

Legal Consequences arising from the Policies and Practices of Israel
in the Occupied Palestinian Territory, including East Jerusalem

(Request for Advisory Opinion)

Written Statement

Republic of Guatemala

I. Introduction

1. The United Nations General Assembly adopted, on 30 December 2022, Resolution 77/247¹. Said Resolution in its Paragraph 18 requests the International Court of Justice an advisory opinion. The said paragraph reads as follows:

18. Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following questions, considering the rules and principles of international law, including the Charter of the United Nations, international humanitarian law, international human rights law, relevant resolutions of the Security Council, the General Assembly and the Human Rights Council, and the advisory opinion of the Court of 9 July 2004:

(a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967,

¹ <https://www.undocs.org/A/RES/77/247>

including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?

(b) How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?

2. The Secretary General of the United Nations, by a letter addressed to the President of the Court, dated 17 January 2023 and received in the Registry on 19 January 2023,² transmitted to the Court the above request.
3. The International Court of Justice, by Order of 3 February 2023³, decided, in accordance with Article 66, paragraph 2 of its Statute, that the United Nations and its Member States, as well as the Observer State of Palestine, were likely to be able to furnish information on the questions submitted to the Court for an advisory opinion and fixed 25 July 2023 and 25 October 2023 as the time-limits within which written statements and written comments may be submitted to it, respectively. The Court reserved subsequent procedure for further decision.
4. By letter dated 6 February 2023, the Registrar of the International Court of Justice informed States of the decision of the Court. Such letter, the Registrar requested, was to be considered as constituting the special and direct communication required by the Statute. Further communications informed that upon their request, the Court decided that the League of Arab

² <https://www.icj-cij.org/sites/default/files/case-related/186/186-20230117-REQ-01-00-EN.pdf>

³ <https://www.icj-cij.org/sites/default/files/case-related/186/186-20230203-ORD-01-00-EN.pdf>

States and the African Union were likely to be able to furnish information on the questions.

5. The Republic of Guatemala, as a founding member of the United Nations and, pursuant to Article 66 paragraph 2 of the Statute of the International Court of Justice, being in receipt of a *special and direct communication*, has decided to assist the Court in this matter and submit this written statement.
6. The written statement addresses mainly the issues related to the jurisdiction and the Court's discretionary power regarding the request for advisory opinion contained in the United Nations General Assembly Resolution 77/247 of 30 December 2022. Some comments on the substance of the questions have been furnished in the statement. Yet, the Republic of Guatemala reserves its right to comment on the questions as a reaction to other written statements and to supplement its statement at the written comments phase.

II. Resolution 77/247

7. The adoption of Resolution 77/247 was preceded by the presentation at the 26th meeting of the Fourth Committee on 11 November 2022 of a draft resolution entitled “Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem”. This draft was adopted as draft resolution A/C.4/77/L.12/Rev.1⁴ and recommended it for adoption by the General

⁴ https://digitallibrary.un.org/record/3993908/files/A_C.4_77_L.12_Rev.1-EN.pdf?ln=en

Assembly after a recorded vote of 98 for, 17 against and 52 abstentions. The Committee's report is contained in document A/77/44⁵.

8. Subsequently, the United Nations General Assembly adopted said draft as Resolution 77/247 at the 56th meeting of its 77th Session on 30 December 2022⁶.
9. The adoption of Resolution 77/247 compelled a vote. The vote results reveal that out of 193 Members, 87 States voted in favour, 53 abstained, 27 did not vote, and 26 voted against. The Republic of Guatemala was one of those Member States that voted against that Resolution. In that regard, it must be noted that Resolution 77/247 includes several other matters besides the request for an advisory opinion contained in paragraph 18.
10. As to the validity of the adoption of Resolution 77/247, it is useful to recall what the Court indicated in 1971: "A resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted."⁷ The official record shows⁸ these conditions were met when the Resolution was adopted.

III. Jurisdiction

⁵ https://digitallibrary.un.org/record/3995202/files/A_77_400-EN.pdf?ln=en

⁶ https://digitallibrary.un.org/record/4012919/files/A_77_PV.56_%28Resumption_1%29-EN.pdf?ln=en p. 4/29

⁷ *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, (hereinafter *Namibia*) para. 20

⁸ *Supra* fn.6

11. The Court’s advisory jurisdiction is based on Article 65, paragraph 1 of the Statute:

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request.

