DISSENTING OPINION OF VICE-PRESIDENT SEBUTINDE

The Court has jurisdiction to entertain the request for an advisory opinion — However, in exercising its discretion judiciously and maintaining the integrity of its judicial role, the Court should have refrained from rendering the Advisory Opinion requested — The Advisory Opinion omits the historical backdrop crucial to understanding the multifaceted Israeli-Palestinian dispute and is tantamount to a one-sided "forensic audit" of Israel's compliance with international law — The Advisory Opinion does not reflect a balanced and impartial examination of the pertinent legal and factual questions — It is imperative to grasp the historical nuances of the Israeli-Palestinian conflict, including the competing territorial claims of the parties in former British Mandatory Palestine, as well as the previous and ongoing efforts to resolve the conflict through the negotiation framework identified by the Security Council — The Court lacks adequate, accurate, balanced and reliable information before it to enable it to judiciously arrive at a fair assessment and conclusions on the disputed questions of fact — The Advisory Opinion not only circumvents Israel's consent to the Court's resolution of the issues involved, but also circumvents and potentially jeopardizes the existing internationally sanctioned and legally binding negotiation framework for the resolution of the Israeli-Palestinian conflict — The Advisory Opinion also contains several shortcomings, in particular with respect to its answer to Question 2 — The timeline proposed by the Court for Israel's withdrawal from the occupied territories is impracticable and disregards the matters agreed upon in the existing negotiating framework, the security threats posed to Israel and the need to balance competing sovereignty claims — The Court's application of the principle of full reparation is not appropriate in the circumstances of the Israeli-Palestinian conflict — The Court has misapplied the law of belligerent occupation and has adopted presumptions implicit in the question of the General Assembly without a prior critical analysis of relevant issues, including the application of the principle of uti possidetis juris *to the territory of the former British Mandate, the question of Israel's borders and its competing sovereignty claims, the nature of the Palestinian right of self-determination and its relationship to Israel's own rights and security concerns — The only avenue for*

a permanent solution to the Israeli-Palestinian conflict remains the negotiation framework set out in the United Nations and bilateral agreements.

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I. INTRODUCTION

1. I agree that the Court has jurisdiction pursuant to Article 65, paragraph 1, of the Court's Statute, to entertain the request for an advisory opinion by the General Assembly, and have voted in favour of paragraph 285, subparagraph (1), of the operative clause. Regrettably, I find myself unable to concur with the majority in issuing the Advisory Opinion, for the reasons

detailed in this dissenting opinion. In my view, the Court, in exercising its discretion judiciously and maintaining the integrity of its judicial role, should have refrained from rendering the Advisory Opinion requested. The framing of the questions in resolution 77/247 assumes certain legal and factual conclusions, thereby precluding a thorough and balanced examination of the Israeli-Palestinian conflict's distinctive historical background. Furthermore, most statements in the Court dossier present a unilateral perspective of the conflict, which reinforces the imbalanced approach in the Court's Advisory Opinion. For example, whilst the questions presume that there is an "ongoing violation by Israel of the right of the Palestinian people to self-determination"; and that "since 1967, Israel has unlawfully 'occupied' territory" that previously comprised British Mandatory territory, the Court has not received arguments or evidence on the territorial scope (i.e. borders) of the State of Israel as on the eve of independence; nor of Israel's competing territorial claims in relation to the disputed territory. These are issues that must first be addressed before the legal consequences of the alleged occupation of territory by Israel, or the territorial scope of Palestinian self-determination, can be determined.

2. Furthermore, the Advisory Opinion, while addressing key legal matters and factual determinations central to the conflict — including Israel's alleged occupation, annexation of the disputed territories, and the Palestinian right to self-determination — omits the historical backdrop that is crucial to understanding this multifaceted dispute. As a result, the Advisory Opinion is tantamount to a one-sided, "forensic audit" of Israel's compliance or non-compliance with international law, that does not reflect a comprehensive, balanced, impartial and in-depth examination of the pertinent legal and factual questions involved. It also overlooks the intricate realities and history of the territories and populations within modern-day Palestine, specifically the areas referred to as the "Occupied Palestinian Territories" (OPTs). To be able to render an opinion that is both substantive and equitable, and that genuinely aids the General Assembly and Security Council in resolving the Israeli-Palestinian conflict peacefully and permanently in line with the UN Charter, it is essential to thoroughly examine these issues, informed by the relevant principles of international law, including those I highlight in this dissenting opinion. In this regard, the observation by Judge Rosalyn Higgins in her separate opinion in the *Wall* Advisory Opinion, is particularly poignant to the questions addressed in the present Advisory Opinion, as the Court has clearly adopted a similar approach in the present case[1].

[1] "The law, history and politics of the Israel-Palestine dispute is immensely complex . . . Context is usually important in legal determinations . . . I find the 'history' as recounted by the

3. I must express my regret that, due to the constrained time frame that the Court has allotted to the preparation of individual opinions, my dissenting opinion cannot provide a comprehensive analysis of every aspect of the Advisory Opinion that I find objectionable. Therefore, I have opted to focus on the elements that I deem to be of utmost significance.

II. Historical Context of the Israeli-Palestinian Conflict

A. The Origin of the Israeli-Palestinian Conflict

4. Before addressing the questions raised by the General Assembly, it is imperative to grasp the historical nuances of the Israeli-Palestinian conflict and to acknowledge the sustained efforts of United Nations bodies tasked with upholding international peace and security in their pursuit of a durable resolution to this conflict. The Israeli-Palestinian conflict can be traced back to the conflicting sovereignty claims over the territory comprising British Mandatory Palestine in 1947. The Jewish people view this area as their historical homeland[2], while Palestinian Arabs and their allies regard it as the homeland of the Palestinian Arabs[3]. The pan-Arab viewpoint sees the heart of the conflict in the displacement of Palestinian Arabs from that territory and Israel's subsequent territorial gains over the same. Israel is, in their view, often cast as inherently aggressive and expansionist and a key source of regional turmoil. Their opposition to Israel is rooted in the pan-Arab belief that Palestinians are an essential part of the Arab world's unity[4], and that Palestine, as their homeland, should remain undivided. This stance is bolstered by the conviction that Palestinian Arabs are a homogeneous indigenous people that have a profound connection to the disputed territory and an inalienable right to return thereto and to exercise self-determination therein[5].

Court . . . neither balanced, nor satisfactory." (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, separate opinion of Judge Higgins, p. 210, para. 14 and p. 211, para. 16.)

[2] See Israeli Declaration of Independence, 1948; Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993, Art. V; Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995, Art. XXXI (6).

[3] The Palestinian National Charter, Art. 1, provides that "Palestine is the homeland of the Arab Palestinian people; it is an indivisible part of the Arab homeland, and the Palestinian people are an integral part of the Arab nation".

[4] *Ibid.* This article establishes the Palestinian identity in the context of the broader Arab nations and asserts the indivisibility of Palestine as the homeland of the Palestinian people.

[5] *Ibid.* Article 5 provides,

5. The Jewish people, on the other hand, have an ancient history over the same disputed territory known during the British Mandate, as "Palestine" and after independence, as Israel. Their claim to indigeneity is based on the continuous historical and cultural ties that existed long before the Balfour Declaration of 1917 or the British Mandate of 1922, or the establishment of Israel as an independent State in 1948. Their claim to this territory dates back to the ancient Kingdom of Israel 3,000 years ago. Their bond to the land has persisted despite the adversities, persecution and diaspora the Jewish people have faced over millennia. Israel contends that the essence of the conflict is not about competing territorial claims, as such, but rather the pan-Arab denial of Israel's existence and legitimacy as an independent, non-Arab State; a region perceived as belonging exclusively to the Arabs. According to Israel, its adversaries aim to eradicate its existence as a nation, and therefore, Israel's actions are purely defensive, aimed at safeguarding its sovereignty against those existential threats[6].

6. Notwithstanding the differing perspectives on its origins and nature, the Israeli-Palestinian conflict involves complex historical, cultural, ideological and territorial challenges involving multiple States and non-State actors. In my view, before answering the questions posed by the General Assembly, it is imperative to grasp the historical nuances of the Israeli-Palestinian conflict, including the competing territorial claims of the parties in former British Mandatory Palestine, as well as the previous and ongoing efforts to resolve the conflict through the negotiation framework identified by the Security Council. While acknowledging Arab claims to the land, it is crucial to recognize that Jews in Israel are not settler colonists either. Both Jewish and Arab connections to the region are deeply intertwined. Achieving a permanent solution to the conflict requires carefully negotiated agreements between the parties involved, rather than unilateral declarations and stances. Judicial recommendations based upon one-sided narratives and made in a contextual vacuum, are least likely to assist the United Nations General Assembly or the Security Council to achieve this noble goal.

B. Competing Territorial Claims over the Territory of Former Mandatory Palestine

7. To answer the questions posed by the General Assembly, it is necessary to appreciate the competing historical and territorial claims of the inhabit-

"The Palestinians are those Arab nationals who, until 1947, normally resided in Palestine regardless of whether they were evicted from it or have stayed there. Anyone born, after that date, of a Palestinian father — whether inside Palestine or outside it — is also a Palestinian."

[6] Written Statement of Israel.

ants of the territory previously known as British Mandatory Palestine. The history of Palestine and Israel did not start from the Balfour Declaration of 1917 or the British Mandate of 1922, or the Declaration of Independence of Israel in 1948. Rather, the history of the people residing in the territory formerly known as British Mandatory Palestine, spans millennia, as briefly described below.

The Jewish nation

8. Contrary to popular opinion, available evidence shows that as early as 1200 BCE, the Jewish people existed in the territory known as present-day Israel (also known during the British Mandate of 1922-1947 as "British Mandatory Palestine") as a cohesive national group with a well-established and formed culture, religion and national identity as well as a physical presence which has been maintained through the centuries despite the devastating impacts of conquests and their dispersion into exile. Ancient Israel existed between 1000-586 BCE with current archaeological evidence[7]. Ancient Israel was divided into two provinces or kingdoms: the northern kingdom called Israel with its capital being Samaria; and the southern province of Judea or Judah (*Y'hudah* in Hebrew) with its capital as Jerusalem. Over time, the ancient land of Israel was subjected to various conquests and occupations by stronger kingdoms, including the Babylonian empire (586-539 BCE), the Persian Empire (539-332 BCE), the Hellenistic era (332-167 BCE), the Hasmonean Dynasty (167-63 BCE), the Roman Empire (63 BCE-324 CE), the Byzantine Empire (324-638 CE), the Arab Caliphate

[7] There is substantial evidence that Jewish people lived in the region of ancient Israel between 1000-586 BCE. This period corresponds to the era of the United Monarchy under Kings Saul, David and Solomon, and the subsequent divided kingdoms of Israel and Judah. The evidence includes archaeological findings in the City of David. Excavations in Jerusalem's "City of David" have uncovered structures, fortifications and artifacts dating to the time traditionally associated with the reign of King David. An inscription found at Tel Dan mentions the "House of David", providing extra-biblical evidence for the Davidic dynasty. Mesha Stele (also known as the Moabite Stone) is an artifact from the ninth century BCE that references the Kingdom of Israel and its interactions with neighbouring Moab. Ostraca (pottery shards with inscriptions) found at Lachish dating to the late seventh century BCE provide insights into the administration and military affairs of the Kingdom of Judah. Numerous artifacts, including pottery, seals and inscriptions, have been found throughout Israel and Judah. These artifacts provide evidence of a settled, literate society engaged in trade, agriculture and governance. The Hebrew Bible (Old Testament) offers detailed accounts of the history, culture and governance of the Israelites during this period. While these texts are religious in nature, many scholars consider them valuable historical documents. Assyrian inscriptions and annals mention the Kingdoms of Israel and Judah, including interactions, conflicts and tributes. For example, the Black Obelisk of Shalmaneser III depicts Jehu, king of Israel, paying tribute to the Assyrian king. These combined archaeological, textual and historical pieces of evidence support the existence and continuous habitation of Jewish people in ancient Israel during the period from 1000 to 586 BCE.

