The General Assembly has done similarly.<sup>32</sup>

27. The Security Council continues to urge negotiations between the parties to achieve a resolution of the Israeli-Palestinian conflict and to bring about the end of occupation, based on the relevant Security Council resolutions, the Roadmap, and the two-State solution. This is reflected in Security Council Resolution 2334 (2016). In that Resolution, the Security Council:<sup>33</sup>

*“Calls upon all parties to continue, in the interest of the promotion of peace and security, to exert collective efforts to launch credible negotiations on all final status issues ...*

*Urges in this regard the intensification and acceleration of international and regional diplomatic efforts and support aimed at achieving, without delay a comprehensive, just and lasting peace in the Middle East on the basis of the relevant United Nations resolutions, the Madrid terms of reference, including the principle of land for peace, the Arab Peace Initiative and the Quartet Roadmap and an end to the Israeli occupation ...*

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

28. In voting in favour of Resolution 2334, the United Kingdom representative observed that its adoption was *“first and foremost a clear reinforcement of the international community’s conviction that a two-State solution remains the only viable route to sustained Arab-Israeli peace”*.<sup>34</sup> As the United Kingdom’s representative further recognised, the Resolution was also a clear acknowledgement that Israel’s settlement activity *“is corroding the possibility of the two-State solution”*.<sup>35</sup>

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<sup>31</sup> Security Council Resolution 1850 (2008), 16 December 2008, S/RES/1850 (2008) (UN Dossier No. 1354), paras 3 and 4.

<sup>32</sup> E.g., General Assembly (Tenth Emergency Special Session) Resolution ES-10/13, 21 October 2003, A/RES/ES-10/13 (UN Dossier No. 1225), recitals and para. 2.

<sup>33</sup> Security Council Resolution 2334 (2016), 23 December 2016, S/RES/2334 (2016) (UN Dossier No. 1372), paras 8-10.

<sup>34</sup> Security Council Official Records, 7853<sup>rd</sup> meeting, 23 December 2016, S/PV.7853 (Annex No. 16), p. 10.

<sup>35</sup> *Ibid.*

29. Under the terms of Resolution 2334, the Security Council remains seized of the matter.<sup>36</sup>

#### **F. 2023 communiqués**

30. Against that background, the parties continue to recognise the need for a negotiated settlement and have reaffirmed their commitment to their previous agreements. This is illustrated in the communiqués issued following the recent meetings between Israeli and Palestinian officials in early 2023. Specifically, the Aqaba communiqué records the two sides’ “*commitment to all previous agreements between them, and to work towards a just and lasting peace*” and their desire “*to address outstanding issues through direct dialogue*”.<sup>37</sup> These commitments were again reaffirmed at the subsequent meeting at Sharm El-Sheikh on 19 March 2023.<sup>38</sup>

#### **G. The lead-up to the Request for an advisory opinion**

31. On 27 May 2021, the Human Rights Council established an open-ended Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel (**‘the Commission of Inquiry’**).<sup>39</sup> Along with eight other States,<sup>40</sup> the United Kingdom voted against the establishment of the Commission of Inquiry. Fourteen other States abstained.<sup>41</sup> The United Kingdom’s position was (and remains) as follows:<sup>42</sup>

*“ ... we oppose the open-ended nature of the Commission of Inquiry on the situation in Israel, the West Bank, and Gaza and its vaguely defined mandate.*

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<sup>36</sup> Security Council Resolution 2334 (2016), 23 December 2016, S/RES/2334 (2016) (UN Dossier No. 1372), para. 13.

<sup>37</sup> Aqaba Joint Communiqué, 26 February 2023 (Annex No. 17), paras 1 and 5.

<sup>38</sup> Joint Communiqué from the March 19 meeting in Sharm El Sheikh, 19 March 2023 (Annex No. 18), paras 1, 3 and 5.

<sup>39</sup> Resolution adopted by the Human Rights Council on 27 May 2021, A/HRC/RES/S-30/1, entitled “*Ensuring respect for international human rights law and international humanitarian law in the Occupied Palestinian Territory, including East Jerusalem, and in Israel*” (UN Dossier No. 1472), para. 1.

<sup>40</sup> Austria, Bulgaria, Cameroon, Czechia, Germany, Malawi, Marshall Islands and Uruguay.

<sup>41</sup> Bahamas, Brazil, Denmark, Fiji, France, India, Italy, Japan, Nepal, Netherlands, Poland, Republic of Korea, Togo and Ukraine.

<sup>42</sup> Foreign, Commonwealth & Development Office, Statement on the Human Rights Council Commission of Inquiry on Gaza Report, 8 June 2022 (Annex No. 19).



*The cause of advancing human rights in Israel and the Occupied Palestinian Territories is not served by the disproportionate focus on Israel. The UK is committed to improving the human rights situation in Israel and the Occupied Palestinian Territories. We are also a firm supporter of the Human Rights Council and believe strongly in its mandate to protect human rights and secure accountability for abuses wherever these occur. However, this Commission of Inquiry does not further these goals.”*

32. On 14 September 2022, the Commission of Inquiry issued its report to the General Assembly, in which it reached conclusions on, *inter alia*, the legality of Israel’s occupation.<sup>43</sup> Taking the view that the Israeli occupation “*cannot remain unaddressed*”, the Commission of Inquiry then opined as follows:<sup>44</sup>

*“The International Court of Justice should be requested to advise on the legal consequences of the continued refusal by Israel to end its occupation and of the steps it has taken to entrench its control and expansion into the occupied area through de facto annexation, and on the obligations of third States and the United Nations to ensure that Israel respects international law.”*

33. At the conclusion of its report, the Commission of Inquiry issued the following recommendation to the General Assembly:<sup>45</sup>

*“... the General Assembly ... [u]rgently request an advisory opinion from the International Court of Justice on the legal consequences of the continued refusal on the part of Israel to end its occupation of the Occupied Palestinian Territory, including East Jerusalem, amounting to de facto annexation, of policies employed to achieve this, and of the refusal on the part of Israel to respect the right of the Palestinian people to self-determination, and on the obligations of third States and the United Nations to ensure respect for international law”.*

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<sup>43</sup> Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, 14 September 2022, A/77/328 (UN Dossier No. 1408) (**‘Commission of Inquiry Report’**), paras 75-84.

<sup>44</sup> Commission of Inquiry Report, para. 84.

<sup>45</sup> Commission of Inquiry Report, para. 92(a).

34. In parallel, Palestine<sup>46</sup> expressed its intention to bring the parties' bilateral dispute to the International Court of Justice.
35. On 24 September 2021, the President of the Palestinian Authority, Mahmoud Abbas, called on Israel to withdraw from the Occupied Palestinian Territories within one year. In the event that Israel did not withdraw, Palestine indicated its intention to:
- “... go to the International Court of Justice as the supreme international judicial body, on the issue of the legality of the occupation of the land of the Palestinian state and the relevant obligations for the United Nations and States around the world in this regard and all will have to respect the conclusions of the Court.”<sup>47</sup>*
36. Following that indication, on 10 November 2022, Palestine<sup>48</sup> initiated a resolution under item 47 of the Fourth Committee (Special Political and Decolonization) at the 77<sup>th</sup> Session of the General Assembly.<sup>49</sup>
37. Following a brief debate, the very next day, on 11 November 2022, the draft resolution was adopted by the General Assembly's Fourth Committee without change. It was adopted by a recorded vote: 98 votes in favour, 52 abstaining (including the United Kingdom) and 17 against.<sup>50</sup> 26 UN Members did not attend.
38. Several UN Members placed on record their concerns and objections regarding the propriety of making the Request. The UN Press Office has summarised their statements as follows:<sup>51</sup>

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<sup>46</sup> For the avoidance of doubt, the United Kingdom does not recognise Palestine as a State. It will do so at a time when it best serves the objective of peace. It refers to 'Palestine' in this Statement only to signify the entity that has been accorded 'Permanent Observer' status at the United Nations and without any admission thereby.