12. With regards to the *body* that may bring a request to the Court, Article 96 of the Charter of the United Nations explicitly provides the General Assembly with the entitlement to request an advisory opinion on any legal question:

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

13. Concerning the legal nature of questions, the Court has stated that “questions framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law.”⁹

14. The two questions contained in paragraph 18 of Resolution 77/247 *prima facie* are legal in character. They have been framed in legal terms and, as stated by the Court, it “considers that a request from the General Assembly for an advisory opinion to examine a situation by reference to international law concerns a legal question.”¹⁰ Several different questions arise as to certain qualifications the questions make, the steps the Court would have to

⁹ *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, (hereinafter *Western Sahara*) para. 15

¹⁰ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 (hereinafter *Chagos*) para.58

invest itself in order to answer the questions in full or whether the Court, in use of its inherent powers, decides to interpret the questions and/or determine the scope and meaning of them. This statement will dwell on those issues in the next section.

15. Guatemala believes that the subject matter of the request for an advisory opinion falls within the purview of the General Assembly, particularly given the broad scope of its competence and that it has maintained it active in its agenda through the years preceding the request, In that same vein, “legal questions not covered by the activities of the General Assembly and the Security Council would scarcely be imaginable due to the wide range of competences of the General Assembly and the Security Council.”¹¹ Guatemala wished to clarify this matter, although Article 96 paragraph 1 fixes no requirement of topicality for the General Assembly to request an advisory opinion from the Court on *any* legal question.

16. Furthermore, the General Assembly has indicated that the United Nations has a “permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy.”¹²

17. Additionally, the Court has given guidance on Article 12 of the United Nations Charter and its implications on any General Assembly’s request for

¹¹ Zimmermann, Andreas; Tams, Christian; et.al *The Statute of the International Court of Justice: A Commentary*. 2nd ed. Oxford Commentaries on International Law. Oxford: Oxford University Press, 2012. p.212

¹² General Assembly Resolution 57/107 of 3 December 2002. Available at https://digitallibrary.un.org/record/480175/files/A_RES_57_107-EN.pdf

an advisory opinion¹³ and, for such reason, its discussion seems unnecessary.

18. In view of the above, Guatemala contends that the International Court of Justice has jurisdiction to entertain the request for an advisory opinion, as requested by the United Nations General Assembly in Resolution 77/247 paragraph 18.

IV. Propriety

19. The Court has consistently stated that Article 65, paragraph 1, of the Statute, provides it with a discretionary power to decline giving an advisory opinion even if the conditions of jurisdiction are met¹⁴ and that such discretion exists so as to protect the integrity of the Court's judicial function and its nature as the principal judicial organ of the United Nations.¹⁵

20. Whilst the Court has pronounced that its answer to a request for an advisory opinion represents its participation in the activities of the Organisation, and, in principle, it should not be refused¹⁶, it must satisfy itself as to the propriety of the exercise of its judicial function each time it is seised of a request for an opinion¹⁷, mindful of its determination that only *compelling*

¹³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004*, p. 136 (hereinafter *Wall*) paras. 25-28

¹⁴ *Ibid.* para. 44

¹⁵ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403 (hereinafter *Kosovo*), para.29

¹⁶ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71

¹⁷ *Wall.* para. 45

reasons should lead it to refuse its opinion in response to a request falling within its jurisdiction¹⁸.

21. Some of the arguments that may be advanced in relation to the propriety of the exercise of its jurisdiction in the case at hand are the following:

- a. Whether the underlying question is of a political nature and not of a legal character;
- b. Whether the Court's response will assist the General Assembly in the performance of its functions;
- c. Whether the Court has been furnished with sufficient information and evidence to arrive at a conclusion;
- d. Whether the situation brought to the Court constitutes a bilateral dispute in which the parties have not consented to the settlement of that dispute by the Court;
- e. Whether the questions raise complex and disputed factual issues which are not suitable for determination in advisory proceedings;
- f. Whether the questions are unclear, vague or too abstract to be answered by the Court; and
- g. Whether the answer the Court may give will prejudice the negotiation process between the parties of the underlying dispute.

Guatemala will turn to the above and render its views on each as a way to assist the Court in its task of satisfying itself as to the propriety of the exercise of its judicial function.

¹⁸ *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, I.C.J. Reports 1956, p. 86

1. *Whether the underlying dispute is of a political nature and not of a legal character*

22. Guatemala is aware that the Court does not shy away from a question merely because the underlying situation may have a political dimension, as it has shown through its advisory jurisprudence, where it has addressed some of the most politically charged situations in international affairs.

23. The Court has repeatedly indicated that the fact that a legal question also has political aspects “does not suffice to deprive it of its character as a ‘legal question’ and to ‘deprive the Court of a competence expressly conferred on by its Statute’ and that “[w]hatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law.”¹⁹

24. Nevertheless, proceeding with a legal question notwithstanding its concurrent political dimension cannot mean that the approach to the matter can be identical in all cases unfettered by the diverse importance of the political dimension nor that the Court can deal with the matter in a vacuum, completely detached from the realities on the ground. Complexities must be taken into consideration.