(638-1099 CE), the Crusaders (1099-1291 CE), the Mamluk era (1291-1517 CE), the Ottoman Empire (1517-1917 CE) and British Mandate (1917-1948). Although these conquests led to many Jews being exiled or dispersed to different parts of the world for more than 1,500 years, there was a remnant that continued to live in the land of current Israel until a sizeable number of Jews started to return in 1882 and subsequent years. At that time, no more than 250,000 Arabs lived in the land. In 1948, following the Holocaust, the State of Israel attained its independence or self-determination. The above history is reinforced by recent archaeological evidence obtained through systematic investigation of all the remains of the country's past — from prehistory to the end of Ottoman rule which clearly reveals the historical link between the Jewish people and the Land of Israel, uncovering the remains of their cultural heritage in their homeland. These visible remains, buried in the soil, constitute the physical link between the past, the present and the future of the Jewish people in this part of the world. It can be argued that this history is what informed the civilized community of nations through the United Nations to re-establish the "national homeland of the Jewish people" in 1948[8].

"Syria Palaestina"

9. Territorially, the name "Palestine" applied vaguely to a region that for the 400 years before World War I was part of the Ottoman Empire. In 135 CE, after stamping out the second Jewish insurrection of the province of Judea or Judah, the Romans renamed that province "*Syria Palaestina*" (or "Palestinian Syria"). The Romans did this as a punishment, to spite the "*Y'hudim*" (Jewish population) and to obliterate the link between them and their province (known in Hebrew as *Y'hudah*). The name "*Palaestina*" was used in relation to the people known as the Philistines and found along the Mediterranean coast[9]. The term "Palestine" was used for centuries without a precise geographic or territorial definition. Prior to the establishment of "British Mandatory Palestine", Palestinian Arabs viewed themselves as having a unified identity with the Arabs in the subregion until the twentieth century. When the distinguished Arab American historian, Professor Philip K. Hitti, testified against the Partition of Mandatory Palestine before the Anglo-American Committee in 1946, he remarked:

[8] Encyclopaedia Britannica and J. Liver, ed., *The Military History of the Land of Israel in Biblical Times* (1968).

[9] The Philistines are an ancient tribe who migrated from the Aegean region and settled in the region of Canaan, roughly corresponding to modern-day Gaza Strip, southern Israel, and parts of south-western Lebanon, and who were known for their conflicts with Israel.

"There is no such thing as 'Palestine' in history; absolutely not." The First Palestine-Arab Congress which convened in Jerusalem from 27 January to 10 February 1919 to choose Palestinian representatives for the Paris Peace Conference, adopted a resolution in which it, *inter alia*, considered Palestine as an integral part of Arab Syria[10]. In 1937, Auni Bey Abdul-Hadi, a local Arab leader, told the Peel Commission which ultimately suggested the Partition of Palestine: "There is no such country [as Palestine]! 'Palestine' is a term the Zionists invented! . . . Our country was for centuries part of Syria."

C. The Emergence of "British Mandatory Palestine" in the 1920s

10. Following the defeat of the Ottoman Empire in World War I and subsequent division of Ottoman territories by the League of Nations, British Mandatory Palestine was formed in 1922[11]. The Palestine Mandate was a "Class A" Mandate awarded to Britain, primarily with the charge of reconstituting a national home for the Jewish people, especially those

[10] The First Palestine Arab Congress, held in January and February 1919 in Jerusalem, was a significant event in the history of Palestinian nationalism. This congress brought together representatives from various Palestinian regions to discuss their concerns and aspirations in response to the political changes following World War I and the collapse of the Ottoman Empire. The main resolutions and declarations of the congress included a rejection of the Balfour Declaration of 1917 which supported the establishment of a "national home for the Jewish people" in Palestine. The delegates viewed this as a threat to the rights and existence of the Arab inhabitants of Palestine. The congress demanded the independence of Palestine as part of a larger Arab State. They sought to be free from British control and opposed any form of foreign mandate or colonization. The congress emphasized the unity of Palestine with the greater Arab world, advocating for close ties with neighbouring Arab countries and the creation of a united Arab front to protect their interests. The delegates called for the establishment of a democratic government in Palestine, representative of its Arab majority, and the right to self-determination without external interference. The congress resolved to send a delegation to the Paris Peace Conference to present their demands and grievances, seeking international recognition and support for their cause. The resolutions of the First Palestine Arab Congress laid the foundation for the Palestinian national movement and reflected the aspirations and concerns of the Arab population in Palestine at the time.

[11] The pre-1948 Palestine Mandate comprised the territory that is today known as Israel, the West Bank, the Gaza Strip and Jordan. The area west of the Jordan River constitutes the modern-day State of Israel, the West Bank and the Gaza Strip; whilst the area east of the Jordan River constitutes present-day Hashemite Kingdom of Jordan. In 1922, the British administratively divided the territory, establishing the Emirate of Transjordan in the area east of the Jordan River which later became the State of Jordan in 1946. Thus, by the time the British Mandate ended in 1948, Mandatory Palestine referred to the area west of the Jordan River.

escaping persecution and the Holocaust[12]. Britain issued the Balfour Declaration in 1917 and incorporated it into the Mandate's final approved text in 1922. The Balfour Declaration stated that the British Government "favoured the establishment in Palestine of a national home for the Jewish people" and agreed to use Britain's "best endeavours" to facilitate this, without prejudicing the "civil and religious rights of existing non-Jewish communities in Palestine".

11. The formal establishment of British Mandatory Palestine occurred on 24 July 1922 when the League of Nations granted Britain the mandate[13], which officially came into effect on 29 September 1923. The territorial scope of British Mandatory Palestine originally comprised two regions referred to as Transjordan (in the east) and Palestine (in the west)[14]. The borders of the original Mandatory Palestine were determined by negotiation and agreement as follows. The line in the north emerged from Anglo-French negotiations in 1923. The one in the south was fixed by treaties in the mid-1920s between Britain and the new nation of Saudi Arabia. The border between the Mandate of Palestine and the Mandate of Mesopotamia (Iraq) was of little immediate importance, given that the line was in the middle of an uninhabited desert and Britain controlled both sides. That line was finally fixed through an exchange of letters in 1932. The eastern part of Mandatory Palestine (which constitutes 80 per cent of the territory and was known as "Transjordan") remained under the British administration until 25 May 1946, when it became the independent kingdom of Transjordan and was later renamed Jordan. The western part of Mandatory Palestine (which constitutes 20 per cent of the territory and was referred to as "Palestine") remained under the British Mandate until May 1948 when Britain ended the Mandate. It is this latter territory comprising 20 per cent of the original Mandate of Palestine (known today simply as "Palestine") that remains under contention in the Israeli-Palestinian conflict.

D. The Partition of Mandatory Palestine and Proposal for a "Two-State Solution"

12. The proposal for the creation of a two-State solution in the territory of British Mandatory Palestine (one for the Jewish population and the other for the Arab population) has been a recurrent item on the United Nations agenda but has repeatedly been rejected by the Arab population living in the territory, as well as by Israel's Arab neighbours. Following the breakup of

[12] See British Mandate for Palestine, *American Journal of International Law (AJIL)*, Vol. 17, pp. 164 and 170 (Supp. 1923) (hereinafter "Palestine Mandate").
[13] Article 22, paragraph 4, of the Covenant of the League of Nations.
[14] See map in Figure 1, p. 886.

the Ottoman Empire after World War I, the League of Nations created several mandates over the territories formerly governed by the Ottoman Empire, including the one described immediately above[15]. Seventeen years later, in 1936, the Arabs rebelled against Britain as mandate holder for Palestine and Mesopotamia (present-day Iraq). The Peel Commission[16], a task force established by Britain to ascertain the cause of the Arab rebellion, found that the primary reason for the hostilities was the conflicting national aspirations of Jews and Arabs living in the territory: For, while the Jewish community sought to establish a national home in Palestine, as promised by the Balfour Declaration of 1917 and facilitated by the British Mandate, the Arab community, for their part, sought to establish their own national State and opposed the increasing immigration of Jews to Palestine and their acquisition of land, fearing displacement and loss of political and economic control. The Arabs feared that the growing Jewish population would eventually dominate the region, leading to the displacement and loss of Arab livelihoods. The Commission also found that economic disparities and competition for resources between Arabs and Jews, further fuelled tensions between the two communities. The Jewish community often had better financial support from abroad and more advanced agricultural techniques, which sometimes led to disparities in economic development and job opportunities. The Commission also noted that British policies and the terms of the Mandate, which aimed to facilitate the establishment of a Jewish national home while also safeguarding the rights of the Arab population, were inherently contradictory and difficult to implement effectively.

13. The Peel Commission concluded that these conflicting aspirations were irreconcilable under the existing Mandate and proposed a "partition plan" as a potential solution, suggesting the creation of separate Jewish and Arab States with a continued British Mandate over key areas[17]. However, this proposal was ultimately rejected by the Arab population, leading to

[15] In April 1920, the Mandates for Palestine and Mesopotamia (present-day Iraq) were assigned to Great Britain by the League of Nations, pursuant to Article 22, paragraph 4, of the Covenant of the League of Nations. This Article provided that

> "[c]ertain communities, formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone".

France was assigned the Mandate to govern Syria, including Lebanon.

[16] The Peel Commission, officially known as the Palestine Royal Commission, was established by the British Government to investigate the causes of the Arab revolt in Mandatory Palestine and to propose solutions. The Commission issued its report and recommendations to the British Government on 7 July 1937.

[17] In 1937, the Peel Commission recommended the partition of Palestine into separate Jewish and Arab States, with a continued British Mandate over a corridor including Jerusalem

continued conflict. Since then, the United Nations, has espoused the idea of a two-State solution based on consensual negotiations and agreement between the Palestinian Jews and Arabs, as the only viable option for lasting peace and security in that part of the world. While Israeli leadership has been open to the concept, Palestinian Arabs and neighbouring Arab States have consistently rejected the idea of a Jewish State coexisting with an Arab State on at least seven occasions, as shown below.

Figure 1.

14. *First rejection in 1937*: Pursuant to the recommendations of the Peel Commission in 1937, the British Government offered the Palestinian Arabs 80 per cent of Mandatory Palestine (Transjordan), and the Jews the remaining 20 per cent (Palestine) in a suggested split that was heavily in favour of the former. Despite the tiny size of their proposed State, the Jews voted to accept this offer, but the Arabs rejected it and resumed their violent rebellion against the British Mandate. In 1946, however, the territory known as Transjordan gained independence from Britain on 25 May 1946. This event marked the end of the British Mandate over that part of the territory and

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and Bethlehem. Key points of the Peel Commission's partition plan included the creation of a Jewish State would comprise roughly one third of Palestine, including the fertile coastal plain and the Galilee region; an Arab State that would consist of the remaining two thirds, including the central hills and the Negev Desert; and a small area, including Jerusalem, Bethlehem and a corridor to the port of Jaffa, that would remain under British control due to its religious significance and mixed population. The plan also included recommendations for population transfer, suggesting the voluntary or compulsory movement of Arabs from the proposed Jewish State and Jews from the proposed Arab State to reduce friction between the two communities. Although the British Government did not implement the Peel Commission's recommendations, the idea of partition influenced future proposals for resolving the conflict in Palestine.

the establishment of the Hashemite Kingdom of Transjordan, with the Emir Abdullah becoming its first king. The country was later renamed the Kingdom of Jordan.

