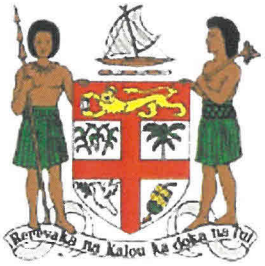
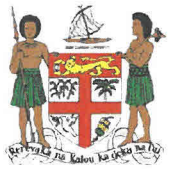


Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem
(Request for an Advisory Opinion)

MEMORIAL OF FIJI

July 2023



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

(Request for an Advisory Opinion)

July 2023

The Government of Fiji has the honour to present the following written submission, with reference to the Court's Order of 3 February 2023, by which member States of the United Nations were invited to present their views regarding the questions referred to the Court in General Assembly Resolution A/RES/77/247 of 20 January 2023, on "Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem".

Fiji's view is that the request for an Advisory Opinion is inappropriate in this case and that there are compelling reasons for the Court to exercise its discretion to decline to respond to this request, even if the Court finds that it does in fact have jurisdiction to do so. The views of the Government of Fiji on the good propriety of the Court exercising its discretion to decline to give an Advisory Opinion are without prejudice to its views on the specific substantive questions that has been put before the Court.

Specifically, the questions referred to the Court are:

(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?"

The Government of Fiji is concerned by several aspects of the mobilization of the Court's advisory jurisdiction in response to the General Assembly resolution. The primary concerns are:

1. Circumvention of legally binding agreements.
2. Circumvention of the principle of consent in UN dispute settlement.
3. Legal obfuscation to instrumentalize the Court.
4. The contentious nature of the Request

1. Circumvention of Legally Binding Agreements.

The Government of Fiji considers it essential to maintain and uphold the binding legal framework established specifically to resolve the Palestinian-Israeli conflict, both by the United Nations Security Council and by the parties to the Oslo Accords. These legal frameworks are binding not just on the parties to the conflict but also upon the international community.

The Peace Process established at the UN-endorsed Madrid conference in 1991 led to partial resolution of the conflict between Israel and Jordan concerning the West Bank, and to a series of agreements negotiated and entered into between Israel and the PLO. The PLO under Chairman Arafat negotiated and signed the "Oslo Accords" between 1993 and 1997 on behalf of all Palestinians, and thus committed to a political process for resolving the conflict. In these agreements, Israel and the PLO (representing the Palestinian people) agreed to a detailed and comprehensive plan for the gradual redeployment of Israeli military forces, and the transfer of powers, responsibilities and authority from the Israeli military government and its Civil Administration to the Palestinian Self-governing Authority.

The Oslo Accords is binding and entail ongoing legal rights and obligations – not only for the parties to the agreements (Israel and the PLO), but also for the USA, Russia, Egypt, Jordan, Norway and the EU (as signatory witnesses), as well as all Members of the UN. The UN General Assembly endorsed the Oslo Accords as the basis for a negotiated political process in Resolution ES-10114 of 8 December 2003 and the agreements were deposited with the UN Secretariat. The Court endorsed the importance of the Oslo Accords in the "Wall" case.[1]

According to Article I of the Oslo Accords Declaration of Principles (1993):

> "It is understood that the interim arrangements are an integral part of the whole peace process and that the negotiations on the permanent status will lead to the implementation of Security Council resolutions 242 (1967) and 338 (1973)."

In the Oslo Accords, the parties accepted that the only way to resolve their dispute is through "the agreed political process". They specifically agreed that, pending a final agreement –

- Israel is entitled to maintain a military government and civil administration in the West Bank and Gaza Strip;
- The West Bank would be divided into three areas – A, B and C. The Palestinians would obtain full control over Area A, Area B would be under joint Israeli/Palestinian control, and Area C would be under exclusive Israeli control; and
- "Settlements", "borders", "Jerusalem" and several other issues would be the subject of permanent status negotiations.

[1] *Construction of a Wall (Advisory Opinion)*, 2004, I.C.J. Reports, p. 158, para.77.