<sup>47</sup> General Assembly Official Records, 76<sup>th</sup> session, 12<sup>th</sup> plenary meeting, 24 September 2021, A/76/PV.12 (**Annex No. 20**), p. 49 (Annex III, Address by President Mahmoud Abbas).

<sup>48</sup> Palestine was listed in the original group of co-sponsors of the Resolution and concluded the debate on item 47 before the General Assembly.

<sup>49</sup> Revised Draft Resolution, 10 November 2022, A/C.4/77/L.12/Rev.1 (**UN Dossier No. 1**).

<sup>50</sup> **Against:** Australia, Austria, Canada, Czechia, Estonia, Germany, Guatemala, Hungary, Israel, Italy, Liberia, Lithuania, Marshall Islands, Micronesia (Federated States of), Nauru, Palau, United States of America.

<sup>51</sup> UN Press Release, 'Fourth Committee, Concluding Its Work, Approves Six Draft Resolutions, Including Request for ICJ Opinion on Israeli Occupation' 11 November 2022, GA/SPD/771 (**Annex No. 21**). The official records of the meeting are not yet available.

### **Australia**

*“... [the Australian delegation] does not support a referral to the International Court of Justice. Doing so will not help bring the parties together for negotiations, [Australia’s representative] said, adding that advisory opinions should not be used to settle bilateral disputes.”*

### **France (speaking on behalf of a group of countries)**

*“... proposals to request advisory opinions from the International Court of Justice should be thoroughly discussed and consulted on with the United Nations membership in a timely manner.”*

### **Israel**

*“...calling for the Court’s involvement would decimate any chances of reconciliation between Israel and the Palestinians. Urging delegations to vote against that text, [Israel’s representative] said such resolutions demonize Israel and exempt the Palestinians of any responsibility for their current situation.”*

### **Japan**

*“... acknowledged the Palestinians’ desire to explore any possible avenue, given the dire situation on the ground. However, it is necessary to consider which approach is most appropriate to achieve peace in the Middle East.”*

### **Singapore**

*“ ... expressed reservations on operative paragraph 18, saying it was not appropriate to involve the Court in this manner.”*

### **United Kingdom**

*“ ... does not believe that referral to the International Court of Justice will bring the parties back to the negotiating table.”*

### **United States**

*“... there are no short cuts to the two-State solution and there is nothing in the package of draft resolutions before the Committee that will ensure this.”*

### **Uruguay**

*“... while advisory opinions from the International Court of Justice are valuable for the international community, in this instance it would be counterproductive and add an unnecessary element of tension.”*

39. The Palestinian representative at the United Nations has since described the Palestinian objective in seeking an advisory opinion in the following candid terms:

*“we are proud of this ... historic accomplishment of all of us, that we are taking the entire Palestine question to be looked at by the highest court in the globe, the International Court of Justice, and we hope that there will be an opinion that is useful, to be rendered to get us closer to the objective of the attainment of the inalienable rights of the Palestinian people, which is the main objective of the Committee ...”*<sup>52</sup>

40. In sum, the position is as follows:

- 40.1. The Request’s genesis was in both the Commission of Inquiry’s recommendation that an advisory opinion be sought and Palestine’s indication that it would seek an advisory opinion if Israel did not terminate the occupation.
- 40.2. The Request was inserted into the draft resolution before the Fourth Committee without any specific articulation as to why an advisory opinion was necessary.
- 40.3. A large group of States voted against or abstained before the Fourth Committee. This included key States involved in the peace process.
- 40.4. Israel, one of two parties to the bilateral dispute, voted against the resolution. The other party to the dispute, Palestine, was a co-sponsor and the key proponent of the resolution, and its representative to the United Nations stated that *“we are taking the entire Palestine question to be looked at”* by the Court.<sup>53</sup>
- 40.5. The intention behind the Request appears to be two-fold: to have the Court adjudicate on the key elements of the parties’ bilateral dispute and, in so doing, confirm the Commission of Inquiry’s own legal conclusions as to the legality of the occupation.
- 40.6. There was no request from the Security Council for an advisory opinion, despite that body having established the enduring framework for the resolution of the

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<sup>52</sup> UN Committee on the Exercise of the Inalienable Rights of the Palestinian People, 411<sup>th</sup> Committee meeting, 3 May 2023, available on UN Web TV at <https://media.un.org/en/asset/k11/k11tjvklq6> (see minutes 1:07:15 – 1:07:52, statement of the Palestinian Permanent Observer at the United Nations). (Emphasis added.) See further UN Press Release, ‘Permanent Observer Briefs Palestinian Rights Committee on Situation in Occupied Territory Situation, Submissions Guidelines for Opinion Case to World Court’, 3 May 2023, GA/PAL/1452 (**Annex No. 22**) (*“The aim is to have a tremendous amount of information for the Court so that the entire question of Palestine can be heard and receive a useful opinion, he underscored.”*) (Emphasis added.)

<sup>53</sup> *Ibid.*

parties' dispute, and despite the Security Council remaining engaged and seized of the Palestinian question.<sup>54</sup>

#### **H. UNGA Resolution 77/247 containing the Request**

41. On 30 December 2022, the General Assembly considered the Fourth Committee's report on "*Israeli practices and settlement activities affecting the rights of the Palestinian people and other Arabs of the occupied territories*"<sup>55</sup> and adopted the draft resolution as recommended.<sup>56</sup>
42. On this occasion, 87 UN Members voted in favour, 53 abstained and 26 voted against, including the United Kingdom.<sup>57</sup> 27 UN Members did not vote at all.
43. UN Members again expressed their reservations about the propriety of the General Assembly making a request for an advisory opinion. The United Kingdom explained its position in the following terms:<sup>58</sup>

*"The United Kingdom will vote against the draft resolution entitled 'Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem', because we do not feel that a referral to the International Court of Justice is helpful in bringing the parties back to dialogue.*

*It is also the position of the United Kingdom that it is inappropriate without the consent of both parties to ask the Court to give an advisory opinion on what is essentially a bilateral dispute. The proposal of requesting an advisory opinion from the International Court of Justice on the occupied Palestinian territories was a recommendation of a report of the Human Rights Council commission of inquiry on the situation in Israel, the West Bank and Gaza, established in May 2021. We reiterate our regret at the establishment of that commission, which furthered the*

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<sup>54</sup> Resolution 2334 (2016), 23 December 2016, S/RES/2334 (2016) (UN Dossier No. 1372), para.13.

<sup>55</sup> Report of the Special Political and Decolonization Committee, 'Israeli practices and settlement activities affecting the rights of the Palestinian people and other Arabs of the occupied territories', 14 November 2022, A/77/400 (UN Dossier No. 2).

<sup>56</sup> Resolution 77/247, 30 December 2022, A/RES/77/247 (UN Dossier No. 3).