15. *Second rejection in 1947*: Ten years later, in 1947, after Transjordan (comprising 80 per cent of the original mandatory territory) had broken away and gained independence, the United Nations General Assembly through resolution 181 (1947) again called for the establishment of two States (one Jewish and one Arab), this time, in the remaining 20 per cent of the territory of the British Mandate, with Jerusalem remaining under international administration ("*corpus separatum*")[18]. The proposal which was initially accepted by the Jewish leadership[19] as a compromise for establishing an independent Jewish State, was rejected by the Arab community who were essentially opposed to the creation of a Jewish State at all in the region. Unable to resolve the territorial issue, Britain withdrew its Mandate from Palestine on 14 May 1948, leaving the thorny issue to be resolved by the United Nations and the conflicting parties within the region. Contemporaneously with the British withdrawal, the Jewish leadership in Palestine declared the creation of an independent State of Israel as a national homeland for Jews and a haven for Jews fleeing the Holocaust[20]. The Declaration referenced the Balfour Declaration of 1917 and the United Nations General Assembly resolution 181, which recommended the partition of Mandatory Palestine into Jewish and Arab States. The Declaration mentioned the creation of the State of Israel, asserting the Jewish people's right to establish their own State in their ancestral homeland with immediate effect. The Declaration also outlined the principles upon which the new State would be founded, including the guarantee of civil rights for all inhabitants regardless of religion, race, or gender. Notably, the Declaration calls for peace and co-operation with neighbouring Arab States and extends an invitation to the Arab inhabitants of Israel to participate in the building of the State based on full and equal citizenship. The document concludes with an appeal to the Jewish people worldwide to support the new State and to the international community to recognize and assist in its development.

16. *Third rejection in 1967*: Twenty years later, in what is known as the "Six-Day War", Israel launched a series of pre-emptive air strikes against Egypt on 5 June 1967 in response to the escalating tension and military threats from its Arab neighbours (namely, Egypt, Syria and Jordan) who once again, sought to eliminate the Jewish State from the region[21]. Israel achieved a swift and decisive victory in this war, recapturing

[18] General Assembly resolution 181 of 29 November 1947.

[19] Represented by the Jewish Agency.

[20] The Israeli Declaration of Independence was proclaimed on 14 May 1948.

[21] Escalating tensions and hostilities leading to the Six-Day War are attributed, *inter alia*, to a steady increase in border skirmishes and hostilities between Israel and its Arab neighbours;

East Jerusalem and the West Bank from Jordan; the Golan Heights from Syria; Gaza and the Sinai Peninsula from Egypt. This recaptured territory has since been referred to as the "Occupied Palestinian Territories" or "OPTs" (although it should perhaps be better referred to as "Disputed Palestinian Territories"). From this point onwards, these Arab States had a direct territorial dispute with Israel quite apart from their commitment to the Palestinian cause. The Israeli Government was split over what to do with this new territory. Half of the Government wanted to return the West Bank to Jordan and Gaza to Egypt in exchange for peace. The other half wanted to give that territory to the region's Arabs, who had begun referring to themselves as the Palestinians, in the hope that they would ultimately build their own State there. Neither initiative got very far. A few months later, the Arab League met in Sudan and issued its "Three-Nos": no peace with Israel, no recognition of Israel, no negotiations with Israel. Again, the two-State solution was flatly rejected by these Arab States.

17. *Fourth rejection in 1969-1970*: Upon ending a ceasefire with Israel, Egypt with the military support of the Soviet Union, initiated renewed attacks against Israel between March 1969 and August 1970 in what became known as the "War of Attrition"[22]. Egypt's objectives during this war included the recapture of the Sinai Peninsula from Israeli forces which had seized control of the peninsula during the Six-Day War; the weakening of Israeli morale and economy through continuous military assaults thereby pressuring it to make territorial and political concessions; and the bolstering of Arab morale and unity against Israel's existence and military dominance in the region. This war ended with Israel's eventual acceptance of a complex ceasefire proposal in August 1970. However, the "cold peace" between the two countries was short-lived as three years later, Egypt, assisted by Israel's other Arab neighbours, launched a surprise attack on Israel.

18. *Fifth rejection in 1973*: From 6 to 25 October 1973, a coalition of Arab States led by Egypt and Syria launched a surprise military attack on the State of Israel, in what is known as the "Yom Kippur War"[23]. The surprise attack which began on Yom Kippur (the Jewish day of

frequent clashes in the demilitarized zones and along the borders; Egypt's blockade of the Straits of Tiran, considered by Israel as an act of war; a build-up of Arab military forces in the Sinai Peninsula; increased political pressure and rhetoric from various Arab leaders calling for the destruction of the State of Israel.

[22] While the Egyptian-Israeli front was the main battleground, there were smaller eastern fronts involving Jordanian, Syrian, Iraqi and Palestinian forces against Israeli forces.

[23] This war is also known as the Ramadan War, the October War, or the Fourth Arab Israeli War.

repentance) and which coincided with the Islamic month of Ramadan, was intended to challenge Israel's victory in the Six-Day War of 1967 whereby Israel had acquired territory four times its previous size[24]. The war which involved the United States and Soviet Union on opposite sides, had far-reaching implications and ultimately led to negotiations on terms more favourable to the Arab States. The Israelis recognized that, despite impressive operational and tactical achievements on the battlefield, there was no guarantee that they would always dominate the Arab States militarily, as they had done consistently throughout the First, Second and Third Arab-Israeli Wars; these changes paved the way for the Israeli-Palestinian peace process. At the 1978 Camp David Accords that followed the war, Israel returned the entire Sinai Peninsula to Egypt, which led to the subsequent 1979 Egyptian-Israeli peace treaty, marking the first instance that an Arab country recognized Israel as a legitimate State.

19. *Sixth rejection in 2000*: Israeli Prime Minister Ehud Barak met at Camp David, with Palestine Liberation Organization (PLO) Chairman Yasser Arafat in 2000, to conclude a new two-State plan. Barak offered Arafat a Palestinian State in all of Gaza, and 94 per cent of the West Bank, with East Jerusalem as its capital. The Palestinian leader flatly rejected the offer. In the words of President Bill Clinton of the United States, "Arafat was here 14 days and said no to everything." Instead, the Palestinians launched a bloody wave of suicide bombings that killed over 1,000 Israelis and maimed thousands more, on buses, in wedding halls and in pizza parlours.

20. *Seventh rejection*: In 2008, Israel tried yet again to table the idea of a two-State solution before the new leadership of the PLO. Prime Minister Ehud Olmert went even further than Ehud Barak had, expanding the peace offer to include additional land to sweeten the deal. Like his predecessor, the new Palestinian leader, Mahmoud Abbas, turned the deal down.

21. To date, Israel still occupies the West Bank and the whole of Jerusalem, whilst Arab Palestinians now claim East Jerusalem as the capital of their potential or future Palestinian State. Most Palestinian refugees and their descendants live in Gaza and the West Bank, as well as in neighbouring Jordan, Syria and Lebanon. Israel is reluctant to allow them to return to their homes claiming that this would overwhelm the country and threaten Israel's existence as a Jewish State. Meanwhile, in the past 50 years the

[24] Egypt had lost 23,500 square miles (60,865 km^2) in the Sinai Peninsula and the Gaza Strip, although Israel had withdrawn from the Peninsula three years prior. Jordan had lost the West Bank and Eastern Jerusalem, and Syria had lost the strategic Golan Heights.

number of Jews returning to Israel has increased and Israel has built settlements in the disputed territories where more than 700,000 Jews now live. These settlements have been declared "legally invalid" by the Security Council[25], although Israel disagrees. In 2005 Israel withdrew its troops and settlers from the Gaza Strip, while retaining control over the airspace, shared border and shoreline, because of "security concerns". However, the United Nations still considers the Gaza Strip territory occupied by Israel precisely because Israel retains significant control over Gaza's borders, airspace and maritime access, as well as the movement of goods and people into and out of the territory. Politically, Gaza has since 2006 been administered by Hamas[26], an Islamist extremist group committed to the destruction of the State of Israel and designated by several States as a terrorist organization. Since then, Hamas militants and their allies have fought several wars with Israel, which along with Egypt has maintained a partial blockade on the Gaza Strip to isolate Hamas and to try to stop their attacks and indiscriminate firing of rockets towards Israeli cities. The Hamas attack on Israel of 7 October 2023 in which several Israeli citizens were murdered and others taken hostage, ushered in the latest war between Israel and Hamas and its allies (including Hezbollah in Lebanon). The United States, European Union and other Western countries have all condemned the Hamas attack on Israel and some have given military support to Israel, whilst extending humanitarian assistance to the Palestinian civilians who continue to suffer huge casualties.

E. Permanent-status Issues That Remain Unresolved

22. Key issues that have historically remained in contention amongst the populations living in the former British Mandatory Palestine, include, (i) the issue of a possible "two-State solution", including when and how an independent Palestinian State could be created in the disputed territories

[25] The United Nations Security Council resolution 2334 (2016) states that Israel's establishment of settlements in Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity. These settlements constitute a flagrant violation of international law and a major obstacle to achieving a comprehensive, just and lasting peace in the Middle East. The resolution calls for an immediate and complete cessation of all settlement activities in the Occupied Palestinian Territory, emphasizing that any changes to the 4 June 1967 lines (including Jerusalem) must be agreed upon through negotiations between the two sides. Additionally, it condemns acts of violence, terrorism and incitement, urging both parties to observe calm and rebuild trust.

[26] In 2006, Hamas won the Palestinian elections and seized control of Gaza the following year after ousting the rival Fatah movement of the West Bank-based President Mahmoud Abbas.

alongside the State of Israel (including determination of the possible borders between the two States and how water, arable land and other natural resources will be shared); (ii) the safety and security of civilian populations in Israel and in Palestine; (iii) whether, when and how Israel should withdraw its military forces and settlements from the disputed territories; (iv) the status of the Holy City of Jerusalem (including whether it should be a shared capital for the two States and how it should be administered); and (v) Palestinian freedom of movement, including the right of Palestinian refugees to return to their homes in the disputed territories. The above issues remain unresolved and are a central part of the context in which the General Assembly's request for an advisory opinion should be understood. A solution to the Israeli-Palestinian conflict would inevitably require that these key issues are addressed and resolved in such a manner as to ensure lasting peace and security for all peoples in the region. Historically, the UN Security Council has identified a negotiation framework as the most viable avenue for achieving a mutually acceptable solution.

III. The Negotiation Framework for the Resolution of the Conflict and the Supporting Role of the United Nations

23. Throughout its history, the United Nations has been vested in trying to find a lasting solution to the Israeli-Palestinian conflict. As stated above, this started in 1947, only two years after the founding of the United Nations, and on the eve of Britain ending its Mandate over Palestine. The General Assembly through resolution 181 (II) (1947) approved a Plan for the Partition of British Mandatory Palestine into three entities that would result in the creation of a Jewish State and an Arab State, with the Holy City of Jerusalem and its immediate suburbs being administered by the United Nations as an international zone or "*corpus separatum*"[27]. As stated above, the said Plan of Partition fell through[28], culminating in the 1948 War of Independence between the Jewish and Arab populations and leading to the eventual abandonment of the Plan. The UN Security Council through resolution 62 (1948) called for "an armistice [to] be established in all sectors of Palestine", and called upon the parties directly involved in the conflict to reach such an agreement[29]. Since then, however, relations between the Jews and Arabs in the former British Mandatory Territories have continued to deteriorate. Nevertheless, the United Nations, in particular the Security Council, has over the years remained seized of the "Palestinian Question",

[27] General Assembly resolution 181 (II) of 29 November 1947.
[28] See paragraphs 15-16 above.
[29] Security Council resolution 62 of 16 November 1948.

desiring to resolve the conflict peacefully and in accordance with its Mandate under the Charter of the United Nations.