The Oslo Accords seeks to implement principles expressed in the seminal UN Security Council Resolution 242. It acknowledged Israel's rights to secure and recognized boundaries and territorial integrity and did not require complete Israeli military withdrawal from the territories captured in 1967 and did not recognize or even refer at that time to "Palestinian" rights to that territory. In the meantime, the status of the West Bank remains subject of negotiation as between Israel and the PLO.

On 19 November 2003, the Security Council adopted resolution 1515 (2003), by which it "Endorse[d] the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict". According to the Road Map:

> "A two state solution to the Israeli-Palestinian conflict will only be achieved through an end to violence and terrorism, when the Palestinian people have a leadership acting decisively against terror and willing and able to build a practicing democracy based on tolerance and liberty, and through Israel's readiness to do what is necessary for a democratic Palestinian state to be established, and a clear, unambiguous acceptance by both parties of the goal of a negotiated settlement as described below."

The thrust of the Oslo Accords and the Road Map is about mutual performance and good faith negotiation, leading to a consensual outcome reflecting the complex matrix of legal, political and practical interests and concerns. By submitting a Request to the ICJ to opine *solely* on legal sanctions flowing from alleged Israeli non-compliance with international law, without even referring to the rights and obligations of the PLO under the Oslo Accords, seeks to undermine the delicate balance of rights and obligations referred to in the Oslo Accords. The fact that these issues are the subject of binding agreements means the Court should respect those agreements.

The ongoing binding nature and relevance of the Oslo Accords were recently confirmed by the Palestinian Authority, on behalf of the PLO, in Sharm el Sheikh, Egypt. At the invitation of the Arab Republic of Egypt, on 19 March 2023 Jordanian, Israeli, Palestinian and U.S. political and security senior officials met in Sharm El Sheikh. The Government of Israel and the Palestinian Authority reaffirmed, their "unwavering commitment to all previous agreements between them", and "reaffirmed their commitment to all previous agreements between them and reaffirmed their agreement to address all outstanding issues through direct dialogue".

The circumstances bearing upon the Chagos archipelago, and which facilitated the delivery of an Advisory Opinion by the Court concerning decolonization, do not apply here.[2] In the Chagos case, Mauritius challenged its 1966 agreement with the United Kingdom. In contrast, the Palestinian Authority endorses the continuing binding status of the Oslo Accords with Israel. The two situations are clearly distinguishable on these and other grounds.

Israel has made it clear that it does not consent to the Court's jurisdiction to make a determination in relation to issues the subject of its agreements with the PLO. The parties

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[2] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)*, 2019, I.C.J. Reports 1, para.s 28-49.

agreed not to take action outside the framework of negotiations. The Request for an Advisory Opinion is a legal maneuver that circumvents obligations imposed on the PLO by the Oslo Accords. It would reshape those Accords to undermine the responsibilities of the PLO pursuant to them.

The Court should decline to circumvent the binding legal framework established to resolve the Palestinian-Israeli conflict. Accordingly, it should exercise its discretion to decline to give the requested Advisory Opinion.

2. Circumvention of the Principle of Consent in United Nations Dispute Settlement.

The request contained in resolution UNGA A/RES/77/247 asks the Court to address an issue that is fundamentally in dispute with a UN Member State, namely, Israel. It is evident that there is no voluntary consent by Israel to submit the dispute to the Court for judicial settlement.

Fiji is concerned that reliance on the Advisory Opinion procedure in such a case would circumvent and erode the principle enshrined in Article 36 of the Court's statute, which is that contentious cases can only be brought before the Court with the consent of the parties concerned.

In addition, to render an Opinion would conflict with the Court's judicial character. As the Court has previously observed:

> "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." (*Western Suharu, I.C.J. Reports 1975,* p. *25,* paras. 32-33.)