<sup>57</sup> **Against:** Albania, Australia, Austria, Canada, Costa Rica, Croatia, Czechia, the DRC, Estonia, Germany, Guatemala, Hungary, Israel, Italy, Kenya, Liberia, Lithuania, the Marshall Islands, Micronesia (Federated States of), Nauru, Palau, Papua New Guinea, Romania, Togo, and the United States.

<sup>58</sup> General Assembly Official Records, 56<sup>th</sup> plenary meeting, 30 December 2022, A/77/PV.56 (Resumption 1) (Annex No. 23), p. 4.

*Human Rights Council's disproportionate focus on Israel and failed to include a time limit on the mandate."*

**I. The General Assembly's endorsement of the agreed negotiation framework**

44. The General Assembly continues to accept the parties' agreements, based on the principles set out in Resolutions 242 (1967) and 338 (1973) and developed in the Roadmap, as providing the relevant framework for the resolution of the Israeli-Palestinian dispute and for the termination of the Israeli occupation.

45. In its resolution making the Request, the General Assembly recognised:<sup>59</sup>

*"... the need for full compliance with the Israeli-Palestinian agreements reached within the context of the Middle East peace process, including the Sharm el-Sheikh understandings, and the implementation of the Quartet road map to a permanent two-State solution to the Israeli-Palestinian conflict,"*

*"... the urgent need for efforts to reverse the negative trends on the ground and to restore a political horizon for advancing and accelerating meaningful negotiations aimed at the achievement of a peace agreement that will bring a complete end to the Israeli occupation that began in 1967 and the resolution of all core final status issues, without exception, leading to a peaceful, just, lasting and comprehensive solution of the question of Palestine".*

46. The General Assembly's decision to request an advisory opinion must be assessed in that context.

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<sup>59</sup> Resolution 77/247, 30 December 2022, A/RES/77/247 (UN Dossier No. 3), recitals.

## CHAPTER III

### THE COURT'S DISCRETION IN THIS CASE

#### A. The Court's power under Article 65(1) of the Statute

47. The Court's power to issue an advisory opinion is derived from Article 65(1) of its Statute, which provides:

*“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.”*

48. The following propositions are well-established by the Court:

48.1. The purpose of the Court's advisory function under Article 65(1) is *“not to settle – at least directly – disputes between States, but to offer legal advice to the organs and institutions requesting the opinion”*.<sup>60</sup>

48.2. The Court must consider whether the jurisdictional conditions for the exercise of its power are met, and, if so, whether there is any reason why the Court should, in the exercise of its discretion, nonetheless decline to render an advisory opinion.<sup>61</sup>

48.3. The Court's answer to a request represents its participation in the United Nations' activities as its principal judicial organ, but the Court should decline to answer a request for an advisory opinion if there are *“compelling reasons”* for it to do so.<sup>62</sup>

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<sup>60</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 236, para. 15, referring to Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950, p. 65, at p. 71.*

<sup>61</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 232, para. 10; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, at p. 144, para. 13; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403, at p. 412, para. 17; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 95, at p. 111, para. 54.*

<sup>62</sup> *Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO, Advisory Opinion, I.C.J. Reports 1956, p. 77, at p. 86; Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 151, at p. 155; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 27, para. 41; Application for Review*

48.4. The Court's discretion exists, in part, "to protect the integrity of the Court's judicial function as the principal judicial organ of the United Nations"<sup>63</sup> since the Court "cannot, even in giving advisory opinions, depart from the essential rules guiding its activity as a Court."<sup>64</sup> Moreover, it is submitted, issues of judicial function should not be the only factor to lead the Court to refuse to render an advisory opinion. The Court should, *per* Judge Keith, be willing to consider other relevant matters,<sup>65</sup> such as whether the "questions put to it are relevant and have a practical and contemporary effect and, consequently, are not devoid of object or purpose".<sup>66</sup>

49. Unlike the Permanent Court,<sup>67</sup> the Court has not yet had occasion to exercise its discretion to refuse to answer a request for an advisory opinion (as opposed to

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*of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 166, at p. 183, para. 40; Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12, at p. 21, para. 23; Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989, p. 177, at p. 191, para. 37; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 235, para. 14; Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999, p. 62, at p. 78, para. 29; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, at 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, p. 403, at p. 416, para. 30; Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012, p. 10, at p. 25, para. 33; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 95, at p. 113, para. 65.*

However, the exercise of its discretion "should not ... be unduly hampered by a label such as 'compelling reasons'": *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403, Separate Opinion of Judge Keith, at p. 483, para. 5.*

<sup>63</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 95, at p. 113, para. 64; see also Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403, at p. 416, para. 29; Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012, at p. 10, para. 33.*

<sup>64</sup> *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012, p. 10, at p. 25, para. 34, citing Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5, at p. 29.*

<sup>65</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403, Separate Opinion of Judge Keith, at p. 483, para. 4; and see the extra-judicial writing by Sir Christopher Greenwood, 'Judicial Integrity and the Advisory Jurisdiction of the International Court of Justice', Gaja and Stoutenburg (eds) Enhancing the Rule of Law through the International Court of Justice (2014) p. 63, at p. 65, footnote 8.*

<sup>66</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12, at p. 37, para. 73. See also the matters considered by the Court in Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403, at pp. 415-423, paras 29-48.*

<sup>67</sup> *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5.*



reformulating it<sup>68</sup>). However, the Court has specifically identified circumstances in which the exercise of its discretion to refuse to answer a request may be appropriate. These are considered below in the context of considering the compelling reasons why the Court should decline to answer the Request in the present case.

**B. The compelling reasons why the Court should decline to answer the Request**

50. The United Kingdom submits that there are four compelling reasons why the Court should decline to answer the Request:

50.1. Responding to the Request would circumvent the principle that a State is not obliged to require its disputes to be submitted to judicial settlement without its consent (the ‘**non-circumvention ground**’): see **Section 1 below**.

50.2. The enormous scope of the factual enquiry that the Court would need to consider in order to answer the Request cannot properly be performed by the Court without trespassing the bounds of its judicial function in an advisory opinion (the ‘**inappropriate factual enquiry ground**’): see **Section 2 below**.

50.3. Giving an advisory opinion in the circumstances of this case would be contrary to the negotiation framework specifically agreed by the parties and endorsed by both the Security Council and the General Assembly, and in conflict with the relevant Israeli-Palestinian agreements (the ‘**conflict with Security Council-endorsed process ground**’): see **Section 3 below**.

50.4. The object and purpose of the Request is unsuited to advisory proceedings. It asks the Court to proceed on the basis of assumed unlawful conduct on the part of Israel, in an attempt to elicit findings necessary to resolve the parties’ bilateral dispute (the ‘**object and purpose ground**’): see **Section 4 below**.

51. The United Kingdom sets out its case on each ground in turn.

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<sup>68</sup> The Court has “often been required to broaden, interpret and even reformulate the questions put”: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136*, at p. 154, para. 38. See, e.g., *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982, p. 325*, at pp. 348-350, paras 46-48; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403*, at pp. 423-424, paras 49-52.

1) **The non-circumvention ground**

52. The Court’s advisory jurisdiction is distinct in nature and effect to its contentious jurisdiction. An advisory opinion is not given to States, but instead to the United Nations organ that has requested the Court’s advice.