24. Over the last 45 years, an international legal framework involving United Nations and bilateral negotiations for the resolution of the Israeli-Palestinian conflict has developed, which is based on the concept of "land for peace", and which does not view the resolution of the conflict as being imposed upon the concerned parties from outside. Peace treaties between Egypt and Israel and Jordan and Israel were signed and implemented in 1979 and 1994 respectively. In 2020, in the context of the Abraham Accords, normalization agreements (equivalent to peace treaties) have been reached between Israel and a diverse list of Arab countries including the United Arab Emirates, Bahrain, Morocco and Sudan. The Israeli presence in the West Bank pending the conclusion of a peace agreement between Israel and the Palestinians is consistent with the international and bilateral frameworks for the resolution of the conflict.

A. Security Council Resolutions 242 (1967) and 338 (1973)

25. International law recognizes negotiation and agreement as the primary mechanisms for resolving international disputes. UN Security Council resolutions 242 (1967) and 338 (1973) establish a framework for peace which has been mutually endorsed and agreed by both parties, and they remain the international framework for resolution of the Israeli-Palestinian conflict. Resolutions 242 and 338 leave open the possibility — indeed probability — of Israeli sovereignty in parts of the West Bank in a final peace agreement. Resolution 242 provides that peace "should" (not "must") include withdrawal of Israeli forces "from territories occupied in the recent [1967] conflict", not from "all the territories occupied" in that conflict. The Security Council's deliberations suggest that this wording was no accident, and the drafting history suggests that many of the drafters intended that withdrawal "is required from some but not all of the territories". Resolution 338 calls upon the parties to implement resolution 242.

26. Resolution 242's "land-for-peace" concept remains the cornerstone of all proposed peace plans to resolve the conflict. It served as a basis for the regional peace initiative in Camp David in 1978; the Israel-Egypt Treaty of Peace of 1979; and the Israel-Jordan Treaty of Peace of 1994. Furthermore, all Israeli-Palestinian agreements, including the Interim Agreement, invoke both resolution 242 and resolution 338. These resolutions have also been invoked in numerous decisions of international organizations relating to the ultimate resolution of the regional conflict. The Security Council and

General Assembly have reiterated on numerous occasions their support for the existing bilateral agreements as the applicable legal framework for settling the Israeli-Palestinian conflict and determining the sovereign status of the territory in dispute. This is evidence which underscores the position both that the relevant framework for a territorial settlement begins with resolution 242, and that any Palestinian right or title to exercise authority over disputed territory (and its inhabitants) is not necessarily exclusive.

B. The Interim Agreements between Israel and the Palestinian Authorities (Oslo Accords)

27. The Oslo Accords[30] are binding bilateral agreements which were entered into by Israel and the Palestine Liberation Organization (PLO), the then official representatives of the Palestinian people, pending a final settlement between the parties, to serve as an irreversible mechanism for reaching a compromise solution acceptable to both parties within the framework of the internationally recognized formula for resolving the regional dispute. According to those agreements, issues to be addressed in permanent status negotiations include "Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours and other issues of common interest". Specifically with respect to recognition of the Palestinian people's right to self-determination, Israel for the first time recognized in the Oslo Accords the PLO as the representative of the Palestinian people, and the Accords reflect the agreed bilateral framework through which Palestinian self-determination can be realized. The Oslo Accords being agreements between subjects of international law (namely Israel and the PLO), bind any successor to the PLO. The Security Council, the General Assembly, the Quartet, the Secretary-General's special envoy, and the subsequent agreements between the parties have all referred to the Oslo Accords and their consistency with applicable UN resolutions. The international and bilateral framework for the resolution of the conflict, establishes a legal basis for Israel's continuing exercise of certain powers and responsibilities in the West Bank which the majority has characterized as "illegal".

28. The Advisory Opinion ignores the *lex lata* international legal framework and has the effect of undermining the international "land for peace" formula set out in UN Security Council resolutions 242 and 338, and of invalidating the bilateral Oslo Accords. I am thus unable to join the majority in that Opinion. The historic peace processes between Israel and its neigh-

[30] Oslo I Accord, officially known as the "Declaration of Principles on Interim Self-Government Arrangements", was signed on 13 September 1993. Oslo II Accord, officially known as the "Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip", was signed on 28 September 1995.

bours show that, in this context, one-time enemies can set aside their differences and resolve their disputes without resorting to force and compulsion. As I have stated before in a previous opinion,

> "a permanent solution to the Israeli-Palestinian conflict can only result from good faith negotiations between Israeli and Palestinian representatives working towards the achievement of a just and sustainable two-State solution. A solution cannot be imposed from outside, much less through judicial settlement."[31]

29. After the Six-Day War of 1967, the Security Council in its resolution 242 (commonly referred to as the "land for peace" framework), affirmed that "the establishment of a just and lasting peace in the Middle East" required the fulfilment of two interdependent conditions, namely the "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict" on the one hand, and the

> "[t]ermination 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"[32].

In resolution 338, which called for a ceasefire in the 1973 Arab-Israeli war, the Security Council again decided 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". This emphasis on the importance of the Israeli-Palestinian and broader Arab-Israeli peace process was subsequently affirmed by the General Assembly, which has emphasized the need to achieve a "just and comprehensive settlement of the Arab-Israeli conflict" (General Assembly resolution 47/64 (D) of 11 December 1992).

30. The international community's focus on encouraging negotiation between the parties resulted in several agreements, including the 1979 peace treaty between Israel and Egypt; the 1994 peace agreement between Israel and Jordan; and the 1993 and 1995 Oslo Accords[33] between Israel and the Palestine Liberation Organization ("PLO"). Most notably, the 1993 Oslo Accords resulted in the recognition by the PLO of the State of Israel and

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[31] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 26 January 2024, I.C.J. Reports 2024 (I)*, dissenting opinion of Judge Sebutinde, p. 40, para. 11.

[32] Security Council resolution 242 of 22 November 1967.

[33] The Oslo I Accord, signed in Washington, DC, in 1993, and the Oslo II Accord, signed in Taba, Egypt in 1995.

the recognition by Israel of the PLO as the representative of the Palestinian people. The Declaration of Principles on Interim Self-Government Arrangements (Oslo I Accord), signed by representatives of both parties, endorsed the framework set out in Security Council resolutions 242 and 338 and expressed the parties' agreement on the need to

> "put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process" (Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993).

31. Although the Oslo Accords have not yet been fully implemented, they continue to bind the parties concerned and to provide a framework for allocating responsibilities between Israeli and Palestinian authorities and informing future negotiations regarding permanent status issues. Since then, the United Nations has repeatedly affirmed the need for negotiations aimed at achieving a two-State solution and resolving the dispute between Israel and Palestine. In 2003, the Security Council, in resolution 1515, "*[e]ndorse[d]* the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict". The Quartet was composed of representatives of the United States, European Union, Russian Federation and United Nations[34]. In that resolution, the Security Council "*[c]all[ed]* on the parties to fulfil their obligations under the Roadmap in co-operation with the Quartet and to achieve the vision of two States living side by side in peace and security"[35]. Another major set of peace negotiations between Israel and the PLO took place from 2007-2008. These negotiations appear to have been extremely close to a peace deal[36]; however, they once again failed[37], and were followed by domestic political change in Israel to a government less open to such a deal.

32. Although attempts at negotiation have periodically continued, including efforts supported by the United Nations and other members of the

[34] Security Council resolution 1515 of 19 November 2003.

[35] *Ibid.*

[36] See e.g. G. Brown: "In 2008, we were inches from peace in the Middle East. I believe it's still within our grasp", *The Guardian*, 9 January 2024, https://www.theguardian.com/commentisfree/2024/jan/09/israel-palestine-gaza-peace-plan.

[37] Reports suggest that the Israeli Prime Minister, Ehud Olmert, offered a peace deal to Palestinian Authority President Abbas, which was rejected. See e.g. *Jerusalem Post*, "Revealed: Olmert's 2008 peace offer to Palestinians", https://www.jpost.com/diplomacy-and-politics/details-of-olmerts-peace-offer-to-palestinians-exposed-314261.

international community[38], there has as of yet been no final negotiated settlement of the Israeli-Palestinian conflict. Nevertheless, the Security Council in 2008 declared its support for continued negotiations between the parties and "*[s]upport[ed]* the parties' agreed principles for the bilateral negotiation process and their determined efforts to reach their goal of concluding a peace treaty resolving all outstanding issues"[39]. In 2016, the Security Council in resolution 2334 recalled both parties' obligations, "*[c]alling* upon all parties to continue, in the interest of the promotion of peace and security, to exert collective efforts to launch credible negotiations on final status issues" and "*[u]rg[ed]* . . . 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"[40].

33. The General Assembly has likewise regularly recalled the Oslo Accords and the Quartet Roadmap in its resolutions regarding the Israeli-Palestinian Conflict. For example, the General Assembly has:

> "*[r]eiterate[d]* its call for the achievement, without delay, of a comprehensive, just and lasting peace in the Middle East on the basis of the relevant United Nations resolutions, including Security Council resolution 2334 (2016), the Madrid terms of reference, including the principle of land for peace, the Arab Peace Initiative and the Quartet road map, and an end to the Israeli occupation that began in 1967, including of East Jerusalem, and reaffirms in this regard its unwavering support, in accordance with international law, for the two-State solution of Israel and Palestine, living side by side in peace and security within recognized borders, based on the pre-1967 borders"[41].

34. Finally, the Court has itself previously recognized the importance of continued negotiations between the concerned parties, as the only viable means to achieving lasting peace and security in the Middle East. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court explained:

> "Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would

[38] See *Vox*, "The many, many times Israelis and Palestinians tried to make peace — and failed", 22 November 2023, https://www.vox.com/world-politics/2023/11/22/23971375/israel-palestine-peace-talks-deal-timeline.

[39] Security Council resolution 1850 of 16 December 2008.

[40] Security Council resolution 2334 of 23 December 2016.

[41] See General Assembly resolution 77/25 of 30 November 2022; General Assembly resolution 76/10 of 1 December 2021; General Assembly resolution 75/22 of 2 December 2020.

emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, *in the Court's view, this tragic 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*."[42] [Emphasis added.]

35. As can be seen from the above history, the relevant organs of the United Nations have consistently envisaged a permanent resolution of the Israeli-Palestinian conflict based on good faith negotiations between Israeli and Palestinian representatives working towards the achievement of a just and sustainable two-State solution. A solution cannot be imposed from outside, much less through judicial settlement. This context must be kept in mind in assessing the current General Assembly's request for an Advisory Opinion.

C. The General Assembly's Request for an Advisory Opinion

36. On 30 December 2022, the United Nations General Assembly adopted resolution 77/247 requesting the Court pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following questions:

"*(a)* What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?

(b) How do the policies and practices of Israel referred to . . . 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?"

[42] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 200-201, para. 162.

37. On 31 May 2023 and 22 June 2023, the Secretary-General of the United Nations, under cover of a letter from the Legal Counsel, transmitted to the Registry a dossier of documents likely to throw light upon the questions asked, pursuant to Article 65, paragraph 2, of the Court's Statute[43]. Fifty-seven States and international organizations filed their written statements pursuant to Article 66, paragraph 4, of the Court's Statute[44]. In addition, 15 participants submitted their written comments on the submitted written statements[45]. Resolution 77/247 has been criticized as having been supported by only 87 Member States of the General Assembly, with the remaining 106 members having abstained or voted against the resolution or simply were absent during the vote. Further criticism has been levelled against the request which is perceived by some as an attempt by a frustrated General Assembly taking over the role of the Security Council, the body that is primarily charged with the responsibility for international peace and security. However, it is not for the principal judicial organ of the United Nations to concern itself with the internal relations between the other organs of the United Nations. The Court need only satisfy itself that the present request was made in accordance with the provisions of the Charter of the United Nations, in particular, Article 96 thereof, as well as Article 65 of the Statute of the Court.