It is important to stress that this Request concerning the Palestinian-Israeli conflict is very different from the Request submitted by the UN General Assembly in 2003. In the *Wall* case, the Court was asked to opine on the legal consequences of a specific, confined action, namely Israel's erection of a security barrier. That Request for an Advisory Opinion is distinguishable from the current Request, as that case dealt only with a part of the greater whole, as stressed by the Court.[3] Here, the Court is being asked to give its views across the broadest range of issues relating to political and armed conflict between Israelis and Palestinians. An Advisory Opinion on the legal consequences of the alleged infringements of international law would go to the very core of their conflict and require the Court to settle law in relation to the whole conflict.

Moreover, the delivery of an Advisory Opinion would establish a dangerous precedent. The Court might just as easily be asked to opine on the self-determination via statehood of peoples in Basque, Kanak, Kashmiri, Kurdish, Papuan, Taiwanese, Tibetan, Xinjian or 100 other countries. Delivery of an Advisory Opinion by the Court pursuant to UNGA

[3] *Construction of a Wall (Advisory Opinion),* 2004, I.C.J. Reports, p. 158, para 49.

A/RES/77/247 would undermine the stature and judicial integrity of the Court.

In addition, advisory proceedings are inappropriate because they do not provide safeguards that necessarily apply to adversarial proceedings, despite the obvious contentious nature of the dispute that this case would consider. Thus, there is no opportunity to appoint ad hoc judges of the nationalities of the parties, nor to appoint counsel, nor to cross-examine evidence. Furthermore, the Request is an exemplar of prejudicial bias. The injustice of lack of safeguards is exacerbated by the terms of the Request, which presume without contest a web of legal violations that themselves demonstrate prejudgments of the facts and of the law.

3. Legal Obfuscation to Instrumentalize the Court.

Legal obfuscation is problematic throughout the Request. It is evident, inter-alia, in the conflation of the legal doctrines of *jus ad bellum* and of *jus in bello*, in the false assertions of violation of the Palestinian right to self-determination, false assertions of Israeli annexation throughout the West Bank, and of Palestinian national territory.

The problem of conflation of the legal doctrines of *jus ad bellum* and of *jus in bello* is apparent in the allegations embodied in the Request. The allegations impugn the entire Israeli occupation despite its legality in accordance with *jus ad bellum*. Controversy over Israeli application of *jus in bello* should not be conflated with and does not equate to negation of the rights of the occupier under *jus ad bellum*.

Under *jus ad bellum*, the presence of Israel is legitimate, as is affirmed in UN Security Council Resolutions 242 (1967), 338 (1973) and 2334 (2016). These recognize control by Israel of the presumed occupied territories but do not declare that control *per se* to be a violation of international law. Furthermore, Israel's presence in the West Bank is endorsed by detailed international legal agreements, such as the Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan of 26 October 1994. According to the Oslo Accords, the final status of the territories is subject to negotiations. Various peace proposals negotiated between the parties have all recognized the potential for territorial exchanges, including the letter from US President Bush to Israeli Prime Minister Sharon of 14 April 2004.

The Request also asks for legal consequences against Israel to flow from *"prolonged occupation"*. While Israel is occupying a remainder of territories over which it gained control in self-defense in June 1967, the mere fact of occupation does not entail illegality. Control over much of those territories was handed back following the conclusion of an Egypt-Israel peace agreement of 26 March 1979 based on the 1978 Camp David Accords. (Israeli control over the Gaza Strip was unilaterally relinquished and handed by Israel to the Palestinian Authority in 2006 also, despite the lack of a final status peace agreement. The consequent continuing acts of aggression against Israel emanating from the Gaza Strip are well-known.) Israel has expressed and demonstrated willingness to cede control over territory in return for peace. International law imposes no constraint on the duration of occupation. The right of occupation continues throughout an armed conflict and endures until it is resolved.

The illegal South African presence in Namibia is not comparable, as that situation involved a League of Nations Class C Mandate in Southwest Africa (Namibia) granted to South Africa in 1915 and then terminated in 1966 under UN General Assembly Resolution 2145(XXI). The General Assembly resolution rendered the continuing South African presence illegal. In the current situation, there is no mandate and no termination of it. The Israeli presence is legal.