53. However, the fundamental principle of consent remains highly relevant to the Court’s exercise of its advisory jurisdiction in proceedings involving bilateral disputes. While the lack of consent by interested States does not affect *per se* the Court’s jurisdiction to render an advisory opinion,<sup>69</sup> the Court has consistently recognised that an interested State’s lack of consent engages considerations of judicial propriety and may constitute a “*compelling reason*” to exercise its discretion to refuse to answer a request. In its well-known passage in *Western Sahara*, the Court explained:<sup>70</sup>

“... *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.*”

54. Such circumstances may arise where:<sup>71</sup>

“... *the question put to [the Court] was directly related to the main point of the dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties.*”

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<sup>69</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, at p. 157, para. 47.*

<sup>70</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12, at p. 25, para. 33 (Emphasis added).* See further *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 95, at p. 117, para. 85.*

<sup>71</sup> *Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950, p. 65, at p. 72, referring to Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5.* In that latter case, “*one of the States concerned was neither a party to the Statute of the Permanent Court nor, at the time, a Member of the League of Nations, and lack of competence of the League to deal with a dispute involving non-member States which refused its intervention was a decisive reason for the Court's declining to give an answer*”: *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12, at pp. 23-24, para. 30.* See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 24, para. 31.*

55. Judge Owada elaborated on this criterion in a passage of his Separate Opinion in the *Wall* proceedings, which the United Kingdom adopts and commends to the Court. He said as follows:<sup>72</sup>

*“Thus, acknowledging the fact that in the present case there is this undeniable aspect of an underlying legal controversy or a dispute between the parties involved, and keeping this aspect clearly in mind, I wish to state that the critical test for judicial propriety in exercising jurisdiction of the Court, which it undoubtedly has, should lie, not in whether the request is related to a concrete legal controversy or dispute in existence, but in whether ‘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 Sahara ...). To put it differently, the critical criterion for judicial propriety in the final analysis should lie in the Court seeing to it that giving a reply in the form of an advisory opinion on the subject-matter of the request should not be tantamount to adjudicating on the very subject-matter of the underlying concrete bilateral dispute that currently undoubtedly exists between Israel and Palestine.”*

56. The United Kingdom respectfully submits that the Court is right to recognise the continued application of the principle of non-circumvention of the parties’ consent to its discretionary assessment. It makes the following six points:

56.1. **First**, the principle is consistent with the relatively narrow language of Article 96(1) of the UN Charter and Article 65(1) of the Statute compared to the broader language of Article 14 of the League of Nations Covenant.<sup>73</sup>

56.2. **Second**, following on from this, as the Court stated in the *Kosovo* Advisory Opinion, it is not the purpose of Article 65(1) to establish “*a form of judicial recourse for States*”<sup>74</sup> or, as put in different terms by Judge Donoghue, a “*fall-*

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<sup>72</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, Separate Opinion of Judge Owada, at p. 260, para. 13.*

<sup>73</sup> Article 14 empowered the Permanent Court to “*give an advisory opinion upon any dispute or question referred to it ...*” (“*sur tout différend ou tout point*”), and thus “*... a mere comparison of the texts of the Covenant and the Charter suffices at once to reveal the restrictions which were placed on the Court’s advisory function*”: *Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950, p. 65, Separate Opinion of Judge Azevedo, at p. 82, para. 7.*

<sup>74</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403, at p. 417, para. 33.*

*back mechanism to be used to overcome the absence of consent to jurisdiction in contentious cases”.*<sup>75</sup>

56.3. **Third**, the distinction drawn in the Court’s Statute between its advisory and contentious jurisdictions must be respected if the integrity of both functions is to be preserved.<sup>76</sup> Indeed the reason why the Court’s jurisdiction to render an advisory opinion remains unaffected by issues of State consent is precisely because the Court in giving an advisory opinion is not considered to be adjudicating on a dispute between parties.<sup>77</sup> In contrast, in contentious cases, it is necessary for the Court to establish that the scope of consent of both States is sufficient to encapsulate the dispute before the Court in order for it to exercise jurisdiction in the case. In this context, the circumstances relating to the formulation of the request for an advisory opinion may be of importance, especially where the request has been formulated by only one party to the dispute.

56.4. **Fourth**, the non-binding nature of an advisory opinion does not justify the Court deciding a bilateral dispute or otherwise rectify the lack of State consent to such a dispute being adjudicated in an advisory proceeding.<sup>78</sup> While an advisory opinion is not formally binding on the parties to a bilateral dispute and is being rendered to the requesting UN organ, the Court makes statements of law, which may have legal consequences,<sup>79</sup> even if not intended by the Court or required by the Statute.

56.5. **Fifth**, the fact that a bilateral dispute may be located in a “*broader frame of reference*”<sup>80</sup> does not render the non-circumvention rule inapplicable. Every legal dispute falls within a broader context.<sup>81</sup> The fact that a UN organ may be

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<sup>75</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 95, Dissenting Opinion of Judge Donoghue, at p. 266, para. 23.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, at pp. 157-158, para. 47.*

<sup>78</sup> Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice (1986), Vol. II, at p. 568.

<sup>79</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12, Declaration of Judge Gros, at p. 73, para. 6.*

<sup>80</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12, at p. 26, para. 38.*

<sup>81</sup> In a similar vein, see *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 95, Dissenting Opinion of Judge Donoghue, at p. 265,*

considering the legal dispute in such a context says nothing about the test to be applied by the Court, *viz*, whether the specific request requires the Court to determine in effect the specific legal dispute between the parties in circumstances where to do so would circumvent the consent requirement.

- 56.6. **Sixth**, simply because a UN organ may have previously considered certain of the issues contained in the Request does not somehow obviate the relevance and application of State consent in the context of a particular case. The very fact that the General Assembly has made the Request indicates its view that the questions asked are of concern to a majority of its Members,<sup>82</sup> but, again, this is not the relevant test for the Court.
57. It is instead for the Court to compare the subject-matter of the bilateral dispute with the issues presented by the request before the Court,<sup>83</sup> recognising the significance of the “*origin and scope of the dispute ... in appreciating, from the point of view of the exercise of the Court’s discretion, the real significance in this case of the lack of ... consent*” (as the Court noted in *Western Sahara*<sup>84</sup>). Above all, as it was put pertinently by Judge Owada in *Wall*, “*giving a reply in the form of an advisory opinion on the subject-matter of the request should not be tantamount to adjudicating on the very subject-matter of the underlying concrete bilateral dispute that currently undoubtedly exists between Israel and Palestine.*”<sup>85</sup>
58. The United Kingdom submits that the principle is squarely engaged in this case. It points to the following relevant factors:
- 58.1. Israel has not consented to the Court’s exercise of jurisdiction over the Israeli-Palestinian conflict, having voted against Resolution 77/247. Instead, Israel (along with the PLO) has consented to an entirely different dispute resolution

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para. 20: “... any bilateral dispute that attracts sufficient support in the General Assembly so as to lead that organ to request an advisory opinion could be described as falling within a ‘broader frame of reference’. Were that not the case, the General Assembly would not vote to put the matter before the Court”.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 95*, Dissenting Opinion of Judge Donoghue, at p. 263, para. 10.

<sup>84</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12*, at p. 27, para. 42.

<sup>85</sup> See para. 55 above.

mechanism, namely negotiation, conciliation and/or arbitration, as explained above.<sup>86</sup>

58.2. Only one party to the bilateral dispute participated in the initiation of and drafting of the Request.<sup>87</sup> This stands in stark contrast to the position in a contentious case, where both parties have the right to define the limits of the Court's adjudication of their dispute by restricting the scope of their respective grants of consent to the Court.