IV. Jurisdiction and Discretion of the Court

A. Jurisdiction

38. Article 65, paragraph 1, of the Court's Statute empowers the Court to render advisory opinions "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". Article 96 of the Charter of the United Nations provides that "[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question". The Court has also previously stated that the questions requested should arise "within the scope of the activities of the

[43] Dossier of documents submitted pursuant to Article 65, paragraph 2, of the Statute.

[44] Türkiye, Namibia, Luxembourg, Canada, Bangladesh, Jordan, Chile, Liechtenstein, Lebanon, Norway, Israel, Algeria, the League of Arab States, Syrian Arab Republic, Palestine, the Organization of Islamic Cooperation, Egypt, Guyana, Japan, Saudi Arabia, Qatar, Switzerland, Spain, Russian Federation, Italy, Yemen, Maldives, United Arab Emirates, Oman, the African Union, Pakistan, South Africa, United Kingdom of Great Britain and Northern Ireland, Hungary, Brazil, France, Kuwait, United States of America, China, The Gambia, Ireland, Belize, Bolivia, Cuba, Mauritius, Morocco, Czechia, Malaysia, Colombia, Indonesia, Guatemala, Nauru, Djibouti, Togo, Fiji, Senegal and Zambia.

[45] Jordan, the Organization of Islamic Cooperation, Qatar, Belize, Bangladesh, Palestine, United States of America, Indonesia, Chile, the League of Arab States, Egypt, Algeria, Guatemala, Namibia and Pakistan.

requesting organ"[46] and that "[i]t is for the Court to satisfy itself that the request for an advisory opinion comes from an organ or agency having competence to make it"[47].

39. Although the Charter of the United Nations has vested the Security Council with the primary responsibility for the maintenance of international peace and security[48], the present request for an Advisory Opinion was authorized by the General Assembly under its agenda item entitled "Israeli practices and settlement activities affecting the rights of the Palestinian people and other Arabs of the occupied territories"[49]. The Court has previously recognized that the General Assembly has been involved with the Israeli-Palestinian question since 1947, when it recommended the Plan of Partition for Palestine[50]. As the United Nations has "permanent responsibility towards the question of Palestine until the question is resolved"[51], it follows that the questions asked in the General Assembly's request for this Advisory Opinion do arise within the scope of its activities in maintaining international peace and security. Therefore, I agree that the Court has jurisdiction to render an advisory opinion in the present case and have accordingly voted in favour of paragraph 285, subparagraph (1), of the operative clause.

B. Judicial Discretion and the Impropriety of Rendering an Advisory Opinion

40. Where advisory jurisdiction has been established, the Court retains the discretion to decline to give an opinion where there are "compelling reason[s]" for it to do so[52]. The Court must "satisfy itself . . . as to the propriety of the exercise of its judicial function"[53] with reference to these compelling reasons. Thus, while "[a] reply to a request for an Opinion should

[46] *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 334, para. 21.

[47] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 145, para. 15.

[48] Charter of the United Nations, Art. 24.

[49] General Assembly, Seventy-seventh Session, "Israeli practices and settlement activities affecting the rights of the Palestinian people and other Arabs of the occupied territories", 30 December 2022.

[50] General Assembly, resolution adopted on the report of the *ad hoc* committee on the Palestinian question, 29 November 1947; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 188-189, para. 129.

[51] General Assembly, Seventy-seventh Session, "Israeli practices and settlement activities affecting the rights of the Palestinian people and other Arabs of the occupied territories, 30 December 2022.

[52] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 20, para. 19.

[53] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 157, para. 45.

not, in principle, be refused"[54], nevertheless, the retention of the discretion of whether to render an advisory opinion "exists so as to protect the integrity of the Court's judicial function as the principal judicial organ of the United Nations"[55]. As observed by Judge Buergenthal in the *Wall* Opinion, quoting what the Court said in *Western Sahara*, the critical question in determining whether or not to exercise its discretion in acting on an advisory opinion request 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"[56].

41. I have voted against subparagraph 2 of the operative paragraph 285 because I am of the view that there are compelling reasons in the present case why the Court should have declined to render the requested advisory opinion. These are as follows:

1. Lack of adequate information before the Court

42. In my view, the Court does not have before it accurate, balanced and reliable information to enable it to judiciously arrive at a fair conclusion upon disputed questions of fact, in a manner compatible with its judicial character[57]. Due to the one-sided formulation of the questions posed in resolution 77/247, coupled with the one-sided narrative in the statements of many participants in these proceedings, some of whom do not even recognize the existence or legitimacy of the State of Israel, the Court does not have before it the accurate and reliable information that it needs to render a balanced opinion on those questions. Most of the participants in these advisory proceedings have, regrettably, presented the Court with a one-sided narrative that fails to take account of the complexity of the conflict and that misrepresents its legal, cultural, historical and political context. By asking the Court to look only at the "policies and practices of Israel", the General Assembly shields from the purview of the Court, the policies and practices of the Palestinian Arabs and their representatives (including non-State actors), as well as those of other Arab States in the Middle East whose interests are intertwined with those of the Palestinian Arabs. As pointed out in Part II of this dissenting opinion (Historical Context to the Israeli-

[54] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 19.

[55] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 113, para. 64.

[56] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, declaration of Judge Buergenthal, p. 240, para. 1, citing *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 28-29, para. 46.

[57] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 28-29, para. 46; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 161, para. 56; and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 103, para. 7.

Palestinian Conflict), these other States have historically played a significant role in the success or failure of efforts at finding a lasting solution to peace in the Middle East, including by either fostering peace agreements between Israel and representatives of the Arab Palestinians (such as the PLO); or by sponsoring or engaging in several wars against Israel, including by simply calling for its annihilation. Without information regarding the policies and practices of Israel's adversaries, the Court is limited in its opinion regarding the various complex issues behind the Israeli-Palestinian conflict and has, as feared, resorted to imposing obligations on Israel, whilst disregarding her legitimate security concerns and the obligations of Israel's Arab neighbours. In my respectful view, this approach is likely to exacerbate rather than de-escalate tensions in the Middle East. In Part VI of this dissenting opinion, I further highlight some of the important international law principles and propositions that the Court could and should have considered and carefully examined before drawing the conclusions contained in its Advisory Opinion.

2. The Advisory Opinion circumvents the existing international negotiation framework

43. The Advisory Opinion clearly circumvents and is likely to jeopardize the existing internationally sanctioned and legally binding negotiation framework for the resolution of the Israeli-Palestinian conflict referred to in Part III of this dissenting opinion. The Court, by addressing in the Advisory Opinion the legal obligations of only one party to the dispute and ignoring the rights and obligations of both parties as envisaged in the Oslo Accords and Road Map, both of which exclude recourse to the Court, clearly circumvents the existing negotiation framework. It is no wonder that the Security Council, the organ of the United Nations charged with the primary responsibility for international peace and security, is not the one that requested the Court for an advisory opinion on the Israeli-Palestinian conflict. That body understands that the complex issues encompassed are best resolved through the existing negotiation framework rather than through the imposition of a solution outside that framework. As recently as 19 March 2023, both Israel and Palestine met with other interested parties in Sharm-el-Sheikh, Egypt, and reaffirmed their "unwavering commitment to all previous agreements between them" and to "address all outstanding issues through direct dialogue"[58]. Again, there was no mention of judicial involvement in any shape or form, notwithstanding that resolution 77/247 had already been adopted.

[58] On 19 March 2023, at the invitation of Egypt, Israeli, Palestinian, Jordanian and American political and security senior officials met to pave a way forward towards the

44. As narrated in Part III of this dissenting opinion, Israel and Palestine painstakingly concluded a series of agreements known collectively as the Oslo Accords in 1993 and 1995, signifying their intention to "put an end to decades of confrontation and to live in peaceful coexistence, mutual dignity and security, while recognizing their mutual legitimate and political rights"[59]. The thrust of the Oslo Accords and Quartet Roadmap is mutual performance and good faith negotiations, leading to a consensual outcome. To that end the parties thereto agreed upon a wide range of interim measures, pending the achievement of a final agreement through good faith negotiations. Some of the interim measures agreed included: (i) Israel's recognition of the PLO as the legitimate Palestinian authority; (ii) powers and responsibilities were transferred from the Israeli military Government and its Civil Administration to the Palestinian Authority, while Israel continued to exercise powers and responsibilities not so transferred; (iii) Palestinian citizens were to hold free and direct general elections of their political leaders; (iv) the West Bank was divided into three areas — A, B and C. The Palestinians would obtain exclusive control over Area A; Israel would retain exclusive control over Area C, and Area B would be under joint Israeli-Palestinian control; (v) lastly, the parties agreed to enter into negotiations to resolve remaining issues including "Israeli settlements in the OPTs"; "borders of the two States"; "the Status and administration of Jerusalem"; and "security, stability and peace"[60]. The Oslo Accords also contained a specific dispute resolution mechanism and do not permit either party to unilaterally resort to external, third-party, or judicial settlements[61]. Since 1993 an elaborate set of arrangements have been put into place to operationalize the Oslo Accords.

45. According to the 2003 Road Map for peace,

> "a two state solution to the Israeli-Palestinian conflict will only be achieved through an end to violence and terrorism, when Palestinian

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peaceful settlement between the Israeli and Palestinian peoples. The parties reaffirmed their commitment to advancing security, stability and peace for Israelis and Palestinians alike, and recognized the necessity of de-escalation on the ground, the prevention of further violence, as well as of pursuing confidence-building measures, enhancing mutual trust, creating political horizon and addressing outstanding issues through direct dialogue (http://il.usembassy.gov/joint-communique-from-the-march-19-meeting-in-sharm-el-sheikh/).

[59] Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, 28 September 1995, Preamble.

[60] Declaration of Principles on Interim Self-Government Arrangements, 1993, Arts. I and V.

[61] Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, 28 September 1995, Art. XXI.

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"[62].

3. The Advisory Opinion circumvents the principle of State consent

46. Another reason for declining to give the Advisory Opinion is to avoid adjudicating what is essentially a bilateral dispute between Israel and the Palestinian people in the absence of comprehensive arguments from one of the parties. In *Western Sahara*, the Court ruled that where an advisory opinion "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", the Court would decline to give that opinion[63]. Similarly, in *Eastern Carelia*, the League of Nations sought an opinion from the Permanent Court of International Justice (PCIJ) on Russia's treaty obligations to Finland concerning the autonomy of Eastern Carelia. Russia had previously declined a request to submit this dispute to the League[64]. The PCIJ ruled that "[a]nswering the question would be substantially equivalent to deciding the dispute between the parties"[65] and thus, declined to give an opinion. The deciding factor in that case, was that Russia was not a party of the League of Nations and therefore had not given the PCIJ its consent to its exercise of advisory jurisdiction[66]. The PCIJ also recognized the "particular circumstances" of the case[67], limiting its application.

47. In the present case, many participants have referred to the *erga omnes* (and possible *jus cogens*) nature of some of the rights claimed by the Arab Palestinians and the fact that these are "of interest to the international community" at large, and therefore transform the nature of the dispute between Israel and Palestine from a bilateral one. I respectfully disagree. As I have stated above, the Israeli-Palestinian conflict, and all its attendant complex issues, is historically and essentially a bilateral dispute, in respect of which both parties have subscribed to another mode of dispute resolution, namely international negotiation, and not judicial or third-party settlement.