The Request also refers to *"annexation"* in the context of the West Bank, but the only territory annexed is East Jerusalem. The situation concerning East Jerusalem is complex and the Court cannot decide this issue unless it is presented with extensive, objective and verified legal and historical facts. The previously united city of Jerusalem was recommended by the UN General Assembly in 1947 to become an international condominium, but East Jerusalem was illegally invaded by Jordan in 1948 and then taken from Jordan by Israel in legitimate self-defense in 1967, then *de facto* annexed and reunited by Israel in 1980, and then passed symbolically by Jordan to the PLO in 1988. A substantive Jewish population resided in East Jerusalem for centuries; it has been the Jewish people's historic capital for more than 3000 years. West Jerusalem was built by Jews and has been under Israeli jurisdiction and control since 1948 and was treated as being under Israeli sovereignty in Security Council Resolution 242, which referred to trading peace for only those territories occupied by Israel in 1967. Although the Security Council in 1980 referred to the "Holy City of Jerusalem" and asserted that Israel's *de facto* annexation of the city was an infringement of its obligations as the occupying power, that resolution concerned East Jerusalem only. Furthermore, allegations that Israel illegitimately annexed East Jerusalem presume that international law prohibits annexation in any circumstances, including even reunification of a national capital city.

The Request for an Advisory Opinion also alleges *"discriminatory legislation and measures"*. Vague reference to Israel's alleged "adoption of related discriminatory legislation and measures" is indeterminate and prejudicial. Application of *jus in bello* entails legislation and measures distinct from the municipal law of Israel. To apply Israeli domestic law would amount to *de facto* annexation. Furthermore, Israel can depart from applying prior Jordanian law to the extent needed to meet the security needs of the occupying power.[4] It would be incompatible with the judicial function for the Court to prosecute the case by actively selecting so-called "discriminatory" measures and then actively selecting standards to compare.

The Request also refers to *"settlement (...) of Palestinian territory"*, using language that obfuscates the lawful status of that territory. International law prohibits the forced movement of civilian population into occupied territory but does not prohibit civilian migration *per se*.[5] Furthermore, *"Palestinian territory"* is a political concept without legal specificity. Security Council Resolution 242 does not rule out Israel's legitimate territorial claims to some of those territories, because it did not recommend withdrawal from all of those territories. Moreover, it was Jordan, not the Palestinians, who made claims to the territory originally.

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[4] Geneva Convention IV, Article 64.
[5] Geneva Convention IV, article 49.6.

The sovereignty of these territories is, arguably, *in abeyance* until such a time as a peace agreement is reached. The Court was careful, in 2004, to avoid deciding the sovereign status of these territories, except to determine that they are not, at present, part of the sovereign territory of Israel. The legal status of West Bank/Judaea and Samaria occupied by Israel has never been determined. Moreover, to decide this issue would require the Court to examine the complex history of the region from 1920 onwards, an exercise that goes arguably beyond the scope of the Request. It is relevant to mention that Article 2 of the Mandate for Palestine, created by the Council of the League of Nations in 1922, carries legal weight. It recognized the rights of the Jewish people in its legal obligation to ensure the establishment of the Jewish national home in the territory between the Mediterranean and the Jordan River. The Mandate included in Article 6 a right to immigration and settlement for the Jewish people in that territory.[6]

The international law principle of "acquired legal rights", constituted part of the transitional arrangements from the system of Mandates under the League of Nations to the system of Trusteeships under the UN Charter. Article 80 of the UN Charter continued the rights of Jewish and other peoples under the Mandates system. When the British unilaterally terminated their responsibilities under the Mandate and the Israel was proclaimed a State on 14 May 1948, rights under the Mandate remained relevant in the mandate territory not yet under Israeli control. The Court has underlined the relevance of the rights bestowed by a Mandate on the people concerned in its Advisory Opinions on *Southwest Africa* [7] and *Namibia*.[8]