25. As one of the six principal organs of the United Nations, the Court will surely observe the very long string of political expressions the other principal organs of the Organisation have issued, particularly those by the

¹⁹ *Wall.* para.41

Security Council, which, *inter alia*, called all States and international organisations to contribute to an atmosphere conducive to negotiations²⁰ and urged an intensification of diplomatic efforts to foster in parallel with progress in the bilateral process mutual recognition and peaceful coexistence between all States in the region in the context of achieving a comprehensive, just and lasting peace in the Middle East²¹.

26. Guatemala is confident that the Court is fully cognizant of how significant the political component of the matter at hand is and the many other aspects it encompasses and will proceed accordingly whilst protecting its judicial character.

2. *Whether the Court's response will assist the General Assembly in the performance of its functions*

27. In several of the advisory proceedings prior to this one, the Court has faced the argument that the advisory opinion requested would not assist the General Assembly in the proper exercise of its functions. The Court has answered that “it is not for the Court itself to determine the usefulness of its response to the requesting organ” but rather up to that organ to determine “whether it needs the opinion for the proper performance of its functions”. Equally important has been the pronouncement that:

“it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The

²⁰ S/RES/1850 (2008) para.4 [https://undocs.org/S/RES/1850\(2008\)](https://undocs.org/S/RES/1850(2008))

²¹ *Ibid.* para.5

General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.”²²

28. The Court may want to draw a clear distinction between its future opinion and that of the *Wall* in order to make it clear that the future opinion will bring something additional to the debate and reinforce its position that “in situations in which political considerations are prominent, it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate”²³

29. Without questioning the value and usefulness of the opinion the Court may render, Guatemala contends that the final settlement of the Israel-Palestine dispute will only be achieved through bilateral negotiations, just as the Court stated in the *Wall*²⁴

3. *Whether the Court has been furnished with sufficient information and evidence to arrive at a conclusion*

30. In all likelihood, the above argument will be advanced as a reason for the Court to exercise its discretion not to give an advisory opinion, particularly in the context of specific security concerns which may not be apparent nor contained in the documents furnished by the United Nations, the participating States or International Organisations.

31. The Republic of Guatemala has reviewed the extensive dossier provided by the United Nations and can confirm that it is vast and rich and does contain

²² *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, (hereinafter Nuclear Weapons) p. 226 para.16*

²³ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 87. para. 33*

²⁴ *Wall. p. 69 para.162*

a variety of sources, analyses from different historical periods and from perspectives of different organs, agencies and actors. It remains to be seen what additional information is furnished by the participating States and organisations, in particular, the most concerned ones, since, as the Court has expressed, “the question whether the evidence available to it is sufficient to give an advisory opinion must be decided in each particular instance”²⁵ and what ought to be decisive is “whether the Court has before it 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.”²⁶

32. The two questions subject of the request for an advisory opinion, as forwarded to the Court in observance of Article 65, paragraph 2, may pose a significant challenge for the Court, specifically on how to assess all relevant information and arrive at conclusions with respect to the overall situation. That reality may motivate the Court to interpret, constrain or reformulate one or both questions with the view to adjust the task to the scope of an advisory opinion and the information the Court has at its disposal.

33. As opposed to the *Wall* request, which manifestly addressed only one *part of a greater whole*, the current request has been characterised as *taking the entire Palestine question to be looked at by the Court*. In that previous advisory opinion, the Court explained it would take that circumstance carefully into account in any opinion it may give.²⁷ Guatemala trusts that, in the present matter, the Court will proceed with the same prudence.

4. *Whether the situation brought to the Court constitutes a bilateral dispute in which the parties have not consented to the settlement of that dispute by the Court.*

34. The Court is no stranger to requests for advisory opinions that are related to or touch upon a dispute between two or more parties. The Court has heard

²⁵ *Ibid.* para.56

²⁶ *Western Sahara.* para.46

²⁷ *Wall.* para. 54

pleas that it ought to avoid the circumvention of the principle of consent of States for their disputes to be adjudicated.