[62] A Performance-based Road Map to a permanent two-State solution to the Israeli-Palestinian Conflict (https://peacemaker.un.org/en/node/8984).

[63] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33.

[64] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 24.

[65] *Ibid.*, pp. 28-29.

[66] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 28, para. 46.

[67] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 28.

The questions before the Court do not ask it to opine upon the law relating to occupation or to self-determination, in the abstract: the Court's Advisory Opinion is clearly required to consider the historical context of the conflict between Israel and Palestine spanning decades, including the framework developed by the organs of the United Nations towards settlement of that conflict. Israel has clearly not given its consent to the Court pronouncing itself on the complex issues involved. In this regard, Israel's participation in the contentious case relating to the application and interpretation of the Genocide Convention[68] must not be confused with, or mistaken for its consent to judicial settlement of the various complex issues outlined in this opinion. Similarly, many of the participants who have weighed in on how the Court should or should not answer the questions before it, are not parties to the conflict, whilst others have other vested interests in seeing the matter resolved one way or another. Of particular concern is the question of the ongoing Gaza war between Israel and Hamas, a matter about which many participants aired their views in their written statements or observations, and which is clearly *sub judice* in two contentious cases before the Court. The Court would need to carefully navigate its Advisory Opinion away from the issues that are *sub judice* in those other cases if it is to maintain its judicial integrity.

48. For all the above reasons, I am strongly of the view that the Court should have declined to give its Advisory Opinion in the present case. Instead, Israel and Palestine, the two parties to the conflict, should be encouraged to return to the negotiating table and to find a lasting solution jointly and consensually. The United Nations, and the international community at large, should do all in their power to support such negotiations. Regrettably, the Advisory Opinion has downplayed the importance of the negotiation framework, including the role of the United Nations and the international community in that regard.

V. Shortcomings of the Advisory Opinion

49. The Court, taking a cue from the questions of the General Assembly, and various statements and observations filed before the Court, identifies Israel's policies and practices relating to the occupation which they deemed to be illegal, and which should consequently entail legal consequences for Israel, other States and the United Nations. Besides voting against the Advisory Opinion, I would like to share some thoughts on the questions raised in the request and the Court's responses thereto, highlighting their limitations.

[68] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel).*

A. Answering Question 1

50. Given the broad international support for these legal propositions, the majority of the Court has quite predictably accepted the legal premises or presumptions of the first Question referred to it by the General Assembly, namely: *(a)* that Israel's occupation including settlements and annexation of Palestinian territories occupied since 1967 is illegal per se; *(b)* that Israel is responsible for an "ongoing violation . . . of the right of the Palestinian people to self-determination"; *(c)* that Israel's policies and practices are deliberately and necessarily "aimed at altering the demographic composition, character and status of . . . Jerusalem"; and *(d)* that Israel's practices and policies are inherently discriminatory and violate important rules of international humanitarian law (IHL) and international human rights law (IHRL).

51. Thus unsurprisingly, the Advisory Opinion finds Israel's occupation of the OPTs illegal per se, and certain features thereof as incompatible with international law, including, the long duration thereof, which the Advisory Opinion deems incompatible with the right of the Arab Palestinians to self-determination. The Advisory Opinion further finds that Israel's settlement policy and associated measures have contributed to a prohibited demographic change in the OPTs and therefore unlawful under international law. The Opinion also adjudges Israel's conduct as *de facto* or *de jure* annexation that is incompatible with the prohibition against acquisition of territory by force. The answers to question one, even if based on a one-sided narrative, may not pose any surprises for the General Assembly, especially since much of the applicable law was already pronounced by the Court in previous advisory opinions, including the *Wall* Opinion, *Namibia* Opinion and *Chagos* Opinion. That is a straightforward mathematical exercise. The real challenge for the Court arises when trying to answer the second question with the limited information that the one-sided narrative affords — "How do the policies and practices of Israel referred to . . . 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?"

B. Answering Question 2

52. Predictably, the Court after qualifying Israel's presence in the disputed territories as an illegal occupation, in keeping with the views of most participants, has concluded that under international law Israel is obligated to bring to an end its illegal policies and practices, with a view to realizing Palestine's right to self-determination. Again, this is unsurprising and not new because the Court made similar statements in the *Wall* Opinion. Furthermore, as far as I can tell from the limited information before the

Court, even Israel does not dispute the fact that the Palestinian people have a right to self-determination. The greater challenge from a legal and practical standpoint, is in the Court determining the more complex and nuanced issues, such as territorial scope of the independent Palestinian State, the timeline and process by which Israel should bring the "unlawful occupation" to an end, including withdrawing from the disputed territories without jeopardizing its own security needs.

C. Issues that Require Careful Consideration

53. In this part of my opinion, I share some misgivings that I have with some of the issues that in my view, the Court has not given adequate consideration in the Advisory Opinion.

1. Timeline for ending Israel's occupation is uncertain and impracticable

54. The timeline proposed by most participants and what the Court has called "bring[ing] to an end *as rapidly as possible* the unlawful presence of Israel in the Occupied Palestinian Territory" is uncertain and impracticable[69]. While Palestine, as well as most of the participants, have called for "an immediate, total and unconditional" end of Israel's illegal occupation, the wording in the Advisory Opinion, coupled with a total absence of any comments addressing Israel's security concerns, has the same effect as what most States asked for. Moreover, this is clearly contrary to what Israel and Palestine previously agreed including under the Oslo Accords, or indeed what the Security Council sanctioned under resolutions 242 and 338. An immediate, total, and unconditional withdrawal of Israeli armed forces and civilian settlements is simply impracticable in the present circumstances. Unlike in the *Namibia* Opinion where such decisive language might have been appropriate, the complexities of the Israeli-Palestinian conflict do not easily lend themselves to such a sweeping formulation. This is because Israel's continued presence in the West Bank and Jerusalem (and recently in Gaza) is premised in part, on real security concerns; the disagreement between the parties over the borders of the two States, and the *de facto* reality on the ground. Those matters will render the immediate and unilateral withdrawal of Israel practically impossible.

55. More importantly, the Court should have envisaged and recommended to the General Assembly, Security Council and third States, a process that incorporates the aforementioned international negotiation framework into "Israel's withdrawal". This could have been done, for example, by recom-

[69] See operative paragraph 285, subpara. 4.

mending that the timeline and the *modus operandi* of Israel's withdrawal should be determined by bilateral or multilateral negotiations under the supervision of the United Nations. This was the approach the Court adopted in the *Gabčíkovo-Nagymaros* case where the Court stated that the immediate parties "must negotiate in good faith in the light of the prevailing situation"; or as in the *Wall* Opinion where the Court stated that "the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation".

2. The Advisory Opinion ignores Israel's legitimate security concerns and need for effective security guarantees

56. Another significant factor which the Court has overlooked, and which distinguishes the Israel-Palestine conflict from other international situations involving calls for an "immediate, total and unconditional end" of colonization or occupation or expired legal mandate, is the existential and security threats posed to the Jewish people and to the State of Israel, from the disputed territories and from its adversaries in the neighbourhood and beyond. It is undeniable that there are States and non-State actors who have openly expressed a desire to see the State of Israel, not just withdraw from the OPTs but also wiped off the face of the earth, including from its own territory. Time and time again Israel's adversaries have launched surprise attacks on Israel within her borders and not just in retaliation for her occupation of Palestinian territory. Indeed, many of the wars between Israel and her Arab neighbours have been fought by Israel pre-emptively to remove an immediate and existential military threat originating from either the OPTs or from enemies further afield. Examples include the 1967 war, the Six-Day War, and more recently, the ongoing Gaza war. As pointed out earlier in this opinion, the Security Council has hitherto taken cognizance of Israel's legitimate security concerns and called for a withdrawal that occurs concurrently with effective security guarantees, as reflected in its resolutions 242 (1967) and 338 (1973) and others.

57. The practical requirement that withdrawal from Palestinian territory should be accompanied by effective security guarantees was also central to the Oslo Accords and the interim agreements[70] between Israel and the PLO, which led to the establishment of the Palestinian Authority to which Israel transferred powers of governance over parts of the OPTs. Indeed, the collapse of the Oslo process was brought about by Israel's unwillingness to continue its withdrawal from the occupied territories in the absence of effective secu-

[70] 1995 Interim Agreement (Oslo II Accord), Art. X.

rity guarantees from the Palestinian side. At that time, instead of security guarantees, Israel was experiencing suicide bombings emanating from the OPTs during the periods 1994-1997 and 2000-2006, which led to a slowing down and eventual halt of the withdrawal exercise. Conversely, the only time Israel has unilaterally withdrawn from the Gaza Strip in 2005 and not insisted on concurrent security guarantees for itself, the results have been disastrous for Israel.

58. In particular, the Advisory Opinion does not consider the tense security situation in the West Bank, which renders it practically impossible for Israeli forces to unilaterally withdraw from occupied territories without putting in place security guarantees for the hundreds of Israeli citizens or settlers (including those that hold valid titles to private land predating 1948) who would remain under Palestinian control. The situation could become dangerously volatile for any Israeli citizen left behind, if a unilateral withdrawal by Israel from the disputed territories would lead to a power vacuum that would be filled, as in the case of the Gaza Strip, by Hamas or other extremist groups dedicated to Israel's destruction. In view of the above circumstances, it is regrettable that the Court, in rendering its Advisory Opinion in the present case, has chosen to overlook and has underestimated the legitimacy of Israel's security concerns.

3. Need to balance competing sovereignty claims

59. Another complex issue which is relevant to analysing the legal consequences of the illegality of Israel's policies and practices is the fact that Israel has its own sovereignty claims regarding parts of the territory which the international community views as the OPT[71], an issue not given any attention by most participants. Although there appears to be a broad international consensus around the proposal that the two-State solution should be implemented based on Israel's 1967 borders, such political consensus cannot, in and of itself, bestow title to territory where none exists under international law, or remove title over territory where such title legally exists. Determination of sovereignty may entail, for example, taking cognizance of and treating differently, areas where there was a predominantly Jewish presence pre-1948 (e.g. the Jewish Quarter of Old Jerusalem or Gush Etzion) vis-à-vis other areas from which Israel unilaterally withdrew (e.g. the Gaza Strip). Requiring Israel's "immediate, total and unconditional" withdrawal would be tantamount to denying Israel's legal claims pertaining to parts of those territories.

[71] General Assembly resolution 77/126.

60. To determine the competing sovereignty claims, the Court would need to shift its focus from a review of "Israel's policies and practices in the OPTs" to a review of Israel and Palestine's competing sovereignty claims over different parts of the OPTs, notwithstanding that such matters were not sufficiently argued during these proceedings. Clearly these are complex issues that rightly call for a negotiated, rather than judicial settlement. This is yet another reason why resolution 242 calls for an agreement leading to "termination of all claims" and the acknowledgment of "secure and recognized boundaries". This is also why the Oslo Accords envisioned final status negotiations over borders. In this respect, Israel's occupation is different from cases of decolonization (covered by resolution 1514) or termination of League of Nations Mandates (as described in the 1971 *Namibia* Opinion) where in both cases the occupying Power had no plausible sovereignty claim to any part of the territory in question. It is also different from the *Chagos* Opinion where the legal dispute underlying the competing sovereignty claims was relatively straightforward and was properly argued before the Court.

4. The question of remedies or reparations

61. Finally, I have serious doubts as to whether it is appropriate to apply the 1928 *Chorzów Factory* principle of "reparations" (as a remedy that "must, as far as possible, wipe out all the consequences of the [alleged] illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed") to all of Israel's violations of international law identified in the Advisory Opinion. This is clearly a situation where there is enough blame to go round, not just of Israel but also of Arab Palestinians (for the failure of prior peace negotiations and for resorting to war) and, to some extent, the international community, for taking so long to find a lasting solution to the Israeli-Palestinian conflict. The solution of two States coexisting peacefully side by side, has never lain in the hands of one or the other party. Israel's unilateral withdrawal from the OPTs (short of vanishing from the face of the earth) is not going to bring about the much-needed peace in the Middle East. This begs the question: what exactly is Israel's share of the blame for which it should pay reparations?