58.3. The scope of the Request encompasses the matters at the very heart of the Israeli-Palestinian dispute:

58.3.1. The Request focuses on the "*legal status*" of the Occupied Palestinian Territories and the "*legal consequences*" of that status, explicitly asking the Court to rule on both matters. The legal validity and effect of the occupation are the primary subject matters of the two questions that comprise the Request.

58.3.2. Further, the Request refers to a wide range of Israeli "*policies and practices*" over the course of the occupation since 1967 in what it presents as the factual basis for the Court's adjudication of the Israeli occupation. Not only do those "*policies and practices*" cover the entire temporal scope of the occupation, but they are premised on Israel's violation of the Palestinian people's right to self-determination. Putting to one side the highly partisan nature of the terms of the Request (addressed further below<sup>88</sup>), this manner of framing the Request makes clear that the parties' long-standing dispute over the sovereignty and status of the Occupied Palestinian Territories is at the core of the Request.

58.3.3. The Request, on any view, embraces core "*permanent status issues*" in dispute between the Israelis and the Palestinians. It seeks the Court's determination of Israeli liability in relation to certain of those issues,

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<sup>86</sup> See para. 15.4 above; referring to Oslo I, Article XV; Oslo II, Article XXI.

<sup>87</sup> See paras 36 and 40.4 above.

<sup>88</sup> See paras 73-80 below.

having expressly identified both Israeli “*settlements and annexation of the Palestinian territory*” and Israeli measures seeking to alter the “*composition, character and status of the Holy City of Jerusalem*” in its terms. The Request also generally requires consideration of matters of security as part of any assessment of the legality of Israel’s alleged measures. For these reasons, the Request has a direct parallel with key permanent status issues, which, as noted above, expressly encompass “*Jerusalem*”, “*settlements*”, “*security arrangements*”, “*borders*”, and “*other issues of common interest*”.<sup>89</sup>

58.4. This comprehensive scope of the Request is consistent with Palestine’s stated aim, which was to “*tak[e] the entire Palestine question to be looked at by the highest court in the globe, the International Court of Justice*” with a view to obtaining an opinion “*to get us closer to the objective of the attainment of the inalienable rights of the Palestinian people*”.<sup>90</sup>

58.5. In those circumstances, were the Court to answer the Request, it would decide on the “*main point[s] of the dispute*” between the Israelis and the Palestinians.

59. For all of those reasons, the United Kingdom respectfully submits that the Court should decline to provide a response to the Request.

60. The United Kingdom further observes that the situation in the present case is readily distinguishable from specific aspects of past advisory proceedings. By way of example:

60.1. *Interpretation of Peace Treaties*: The request was solely concerned with the applicability to certain disputes of the procedure for settlement instituted by the Peace Treaties with Bulgaria, Romania and Hungary. The Court was not being asked to engage in the *merits* of those disputes. Distinguishing the request at issue in *Eastern Carelia*, the Court stated in terms that the request “*in no way touches the merits of those disputes*”, and that “*the legal position of the parties*

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<sup>89</sup> Oslo I, Article V(3); Oslo II, Article XXXI(5). See further paras 15.3 and 17 above.

<sup>90</sup> See para. 39 above.

*to these disputes cannot be in any way compromised by the answers that the Court may give to the Questions put to it.”*<sup>91</sup>

60.2. *Western Sahara*: Although there was a “*legal controversy*” concerning whether Western Sahara had been *terra nullius*, it was one that arose during the proceedings of the General Assembly and “*did not arise independently in bilateral relations*”.<sup>92</sup> Moreover, as the Court explained, the issue between Morocco and Spain regarding Western Sahara was not one as to the legal status of the territory as of the date of the request, but one as to the rights of Morocco over that territory at the time of colonization. Thus, the Court concluded: “*The settlement of this issue will not affect the rights of Spain today as the administering Power ... It follows that the legal position of the State which has refused its consent to the present proceedings is not ‘in any way compromised by the answers that the Court may give to the questions put to it’.*”<sup>93</sup>

60.3. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*:

60.3.1. Unlike the current case, the subject-matter of the advisory opinion sought in *Wall* did not concern the main – let alone core – aspects of the legal dispute between the Israelis and the Palestinians. That case concerned a particular measure taken by Israel, namely the construction of the wall.

60.3.2. The Court indeed accepted that it could not properly address the core of the Israeli-Palestinian dispute in advisory proceedings. In particular, the Court acknowledged that the question of the wall was “*part of a greater whole*”,<sup>94</sup> but was satisfied that “*the question that the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall*”. The Court expressly noted that it “*would*

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<sup>91</sup> *Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950, p. 65, at p. 72.*

<sup>92</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12, at p. 25, para. 34.*

<sup>93</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12, at p. 27, para. 42, citing Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950, p. 65, at p. 72. (Emphasis added.)*

<sup>94</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, at p. 160, para. 54.*



*only examine other issues to the extent that they might be necessary to its consideration of the question put to it.*<sup>95</sup>

60.3.3. The Court, moreover, went on to recognise in terms that negotiations to achieve implementation of all relevant Security Council resolutions, in particular Resolutions 242 (1967) and 338 (1973), were the “*only*” way to resolve the dispute.<sup>96</sup> By contrast, the present Request concerns precisely the “*greater whole*” which the parties have specifically reserved for direct negotiations between themselves, as explained above.<sup>97</sup>

60.3.4. Consistent with this, Judge Higgins observed that the Court was “*wise and correct*” to avoid “*permanent status issues*” and refrain from “*pronouncing on the rights and wrongs in myriad past controversies in the Israel-Palestine problem*”.<sup>98</sup> As noted above, Judge Owada accepted that the Court’s answer could not be “*tantamount to adjudicating on the very subject-matter of the underlying concrete bilateral dispute that currently undoubtedly exists between Israel and Palestine*”,<sup>99</sup> whereas Judge Koroma distinguished the request from one that concerned “*the Israeli-Palestinian conflict as such*” or “*its resolution*”.<sup>100</sup>

61. Against that background, the Request invites the Court to determine the core of the parties’ bilateral dispute, namely the validity and effect of Israel’s occupation. That engages key permanent status issues, including “*Jerusalem*”, “*settlements*”, “*security arrangements*” and “*borders*”. The Request seeks to do so in a manner that is intended to affect Israel’s current obligations as occupying power. Consistent with

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<sup>95</sup> *Ibid.*

<sup>96</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, at p. 200, para. 162. See also para. 161.*

<sup>97</sup> See paras 15-18 above.

<sup>98</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, Separate Opinion of Judge Higgins, at p. 211, para. 17.*

<sup>99</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, Separate Opinion of Judge Owada, at p. 263, para. 13.*

<sup>100</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, Separate Opinion of Judge Koroma, at p. 204, para. 3.*

the Court’s judgment and the separate opinions in the *Wall* proceedings, these are not matters that the Court can properly determine in the exercise of its advisory function. For all those reasons, the United Kingdom invites the Court to decline to answer the Request.