35. In the past, arguments inviting the Court to exercise its discretionary power not to deliver an opinion have been discarded mainly on the basis that even if an underlying dispute exists, the request for an advisory opinion has been made by a body other than any of the parties to such dispute and the opinion will be delivered to that body. The Court has also insisted in the argument that advisory opinions do not have a binding effect on the parties to a dispute underlying the situation brought to it through a request for an advisory opinion.
36. Inasmuch as Guatemala is in agreement with the above statements in general, a word of caution must be advanced in the current proceedings primarily because of the manner in which the questions brought to the Court are drafted.
37. Firstly, the questions raise claims against one State involving charges of exceptional gravity. Whilst the Court has admitted that in such circumstances, the said charges must be proved by evidence that is fully conclusive, advisory proceedings may not be the most suitable procedural framework for that heightened evidentiary threshold to materialise as opposed to contentious proceedings, which require the manifest consent of the involved parties for adjudication.
38. Secondly, both questions target acts, legislation, policies and practices of one specific party to the underlying dispute towards the other and answering will entail assessing that State's conduct devoided of the *greater whole*, which includes reasons – particularly actions from the other party to the underlying dispute – that have motivated many of the said acts, legislation, policies and practices without analysing the conduct of the other party.
39. Therefore, Guatemala contends that the Court must satisfy itself that the principle of consent of States for judicial settlement is not being circumvented and purports that it may need to engage its inherent powers to interpret, constrain and redraft the questions posed to it in order to adjust its findings to the scope of an advisory opinion.
40. Finally, whilst Advisory Opinions are not legally binding as they are not directed to States but to the requesting entity, the Court is well aware of the

weight its opinions carry and cannot distance itself from the impact and potential consequences that its pronouncement may bring about.

5. *Whether the questions raise complex and disputed factual issues which are not suitable for determination in advisory proceedings*

41. Few questions are as contentious, multi-faceted and long-lived as the question of Palestine. In the preceding paragraphs, Guatemala has advanced several arguments advising caution to the Court on that account: The many parties involved, including non-State actors, wrongdoing on both sides of the dispute, the multiplicity of issues at hand such as territorial sovereignty, security concerns, economic, cultural and social considerations, *inter alia*.

42. Likewise, Guatemala has also expressed its concern about the suitability of advisory proceedings for the Court to make findings on the grave charges the questions make toward one State in particular, together with the issue of the potential (in)completeness of the information available to the Court when making its findings.

43. In view of the above, Guatemala invites the Court to proceed in the understanding of its statement of 1971, where it held that “to enable [it] to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues”²⁸ of its own, rather than relying necessarily on expressions of political will rather than demonstrated, objective facts.

²⁸ *Namibia*. para.40

6. *Whether the questions are unclear, vague or too abstract to be answered by the Court*

44. In the above paragraphs, Guatemala has been abundantly clear on the fact that it is inviting the Court to exercise its inherent powers to interpret, constrain or redraft the questions brought to it by the request for an advisory opinion at hand. It does so on the understanding that the “lack of clarity in the drafting of a question does not deprive the Court of jurisdiction. Rather, such uncertainty will require clarification in interpretation, and such necessary clarifications of interpretation have frequently been given by the Court.”²⁹ Thus, it is Guatemala’s view that such an argument would not constitute a *compelling reason* for the Court to decline to answer the request if the questions are interpreted, constrained or redrafted accordingly.

7. *Whether the answer the Court may give will prejudice the negotiation process between the parties of the underlying dispute*

45. The Court, in its *Wall* opinion, indicated that it had considered this type of submission several times in the past. In turn, it answered that “the effect of the opinion is a matter of appreciation”³⁰ and “no matter what might be its conclusions in any opinion it might give, they would have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter.”³¹

46. The Court is surely aware of the distinct and subsequent frameworks for a negotiated outcome of the Palestine question and their current applicability

²⁹ *Wall*, para.38

³⁰ *Western Sahara*, para. 73

³¹ *Nuclear Weapons*, para. 17

to the parties, which include the requirement for the parties to resolve through direct negotiations the matter before the Court. Such a mandatory framework enjoys the endorsement of the international community and of the Security Council.

47. Historically, the Israel-Palestine dispute has had a destabilising effect on the Middle East Region and beyond. It heightens and exacerbates emotions all around the world. Any development will provoke ripples that will resonate and provoke reactions. It's highly likely that the Court's opinion will be used for purposes different than the ones envisaged by the General Assembly when requesting the opinion. Hence, the Court, if it decides to give an advisory opinion, should be precise and unambiguous in the wording of the opinion in order to avoid additional uncertainty.

48. It is for those reasons that Guatemala wishes to request the Court that any advisory opinion it may decide to furnish carefully considers the above-mentioned bilateral negotiations framework and contribute to its prompt implementation.

V. Concluding Remarks

49. The Republic of Guatemala wishes to reiterate its full and unqualified trust in its impartiality and fairness. The current proceedings will undoubtedly further cement the trust of the international community as a whole on the Court.

50. As stated above, the Republic of Guatemala reserves its right to further comment on the questions, the substance of it and the statements made by

other participants in the proceedings at the written comments phase and reinstates that all the arguments made in this written statement are for the purpose of the ongoing proceedings only.

The Hague, July 2023

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