62. Besides, in most if not all cases of decolonization or termination of League of Nations or UN Mandates where the occupying or colonial power has benefitted from decades of plundering the natural and mineral resources in the occupied territory or colony, the people of those territories have, upon

attainment of self-determination, not received any reparations for their loss, much less that restoring them to the *status quo ante*! The situation in this part of the Middle East is different because as has been shown in the historical context, Israel is not a colonizer. It was Britain that originally held the Mandate for Palestine, and the State of Israel was the only State to emerge as an independent State, inheriting the whole of the disputed territory under *uti possidetis juris*. Without first ascertaining and balancing the competing sovereignty and territorial claims of the concerned parties, it is, in my view, unrealistic and simplistic to recommend the kind of reparations referred to in the Advisory Opinion. The European Court of Human Rights (ECHR), in comparable circumstances, opined in the 2010 *Demopoulos* case involving Northern Cyprus, with which opinion I would agree in the present case, that:

> "[T]he Court finds itself faced with cases burdened with a political, historical and factual complexity flowing from a problem that should have been resolved by all parties assuming full responsibility for finding a solution on a political level. This reality, as well as the passage of time and the continuing evolution of the broader political dispute must inform the Court's interpretation and application of the Convention which cannot, if it is to be coherent and meaningful, be either static or blind to the concrete factual circumstances."[72]

VI. The Advisory Opinion Disregards Important Legal Principles and Propositions in International Law

63. In my respectful view, the approach taken by the majority in rendering the Advisory Opinion is fundamentally flawed as it fails to consider important legal principles and propositions in international law, governing the Israeli-Palestinian question. The Court's analysis of the status of the territories recaptured by Israel in 1967 and any legal pronouncements on the status of those territories, should have been guided by the following principles of international law.

A. Sovereign Equality of States

64. Article 2, paragraph 1, of the Charter of the United Nations enshrines the idea that all Member States of the United Nations, regardless of their size, population, economic power or military strength, are considered equal

[72] ECHR, *Demopoulos and Others* v. *Turkey*, Decision of 1 March 2010, Grand Chamber.

under international law[73]. The principle of sovereign equality necessitates that international law be applied consistently across all States and situations. Yet, the application of international law to the Israeli-Palestinian conflict seems to diverge from this standard. For instance, the characterization of Israeli settlements in the post-1967 territories, including East Jerusalem, as illegal and a serious violation of international law, or the assertion that the borders as of 4 June 1967 serve as Israel's *de facto* boundaries, or the prescription of a mandatory two-State solution — these are interpretations not uniformly applied to other regions deemed "occupied", such as Crimea by Russia, Western Sahara by Morocco, or Northern Cyprus by Türkiye. Israel, like any other State, is entitled to equal treatment under international law. Therefore, it is imperative that the rules and principles of international law are crafted and applied with objectivity, ensuring equal and non-discriminatory treatment for all States. As stated above, the General Assembly's questions, and the whole approach in the Advisory Opinion are one-sided and imbalanced and ignore or downplay Israel's existing territorial and sovereignty rights.

B. The Rule of Law Must Clearly Distinguish between Law and Policy

65. Not all international expressions of norms take on the character of binding law. And yet the Advisory Opinion treats all UN resolutions quoted therein, as creating binding legal obligations which is not necessarily true. For instance, the UN General Assembly's or Security Council's legal views do not automatically become international law. They only serve as proof of customary international law if they represent widespread State practices and the collective belief that such practices are legally required (*opinion juris*). Meanwhile, the international legal framework also acknowledges policy statements that carry no legal weight and do not impose any legal obligations. Many of the UN General Assembly and Security Council resolutions referring to the Israeli-Palestinian conflict are examples of non-binding statements of policy. Resolution 242 is an example of a non-binding recommendation by the Security Council issued in response to the Israeli-Arab Six-Day War in June 1967. This resolution emphasized the necessity of negotiations and suggested guidelines for the parties during their negotia-

[73] The principle has been described by the ICJ as "one of the fundamental principles of the international legal order" which should be "viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory" (*Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, pp. 123-124, para. 57).

tions. Another example is General Assembly resolution 194 (1948) which is relied upon for the assertion that Palestinian refugees have "a right of return". Rather than creating a binding obligation on Israel, this resolution was no more than an expression of policy in relation to refugees resulting from the 1947-1949 Israeli-Palestinian conflict. Similarly, the statement or inference that the two-State solution is mandatory or necessary to achieve a just, lasting and comprehensive peace, is another non-binding policy statement.

C. State Consent Is Required before Resolution of Inter-State Disputes

66. As a fundamental principle of international law, UN institutions (including the principal judicial organ) require the explicit consent of the involved State to mediate disputes between States or between States and non-State entities. The United Nations primarily operates on the principle of State sovereignty and typically cannot impose resolutions without the agreement of the State. Yet as observed above, the Advisory Opinion circumvents State consent by giving judicial opinions over matters that are clearly reserved for the UN and bilateral negotiation framework.

D. Borders, Sovereignty and Precise Scope of Territorial Claims Cannot Be Presumed

67. The questions of Israel's alleged occupation of certain Palestinian territories since 1967, or of its annexation of foreign territory, or of the alleged infringement of the Palestinian people's right to self-determination, are all questions that cannot be answered without first determining the territorial scope (i.e. borders) of the State of Israel, a critical matter regarding which the Court has not received arguments or evidence. The borders, the territorial sovereignty of both Israel and Palestine, are another sensitive area the Court cannot simply presume to appreciate based on the one-sided narrative contained in the statements of the pro-Palestinian group of States.

68. The General Assembly's questions contained in resolution 77/247 rest on certain assumptions, namely that: (1) all the territories held during the Jordanian and Egyptian occupation within the 1949 armistice lines are automatically the sovereign territories of Palestine, and thus not of Israel; (2) that Israel's presence in the West Bank, the Gaza Strip and Jerusalem is

without any legal justification; (3) Israel's presence in these areas violates Palestinian rights; (4) this territory is "Palestinian"; and (5) that Israel's policies and practices are annexational and necessarily "aimed at altering the demographic composition, character and status of . . . Jerusalem". While the language of resolution 77/247 portrays these assumptions as having been established already, I am not sure that these issues are as straightforward as they appear. Consequently, it falls to the Court to carry out its obligation to unpack, test and verify these assumptions, both for the purpose of determining whether it should exercise its jurisdiction and ultimately, in delivering the requested opinion. At the very least, the Court would need to examine and evaluate evidence concerning whether the 1949 armistice lines are "secure boundaries" within the meaning of Security Council resolutions 242 and 338. This, in turn, would require examination of the threats facing Israel emanating from the OPTs and the broader region. In the context of the questions put to the Court, determination of territorial sovereignty is critical because without clarifying the respective claims of both parties to the conflict, it would be impossible to answer the question of territorial scope of the Palestinian self-determination claim or of Israel's withdrawal from territory considered occupied. Furthermore, the Court would need to determine the territory over which Palestinians claim sovereignty and whether Palestine has historically made different assertions before different fora. Regrettably, the Court, which evidently adopted the above presumptions without question, does not address any of the above issues and frankly does not have before it sufficient information to even make an educated guess.

69. General Assembly resolution 77/247 refers to the West Bank, the eastern part of Jerusalem and the Gaza Strip as "Palestinian territory". The resolution appears to assume that sovereign rights to this area rest exclusively with the Palestinian people. It disregards any potential claims the State of Israel and the Jewish people may have with respect to some of these areas. In law and in fact, for over a century, sovereign legal title over the West Bank (and indeed the Gaza Strip) has been, and continues to be, indeterminate, or in abeyance. This has been the legal position under international law since the end of World War I, when Türkiye (as the successor to the Ottoman Empire) ceded sovereignty of the areas outside of its current borders. No agreement, instrument, judgment, opinion, or event with legal effect has changed this status since, as reflected — and explicitly stated — in agreements between the interested parties, and particularly agreements between the Israeli and Palestinian authorities. Under these agreements, the question of the final disposition of these areas shall be determined only by

negotiation. Until then, both sides have agreed to provisional arrangements, which continue to apply and govern the legal relationship between them today. I offer a few thoughts below regarding these complex issues.

E. Uti Possidetis Juris *and the Borders of Israel on the Eve of Independence*

70. Under international law there are several principles upon which legally enforceable borders are established, including effective control, historical title and treaties. *Uti possidetis juris*[74] is one of the main principles of customary international law intended to ensure stability, certainty and continuity in the demarcation of territorial boundaries of States emerging from decolonization or mandates such as the British Mandatory Palestine. In effect, the principle of *uti possidetis juris* transforms the colonial and administrative lines existing at the moment of birth of the new State into national borders. The principle applies to the State, as it is "at the moment of independence", i.e. to the "photograph" of the territorial situation existing then. As the Court explained in the *Burkina Faso/Republic of Mali* case, the doctrine ensures that:

> "By becoming independent, [the] new State acquires sovereignty with the territorial base and boundaries left to it by the [administrative boundaries of the] colonial power . . . [The principle of *uti possidetis juris*] applies to the State *as it is* [at that moment of independence], i.e., to the 'photograph' of the territorial situation then existing. The principle of *uti possidetis* [*juris*] freezes the territorial title; it stops the clock"[75].

[74] The principle of *uti possidetis juris*, which stipulates that newly formed sovereign States should maintain the internal borders that their preceding dependent area had before gaining independence, aims to preserve the territorial integrity of new States by maintaining the status quo of borders, thereby preventing conflicts that could arise from border disputes. The principle is also associated with preventing foreign intervention by eliminating any contested *terra nullius* (no man's land) that foreign powers could claim. It has been notably applied by the Badinter Arbitration Committee during the disintegration of Yugoslavia, specifically regarding the nature of the boundaries between Croatia, Serbia, and Bosnia and Herzegovina. In essence, *uti possidetis juris* serves as a stabilizing factor during the transition of territories from colonial rule to independence, ensuring that the new States' borders are recognized based on historical administrative lines rather than being redrawn, which could lead to further disputes and instability.

[75] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 568, para. 30.

71. The Court further observed in the case of *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* that *uti possidetis juris* is a "retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes"[76]. In applying the doctrine, one does not ask whether the law at the time of the "photograph" viewed the administrative lines as international boundaries. Indeed, it is quite plain that the borderlines are not expected to have been international boundaries at the time of the "photograph". Thus, for instance, in the *Burkina Faso/Republic of Mali* case, the Court did not have to inquire whether *uti possidetis juris* was a binding rule of international law at the time of decolonization. It was enough for the Court that *uti possidetis juris* was a binding rule of international law at the time the Court resolved the border dispute.

72. As stated above, when Britain terminated its stewardship over what was left of the Mandate for Palestine in 1947[77], according to the principle of *uti possidetis juris*, the administrative boundaries of the Mandate for Palestine on 14 May 1948 became the borders of the independent State of Israel (the only State to emerge from Mandatory Palestine at the time of Britain's withdrawal)[78]. Those borders were as follows: (1) To the west the Mediterranean Sea was the border. (2) The eastern boundary of the Mandate was the Jordan River, and a line extending south from the Dead Sea (into which the Jordan River empties), to the Red Sea near Aqaba, separating Palestine from Transjordan. (3) To the north, the boundary with the French Mandate for Syria and Lebanon, which was agreed upon in the Franco-British boundary agreements of 1920 and 1923. (4) To the south, the border with Egypt, running along the Negev Desert. These borders remained until the termination of the British Mandate on 15 May 1948, and the subsequent Declaration of Independence by the State of Israel (see map in Figure 2, p. 916).