2) **Inappropriate factual enquiry ground**

62. A further circumstance warranting the Court’s refusal to answer a request for an advisory opinion is where it lacks “*sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character*”.<sup>101</sup>

63. The United Kingdom makes the following observations as to this ground for refusal:

63.1. **First**, this is another manifestation of the Court’s duty to preserve its judicial function. As noted above, in exercising its advisory function, the Court is “*bound to remain faithful to the requirements of its judicial character*”.<sup>102</sup> Questions of the Court’s judicial function are matters over which the Court has inherent jurisdiction, including in advisory proceedings.<sup>103</sup> This may require the Court to exercise its discretion to decline to answer the Request, or to provide an incomplete answer to the question posed.<sup>104</sup>

63.2. **Second**, a distinction is to be drawn between the Court’s treatment of evidence in advisory and contentious proceedings. In the former category, there are no parties as such, and there is no obligation to furnish evidence. This has the consequence that the usual rules on the burden of proof have no application. In particular, the Court may not draw any adverse inferences from a failure of an

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<sup>101</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12, at pp. 28-29, para. 46.* See also Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice (1986), Vol. I, at p. 122.

<sup>102</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12, at p. 21, para. 23;* see also *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960, p. 150, at p. 153.*

<sup>103</sup> *Case concerning the Northern Cameroons (Cameroon v. United Kingdom) Preliminary Objections, Judgment of 2 December 1963, I.C.J. Reports 1963, p. 15, at p. 30.*

<sup>104</sup> This was the position in the *Legality of the Threat or Use of Nuclear Weapons* case, where the “*elements of fact at its disposal*” did not permit the Court to make definitive findings on legality: *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 266, operative para. 2(E).* See also para. 94.

interested party to submit evidence.<sup>105</sup> In fact, it may have a heightened duty to satisfy itself that it is in possession of all of the available facts.<sup>106</sup> There is a further consequence of the general lack of burden of proof in advisory opinions: if the Court does not have sufficient evidence or information to “*enable it to resolve a particular issue of fact, it cannot fall back upon considerations of burden of proof and may, therefore, be unable to answer the question in whole or in part if it is to remain faithful to its judicial function.*”<sup>107</sup>

63.3. **Third**, for these reasons, and as recognised by the Permanent Court in *Eastern Carelia*, the general rule in advisory proceedings is as follows: “*under ordinary circumstances ... the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are.*”<sup>108</sup>

63.4. **Fourth**, even though the cases principally focus on sufficiency of evidence, it follows that the Court must adhere to any principles or practices “*required by its inherent judicial character and by the good administration of justice*”, such as the equality of arms.<sup>109</sup> In other words, the Court must comply with the “*essential rules guiding [its] activity as a Court*”.<sup>110</sup>

64. The Request before the Court makes no attempt to set out the factual premises on which it is founded. Instead, the first question refers to the “*occupation, settlement and annexation ... since 1967*”, referring generally and non-exhaustively to

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<sup>105</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136*, Declaration of Judge Buergenthal, at p. 245, para. 10.

<sup>106</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136*, Separate Opinion of Judge Owada, paras 20-21, referring, *inter alia*, to *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, p. 253, para. 31*.

<sup>107</sup> Judge Greenwood writing extra-judicially in ‘Judicial Integrity and the Advisory Jurisdiction of the International Court of Justice’, Gaja and Stoutenburg (eds) Enhancing the Rule of Law through the International Court of Justice (2014), p. 63 at p. 69.

<sup>108</sup> *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5, p. 28*.

<sup>109</sup> *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012, p. 10, at p. 30, para. 47*. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136*, Separate Opinion of Judge Owada, at p. 266, para. 16.

<sup>110</sup> *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5, p. 29*. This has been regularly endorsed by the Court: see, e.g., *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012, p. 10, at p. 25, para. 34*.

*“measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem”* and Israel’s *“adoption of related discriminatory legislation and measures”*. The second question then references the *“policies and practices of Israel”* identified in the first question. There is no specific identification of any of the *“measures”* or alleged *“related discriminatory legislation and measures”*. That is left entirely to the Court.

65. The General Assembly’s phrasing of the Request in this way gives rise to two issues.

66. The **first** concerns the wide scope of the Request. Not only does it explicitly cover the lifespan of the entire occupation (presently 56 years), but the *“measures”* potentially engage a vast array of issues.

66.1. This is made plain upon a review of the multi-part dossier submitted to the Court on 31 May and 22 June 2023 by the Secretariat of the United Nations, which contains some 1,805 documents spanning nearly 30,000 pages. It furnishes material said to be relevant to the Request published from 1967 onwards.<sup>111</sup> The subjects covered by the dossier encompass, among other matters: (i) Israeli settlements;<sup>112</sup> (ii) the living conditions of the Palestinian people;<sup>113</sup> (iii) the situation of Palestinian women and children;<sup>114</sup> (iv) natural resources in the Occupied Palestinian Territories and related Israeli economic and trade practices;<sup>115</sup> (v) Jerusalem;<sup>116</sup> (vi) expulsion and deportation;<sup>117</sup> (vii) detention and imprisonment;<sup>118</sup> (viii) refugees;<sup>119</sup> as well as (ix) more generalised UN reporting on Israeli practices in the Occupied Palestinian Territories.<sup>120</sup>

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<sup>111</sup> See Introductory Note, 31 May 2023, para. 5.

<sup>112</sup> See documents 4-72, 1546-1574 and 1674-1689.

<sup>113</sup> See documents 73-147.

<sup>114</sup> See documents 148-234.

<sup>115</sup> See documents 235-285.

<sup>116</sup> See documents 614-638.

<sup>117</sup> See documents 781-793.

<sup>118</sup> See documents 794-803.

<sup>119</sup> See documents 943-1194.

<sup>120</sup> See documents 652-779 and 811-862.

66.2. This approach contrasts with previous advisory proceedings, where the questions and accompanying UN dossiers before the Court were considerably narrower in scope. The most relevant comparison is the *Wall* advisory proceedings, where the question before the Court was limited to identifying “*the legal consequences arising from the construction of the wall being built by Israel ... as described in the report of the Secretary-General*”.<sup>121</sup> Not only was this a limited subject, but the General Assembly identified a specific UN report as providing the factual premise for its request in the terms of the question posed. The request was then accompanied by a limited UN dossier (about 1,000 pages), containing the relevant UN report and further UN documentation.

66.3. In these circumstances, there is a real question as to whether the Court can answer the questions posed in a manner consistent with its judicial character. It would require the Court to embark on a fact-finding mission extending over a 56-year period. This is a task to which the Court is unsuited in the exercise of its advisory function, which, as noted above, is not intended to grapple with a complex and controversial factual record.

67. The **second** issue concerns considerations of fairness and due process. There are several relevant points here:

67.1. Insofar as Israel does not participate in the advisory proceedings by furnishing evidence relevant to the Request, the Court will lack “*material explaining the Israeli side of the picture*”.<sup>122</sup> While the Court may have felt able to proceed without such material in the *Wall* proceedings, the present case is of an entirely different order of magnitude. The General Assembly invites the Court to engage with the core of the bilateral dispute and specifically targets Israel’s “*policies and practices*” since 1967. The Court would risk the integrity of its judicial function if it were to proceed without Israel’s full participation in those circumstances.

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<sup>121</sup> General Assembly (Tenth Emergency Special Session) Resolution ES-10/14, 8 December 2003, A/RES/ES-10/14 (UN Dossier No. 1226).

<sup>122</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136*, Separate Opinion of Judge Owada, at p. 268, para. 22.