Legal obfuscation to instrumentalize the Court is evident in the Request to the Court to opine on "*legal consequences arising from*" "*ongoing violation by Israel*" of "*the right of the Palestinian people to self-determination*". The Court is presumed to agree with the assertions of fact concerning alleged violation of the right to self-determination. There is no doubt that the Palestinian people have a right to self-determination, but it cannot be assumed that Israel is violating Palestinian rights to self-determination:

a. The application of a right to self-determination requires the will of the peoples concerned to be fully established.[9] This condition has not been satisfied, as a result of the failure of Palestinian leaders to hold elections for the last 16 years.
b. Contrary to unsubstantiated frequent assumptions, reliable opinion polls (e.g. December 2021) show that an overwhelming majority of Arabs in East Jerusalem prefer a continuation of Israeli rule.[10]

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[6] Wolfgang Bock, Andrew Tucker, Gregory Rose: will *Two States for Two Peoples? The Palestinian-Israeli Conflict, International Law and European Union Policy*. Sallux ECPM Foundation, 2023, Chapter 7 - West Bank Territorial Sovereignty.

[7] ICJ 11 July 1950 *International Status of South-West Africa Case, Advisory Opinion* ICJ Reports 1950, p. 128 at p.133.

[8] ICJ 21 June 1971 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory Opinion*, ICJ Reports 1971, p. 16 at pp. 33-38.

[9] See para 4 of Opinion No. 4 of the Badinter Commission (Arbitration Commission of the Conference on Yugoslavia), English translation published by the University of Ljubljana at https://www.pf.uni-lj.si/media/skrk_mnenja.badinterjeve.arbitrazne.komisije.1_.10.pdf .

c. Self-determination is a relative right, that must be respected together with other rights, including the rights of the Jewish people to self-determination and to security. This is why a solution to the conflict must be found through a political process.

Under the Oslo Accords, the PLO agreed that "realization of the legitimate rights of the Palestinian people and their just requirements" depends on the fulfillment of conditions, including "direct, free and general political elections", establishing "a democratic basis for the establishment of Palestinian institutions". The Oslo II Interim Agreement (1995) contains current provisions regarding the election of the Authority in its Articles II–IX and Annex 2. It is the non-implementation of these provisions by Palestinian leaders that is currently depriving Palestinians of self-determination.

Even a *prima facie* analysis shows strong reasons why the allegations made in the Request obfuscate the law and make factual assertions that are misleading or false. If the UN General Assembly seeks advice, it must not require the Court to agree first with its own assertions. If the Court was to address these issues, there is a high risk its Advisory Opinion would be based on false information.[11]

4. The contentious nature of the Request

It is important to bear in mind the political background of the Request. The Request is not supported by the majority of UN Member States. On 30 December 2022, the UN General Assembly adopted a Resolution, with 87 votes in favor, 26 against, and 53 abstentions. A minority (87 of 193 Member States) supported the resolution.[12] The motion had been prepared by the Palestinian Authority in the General Assembly's Fourth Committee and the contentious and politicized nature of the resolution was evident in the debates and voting, where a majority of Member States expressed opposition abstained or chose to be absent. The delivery of an Advisory Opinion would deepen these global divisions, entrench partisanship and render the conflict more intractable.

Perhaps the gravest harm of delivering an Advisory Opinion in response to this Request would be the encouraged misuse of international law against its intended proper purposes. It would undermine the *pacta sunt servanda* principle of honoring legal agreements, erode the principle of consent to dispute resolution, compromise the Court's judicial function, and obstruct peaceful settlement of disputes. In the long term, this undermines respect for the rule of law and the integrity of international legal institutions.

To protect UN Charter values for peaceful settlement of disputes and to preserve the integrity and apolitical role of the Court, it would be a sensible exercise of judicial discretion not to give the requested Advisory Opinion.

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[10] https://www.shfanews.net/post/102082

[11] False information was relied on in the "Wall" case, as shown by the Israeli Supreme Court in its judgement in Maraábe et al v. Prime Minister of Israel et al, Supreme Court of Israel H.C.J. 7957/04, 15 September 2005.

[12] https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/690/18/PDF/N2269018.pdf?OpenElement