- 67.2. Even if Israel were to furnish evidence of general relevance to the Request, the advisory procedure offers insufficient protection to the procedural rights of the parties to the bilateral dispute, in a case where there are highly controversial matters of fact with which the Court would be required to engage and where a heightened standard of proof may apply, insofar as grave allegations are made against Israel and the Court sees fit to determine them.<sup>123</sup>
- 67.3. Further and in any event, the Court should exercise particular caution in relying on reports of UN bodies (such as those of the Commission of Inquiry) insofar as those reports have been prepared (i) without Israel’s involvement and (ii) without access to Israel or the Occupied Palestinian Territories. It is also to be noted that the United Kingdom, along with several other States, has expressed reservations about those reports, as set out above.<sup>124</sup>
68. Ultimately, the United Kingdom respectfully submits that the Court cannot be confident that it would have a complete or accurate evidential picture before it, or properly satisfy due process and fairness concerns. This means that it cannot proceed in a manner compatible with its judicial character. For this additional reason, the Court should decline to answer the Request.

### **3) Conflict with the Security Council-endorsed process ground**

69. The Court has, on a number of occasions, considered the submission that it should refuse to respond to a request for an advisory opinion on the basis of adverse political consequences flowing from its opinion. As the Court reaffirmed in the *Kosovo Advisory Opinion*, for such an argument to succeed, the Court must be able to conduct an objective assessment of the relevant factors:<sup>125</sup>

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<sup>123</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at p. 129, para. 209 (“The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive”). See further *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 9 February 2022, para. 120.

<sup>124</sup> See para. 31 above.

<sup>125</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403, at p. 418, para. 35, citing *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 237, para. 17; *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 12, at p. 37, para. 73; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, at pp. 159-160, paras. 51-54.

“... Just as the Court cannot substitute its own assessment for that of the requesting organ in respect of whether its opinion will be useful to that organ, it cannot — in particular where there is no basis on which to make such an assessment — substitute its own view as to whether an opinion would be likely to have an adverse effect. As the Court stated in its *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons*, in response to a submission that a reply from the Court might adversely affect disarmament negotiations, faced with contrary positions on this issue ‘there are no evident criteria by which it can prefer one assessment to another’ ...”.

70. In this case, there is indeed a firm “*basis on which to make ... an assessment*” that the Request would undermine an established political process. As set out above, there is an agreed negotiation framework for the resolution of the Israeli-Palestinian conflict, which expressly aims to bring about the termination of the Israeli occupation that the Request seeks. The parties’ commitment to that framework is an objective fact sufficient to justify the Court’s exercise of its discretion to refuse to answer the Request.
71. In this regard, the United Kingdom emphasises the following facts and matters:
- 71.1. The principles set down in Security Council Resolutions 242 (1967) and 338 (1973) for the final resolution of the parties’ dispute establish that questions of sovereignty over territory and security go hand-in-hand.<sup>126</sup> This is also reflected in the Roadmap, which envisages that a comprehensive peace settlement between the parties is required in order to bring the occupation to an end.<sup>127</sup>
- 71.2. Israel and the PLO have already agreed to enter into permanent status negotiations based on principles set down in Resolutions 242 (1967) and 338 (1973), including on issues of settlements, Jerusalem, security and borders. They continue to affirm the need for a negotiated comprehensive settlement to secure Israel’s withdrawal.<sup>128</sup>
- 71.3. This is recognised by the Security Council and the General Assembly, including in Resolution 77/247 itself, which underlines the “*urgent need for ...*

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<sup>126</sup> See paras 10-13 above.

<sup>127</sup> See paras 21-24 above.

<sup>128</sup> See para. 30 above.

*negotiations aimed at the achievement of a peace agreement that will bring a complete end to the Israeli occupation that began in 1967*". It was also expressly acknowledged by the Court in the *Wall* Advisory Opinion:<sup>129</sup>

*"... [the] situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The 'Roadmap' approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region."*

71.4. Moreover, Israel and the PLO specifically agreed not to “*initiate or take any step*” that would “*change the status of the West Bank and the Gaza Strip*” and confirmed that the “*status*” of those territories would “*be preserved during the interim period*”.<sup>130</sup> The parties also agreed a specific dispute settlement regime for any disputes relating to their interim agreements, which did not involve recourse to the International Court of Justice, in either its advisory or contentious capacities.<sup>131</sup> It is to be noted that the PLO has not sought to invoke that dispute resolution mechanism in this case.

71.5. Further, there has been no endorsement by the Security Council or the Quartet of the General Assembly’s request to the Court as conducive to, or at least consistent with, the peace process. Nor has there been any suggestion from the General Assembly, the requesting organ, that the advisory opinion would assist in bringing the parties back to the agreed framework.

72. In those circumstances, there is an objective basis for the Court to conclude that answering the General Assembly’s request for an advisory opinion on this occasion

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<sup>129</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, at p. 200, para. 162 (emphasis added).*

<sup>130</sup> See para. 17 above.

<sup>131</sup> See para. 15.4 above; referring to Oslo I, Article XV; Oslo II, Article XXI.



would conflict with both the parties' agreed framework for resolving the dispute and their commitment not to take any steps to interfere with the status of the Occupied Palestinian Territories, of which requesting an advisory opinion addressing that very question is plainly one.

**4) Object and purpose ground**

73. Protecting the integrity of the Court's judicial function has been identified as a reason for refusing to answer a request for an advisory opinion, as explained above. However, the Court "*has not ever identified it as the only factor which might lead it to refuse*".<sup>132</sup> Indeed, the Court's jurisprudence illustrates that it is willing to consider matters beyond judicial propriety, including "*object or purpose*".<sup>133</sup>
74. It is well-established that it is not for the Court to decide upon the extent to which its opinion might impact upon the action of the General Assembly.<sup>134</sup> It is equally well-established that the Court will not give an advisory opinion as an end in itself. It will only do so "*once it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect and, consequently, are not devoid of object or purpose*".<sup>135</sup>
75. The object and purpose of the request must also be consistent with the Court's judicial function and role as the principal judicial organ of the United Nations. That object should be "*to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions*", rather than "*to bring before the Court ... a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of*

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<sup>132</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403*, Separate Opinion of Judge Keith, at p. 483, para. 4 (emphasis added); Sir Christopher Greenwood, 'Judicial Integrity and the Advisory Jurisdiction of the International Court of Justice', Gaja and Stoutenburg (eds) *Enhancing the Rule of Law through the International Court of Justice* (2014) p. 63 at p. 65, footnote 8.

<sup>133</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12*, at p. 37, para. 73. See also the matters considered by the Court in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403*, at pp. 415-423, paras 29-48.

<sup>134</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226*, at p. 237, para. 16; see also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403*, at pp. 417-418, para. 34; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 95*, at p. 115, para. 76.

<sup>135</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12*, at p. 37, para. 73.

*that dispute or controversy*".<sup>136</sup> In this connection, "[i]t is essential for the Court to ensure, in performing its advisory function, that it is not exploited in favour of one specific political strategy or another".<sup>137</sup>

76. Against this backdrop, there are **two** notable features of the drafting of Resolution 77/247. In both the recitals and in the terms of the Request:

76.1. The General Assembly assumes that Israel has committed a series of violations of international law and invites the Court to consider the status of the Occupied Palestinian Territories on that basis. It presents both the recitals and the questions themselves in tendentious terms, instead of framing the questions in a neutral manner, consistent with normal practice.<sup>138</sup>

76.2. The General Assembly focuses exclusively on the actions of only one party to the dispute, despite the Court having accepted that "[i]llegal actions and unilateral decisions have been taken on all sides".<sup>139</sup>

77. By these means, the General Assembly seeks to constrain the Court's enquiry in a manner that is inconsistent with its judicial function. That function "*precludes it from accepting, without any enquiry whatsoever, a legal conclusion which itself conditions the nature and scope of the legal consequences flowing from it*".<sup>140</sup> Were it to proceed to answer the Request, the Court would have to decide a series of threshold legality

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<sup>136</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12, at pp. 26-27, para. 39; see further Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950, p. 65, at pp. 71-72; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, Separate Opinion of Judge Higgins, at p. 210, para. 12; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 95, Declaration of Vice-President Xue, at pp. 142-143, para. 4.*

<sup>137</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403, Dissenting Opinion of Judge Bennouna, at p. 503, para. 15.* See also Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), Vol. I, at p. 122, where the question being "*framed in an ambiguous or tendentious way*" was identified as a matter relevant to judicial propriety.

<sup>138</sup> *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012, p. 10, at p. 36, para. 62.*

<sup>139</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, at p. 200, para. 162.*

<sup>140</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, Separate Opinion of Judge Dillard, at p. 151.*

questions before addressing the questions expressly posed in the Request,<sup>141</sup> since it would be incompatible with the Court’s judicial functions to consider these matters as having been determined by the General Assembly.<sup>142</sup> Indeed the Court has held in express terms that “*the Charter ‘does not confer judicial functions on the General Assembly’.*”<sup>143</sup>

78. The General Assembly’s approach also suggests that the object and purpose of its request is not to seek the Court’s opinion on a matter on which it requires assistance, but instead, to seek the Court’s confirmation of particular legal conclusions relevant to the resolution of the parties’ bilateral dispute.

79. This is consistent with the background set out above, in particular:

79.1. The Commission of Inquiry’s recommendation that the Court be called upon to issue an advisory opinion, following its conclusion as to the status of Israel’s occupation.<sup>144</sup>

79.2. Palestine’s initiation of the advisory request, with the stated objective of “*taking the entire Palestine question to be looked at by ... the International Court of Justice*” to obtain “*an opinion that is useful ... to get us closer to the objective of the attainment of the inalienable rights of the Palestinians*”.<sup>145</sup>

80. For those reasons, the United Kingdom invites the Court to decline to answer the Request on the further ground that the object and purpose of the Request is unsuited to the discharge of the Court’s function in advisory proceedings.

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<sup>141</sup> These include: (i) whether Israel has lawfully occupied Palestinian territory since 1967; (ii) whether Israel has settled Palestinian territory since 1967; if so, what territory and has it done so lawfully; (iii) whether Israel has annexed Palestinian territory since 1967; if so, what territory and has it done so lawfully; (iv) whether Israel has engaged in measures “*aimed at altering the demographic composition, character and status of the Holy City of Jerusalem*”, and if so, what measures and are each of these measures lawful; (v) whether Israel has adopted “*related legislation and measures*” and if so, what, and were they “*discriminatory*” in character; and (vi) what is the content of the Palestinian people’s right to self-determination.

<sup>142</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403, at p. 424, para. 52.*

<sup>143</sup> *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 166, at p. 173, para. 17.*

<sup>144</sup> See para. 32 above.

<sup>145</sup> See para. 39 above.

## CHAPTER IV

### CONCLUSION

81. For the reasons given above, the United Kingdom respectfully requests the International Court of Justice to reaffirm the principles upon which it should exercise its discretion under Article 65(1) of the Statute and decline to give answers to the questions posed by the General Assembly in this case.

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Sally Langrish

Representative of the United Kingdom of Great Britain and Northern Ireland

20 July 2023

## CERTIFICATION

I certify that the annexes are true copies of the documents reproduced therein.

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Sally Langrish

Representative of the United Kingdom of Great Britain and Northern Ireland

20 July 2023

## LIST OF ANNEXES

The Annexes to the United Kingdom's Written Statements are set out below and numbered in the order in which they are referred to in the text.

- Annex No. 1** Security Council Official Records, 1379<sup>th</sup> meeting, 16 November 1967, S/PV.1379
- Annex No. 2** Security Council Official Records, 1382<sup>nd</sup> meeting, 22 November 1967, S/PV.1382
- Annex No. 3** Security Council Resolution 338 (1973), 22 October 1973, S/RES/338 (1973)
- Annex No. 4** Letters of Invitation to the Madrid Peace Conference, jointly issued by United States and the Soviet Union to Israel, Syria, Lebanon, Jordan and others
- Annex No. 5** Declaration of Principles on Interim Self-Government Arrangements signed at Washington DC on 13 September 1993
- Annex No. 6** Agreement on the Gaza Strip and Jericho Area signed at Cairo on 4 May 1994, 33 ILM 626 (1994)
- Annex No. 7** Agreement on Preparatory Transfer of Powers and Responsibilities signed at Erez on 29 August 1994, 34 ILM 457 (1995)
- Annex No. 8** Protocol on Further Transfer of Powers and Responsibilities signed at Cairo on 27 August 1995
- Annex No. 9** Protocol Concerning the Redeployment in Hebron signed at Jerusalem on 17 January 1997, 36 ILM 653 (1997)
- Annex No. 10** Annex IV, Protocol on Economic Relations between the Government of the State of Israel and the PLO signed at Paris on 29 April 1994, 33 ILM 696 (1994)
- Annex No. 11** Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip signed at Washington DC on 28 September 1995
- Annex No. 12** Wye River Memorandum signed at Washington DC on 23 October 1998, 37 ILM 1251 (1998)
- Annex No. 13** The Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations signed at Sharm el-Sheikh on 4 September 1999, 38 ILM 1465 (1999)
- Annex No. 14** Hansard, House of Commons Debate, 14 June 2021, volume 697, no. 16, columns 1-22WH

- Annex No. 15** Speech on the roadmap, Prime Minister Mahmoud Abbas, 4 June 2003, published in The Guardian
- Annex No. 16** Security Council Official Records, 7853<sup>rd</sup> meeting, 23 December 2016, S/PV.7853
- Annex No. 17** Aqaba Joint Communiqué, 26 February 2023
- Annex No. 18** Joint Communiqué from the March 19 meeting in Sharm El Sheikh, 19 March 2023
- Annex No. 19** Foreign, Commonwealth & Development Office, Statement on the Human Rights Council Commission of Inquiry on Gaza Report, 8 June 2022
- Annex No. 20** General Assembly Official Records, 76<sup>th</sup> session, 12<sup>th</sup> plenary meeting, 24 September 2021, A/76/PV.12
- Annex No. 21** UN Press Release, ‘Fourth Committee, Concluding Its Work, Approves Six Draft Resolutions, Including Request for ICJ Opinion on Israeli Occupation’ 11 November 2022, GA/SPD/771
- Annex No. 22** UN Press Release, ‘Permanent Observer Briefs Palestinian Rights Committee on Situation in Occupied Territory Situation, Submissions Guidelines for Opinion Case to World Court’, 3 May 2023, GA/PAL/1452
- Annex No. 23** General Assembly Official Records, 56<sup>th</sup> plenary meeting, 30 December 2022, A/77/PV.56 (Resumption 1)