73. Israel's independence would thus appear to fall squarely within the bounds of circumstances that trigger the principle of *uti possidetis juris.* Applying the rule would appear to dictate that Israel's borders are those of the Palestine Mandate that preceded it, except where otherwise agreed upon by Israel and its relevant neighbours. Indeed, Israel's peace treaties with neighbouring States to date — with Egypt and Jordan — appear to reinforce it. These treaties ratify borders between Israel and its neighbours explicitly based on the boundaries of the British Mandate of Palestine. Likewise, in demarcating the so-called "Blue Line" between Israel and Lebanon in 2000, the United Nations Secretary-General relied upon the boundaries of the

[76] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 388, para. 43.

[77] The Mandate for Palestine originally included the territory of Transjordan, but that territory was with the approval of the League of Nations, administratively separated from the Mandate in 1922 and granted its independence by Britain in 1946.

[78] See Part II C. above: The emergence of "British Mandatory Palestine" in the 1920s.

Figure 2.

British Mandate of Palestine[79]. Given the location of the borders of the Mandate of Palestine, applying the doctrine of *uti possidetis juris* to Israel would mean that Israel has territorial sovereignty over all the disputed areas of Jerusalem, the West Bank and Gaza, except to the degree that Israel has voluntarily yielded sovereignty since its independence. This conclusion stands in opposition to the widely espoused position that international law gives Israel little or no sovereign claim to these areas[80].

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[79] See UN Secretary-General, "Report of the Secretary-General on the Implementation of Security Council Resolutions 425 (1978) and 426 (1978)", p. 2, note 1, UN doc. S/2000/590 (16 June 2000):

> "As noted in my report of 22 May, the international boundary between Israel and Lebanon was established pursuant to the 1923 Agreement between France and Great Britain entitled 'Boundary Line between Syria and Palestine from the Mediterranean to El Hamme', which was reaffirmed in the 'Israeli-Lebanese General Armistice Agreement' signed on 23 March 1949."

[80] See e.g. Barack Obama, President, US, "Remarks by the President on the Middle East and North Africa" (11 May 2011), https://www.whitehouse.gov/the-pressoffice/2011/05/19/remarks-president-middle-east-and-north-africa; David Cameron and Mahmoud Abbas press conference: Prime Minister David Cameron and Palestinian President Mahmoud Abbas gave a joint press conference in Jerusalem (13 March 2014), https://www.gov.uk/government/speeches/press-conference-in-jerusalem.

F. The UN Partition Plan, 1948 War of Independence and Israel's Armistice Lines

74. On the eve of the British withdrawal, on 14 May, Jewish authorities declared the independence of the Jewish State in Palestine, called Israel[81]. Local Arab authorities, on the other hand, while rejecting the Jewish State, did not declare or otherwise move to create an Arab State in Palestine. Israel's Declaration of Independence was immediately followed by the outbreak of the 1948 Arab-Israeli War[82] as five Arab States (including Jordan, which had received independence from Britain in 1946, Egypt, Iraq, Lebanon and Syria) that were opposed to the establishment of a Jewish State in the region, invaded the newly independent State. The war ended by late 1948, with Israel controlling roughly three quarters of the territory of the Palestine Mandate. The remaining territory was conquered by Syria, Egypt and Jordan. Egypt ruled the conquered parts of Palestine (the Gaza Strip) by military administration. Jordan occupied part of that territory which became known as the West Bank, while Egypt occupied Gaza. Jerusalem was divided between Israeli forces in the West and Jordanian forces in the East, while Transjordan and Syria treated the conquered areas as part of their municipal territories. No other Arab State claimed sovereignty within the area. Syria[83], Egypt[84] and Jordan[85] all signed armistice agreements with Israel, marking the lines between the territory controlled by Israel and the lands conquered by the Arab States. However, the armistice agreements were clear in stating that the armistice lines were not boundaries and that the parties retained their claims to territorial sovereignty[86]. Shortly thereafter, the Arab States that had conquered parts of Palestine imposed a military administration on the areas they had seized[87]. In September, fearing a Transjordanian annexation of parts of Mandatory Palestine, Egypt initiated the creation of an Arab Government of "all Palestine", which, on 1 October, declared an independent Arab State in all of Palestine. While six Arab States recognized the new "Government" of

[81] Declaration of the Establishment of the State of Israel (14 May 1948).

[82] This war is known in Israel as the "War of Independence".

[83] See UN Security Council, Israeli-Syrian General Armistice Agreement, 20 July 1949, UN doc. S/1353.

[84] General Armistice Agreement between Egypt and Israel, 13 December 1949, UN doc. S/1264/Rev. 1.

[85] See Armistice Agreement between the Hashemite Kingdom of Jordan and Israel, 3 April 1949, UN doc. S/1302.

[86] Specifically, Article II, paragraph 2, of the Armistice Agreement between Jordan and Israel states that "[n]o provision of this Agreement shall in any way prejudice the rights, claims and positions of either party hereto in the ultimate peaceful settlement of the Palestine question". Article VI, paragraph 9, provides that "[t]he Armistice Demarcation Lines defined in Articles V and VI of this Agreement are agreed upon by the parties without prejudice to future territorial settlement or boundary lines or to claims of either party relating thereto".

[87] *Ibid.*

Palestine, it never exercised any authority anywhere, and it quietly retired to anonymous offices in Cairo and then dissolution[88].

75. A fourth armistice agreement was signed with Israel's last neighbouring State — Lebanon[89]. Because Lebanon had not succeeded in conquering and holding any of the territory of the Palestine Mandate, the armistice line with Lebanon coincided with the prior boundary of the Mandate. Nonetheless, the armistice line had an interesting feature. Like the armistice lines with Israel's other neighbours, the armistice line with Lebanon was established as a military line, without prejudice to the parties' claims to territorial sovereignty[90].

UN ARMISTICE LINES
1949

Figure 3.

[88] A. Shlaim, "The Rise and Fall of the All-Palestine Government in Gaza", *Journal of Palestine Studies*, Vol. 20, pp. 37-53 (1990).
[89] See Lebanese-Israeli General Armistice Agreement, 23 March 1949, UN doc. S/1296/Rev. 1.
[90] *Ibid.*, Arts. II-III and V.

76. The armistice lines, as established in 1949 and modified by minor adjustments in military lines between 1949 and 1967, are often referred to as the "1967 boundaries"[91]. Indeed, the Advisory Opinion has recommended that Israel withdraws from the disputed territory based on the "1967 boundaries". However, the implication that the 1949 armistice lines became Israel's legal international borders is difficult to square with the doctrine of *uti possidetis juris*. To give these lines the status of international borders would amount to approving the use of aggressive force by foreign States in 1967 against the Jewish people and the territorial integrity of the sovereign State of Israel, in violation of the prohibition under international law of the use of force to acquire territory. As earlier stated, in the course of the first Arab-Israeli war, Egypt took control of the Gaza Strip, while Jordan and Iraqi forces occupied Judea, Samaria and East Jerusalem (redesignated as the West Bank). Jordan subsequently annexed Judea and Samaria illegally. This purported annexation was only officially recognized by three other States[92], but was rejected by the Arab League. Jordan's occupation and subsequent annexation of the "West Bank" was clearly in breach of international law, its control of the area having been obtained by force following an act of aggression and therefore having no effect on Israel's entitlement to sovereignty over the disputed territories upon independence. That is why the said armistice lines are not synonymous with legitimate territorial borders.

77. Thus, while considerable efforts had been invested in creating and advancing proposals for altering the borders of the Jewish State of Israel and a contemplated companion Arab State (two-State solution), no such efforts have so far succeeded in being implemented. Thus, it would appear that *uti possidetis juris* dictates recognition of the borders of Israel as coinciding with the borders of the Mandate as of 1948, rather than the "1967 borders" unless and until the parties to the conflict agree otherwise.

G. Israel's Rights to Settle in the Territory Comprising Former Mandatory Palestine

78. The borders, territorial sovereignty of both Israel and Palestine, is another sensitive area the Court cannot simply presume to appreciate based on the one-sided narrative contained in the statements of the pro-Palestinian group of States. The General Assembly's questions ask the Court to make a number of prejudicial assumptions or presumptions, including, *(a)* the

[91] See e.g. E. Bronner, "Netanyahu Responds Icily to Obama Remarks", *The New York Times*, 19 May 2011, at A9; T. Lister, "Maps, Land and History: Why 1967 Still Matters", *CNN*, 24 May 2011, at IV.

[92] The United Kingdom, Iraq and Pakistan.

illegality of Israel's occupation including settlements and annexation of Palestinian territories occupied since 1967; *(b)* "ongoing violation by Israel of the right of the Palestinian people to self-determination"; *(c)* the fact that Israel's policies and practices are necessarily "aimed at altering the demographic composition, character and status of . . . Jerusalem"; and *(d)* the "discriminatory character of Israel's legislation and policies" in the OPT. The questions ask the Court to presuppose that all the territories held during the Jordanian and Egyptian occupation within the 1949 armistice lines are automatically the sovereign territories of Palestine, and thus not of Israel. I am not sure that this issue is as simple as it appears. At the very least, the Court would need to examine and evaluate evidence concerning whether the 1949 armistice lines are "secure boundaries" within the meaning of Security Council resolutions 242 and 338. This, in turn, would require examination of the threats facing Israel emanating from the OPTs and the broader region. In the context of the questions put to the Court, determination of territorial sovereignty is critical because without clarifying the respective claims of both parties to the conflict, it would be impossible to answer the question of the territorial scope of the Palestinian self-determination claim or of Israel's withdrawal from territory considered occupied. Furthermore, the Court would need to determine the territory over which Palestinians claim sovereignty and whether Palestine has historically made different assertions before different fora. The Advisory Opinion does not address any of the above issues and frankly does not have before it sufficient information to even make an educated guess.

79. As referred to earlier in this dissenting opinion, the Mandate for Palestine which was created by the Principal Allied Powers in 1920 following World War I and approved by the League of Nations in 1922, was primarily set up to reconstitute "a Jewish homeland in Palestine". Accordingly, the Jewish people obtained certain rights to settle in Palestine — which not only included the now disputed territories of the Gaza Strip, the "West Bank" and West Jerusalem, but also Transjordan. Whilst the exact nature of the rights conferred under the Mandate has been the subject of much discussion, the language of the Mandate shows that with respect to the territory then known as "Palestine", the Jewish people were the main beneficiaries of those rights. By incorporating the Balfour Declaration in the Preamble to the Mandate (in which "His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and

political status enjoyed by Jews in any other country"), the Mandate clearly confirmed the right of the Jewish people to settle, self-determine and live peacefully in the Mandate territory (or at least in the part that remained after Britain transferred 70 per cent of the Mandate Territory to Jordan). The Mandate of Palestine did not provide for any other partition, other than the separation of Transjordan. It has been argued that the Palestinian Arab population living within the Mandate also had and continue to have a right to self-determination. However, the founding documents of the Mandate (including General Assembly resolution 181 (1947)) are silent on the issue of the self-determination of Palestinian Arabs living within the Mandatory territory, implying that the question of their self-determination was perceived as one of "internal self-determination" that would require negotiation and mutual agreement[93]. Be that as it may, the rights of multiple nations to self-determination on a given territory should not disturb the application of the principle of *uti possidetis juris*[94].

H. The Rights of the Arab-Palestinians to Self-Determination

80. Whilst there is no doubt that the right to self-determination is a right *erga omnes*, to which the Palestinian people are entitled, in the present context, that question raises issues of the territorial borders and the safety and security of both the prospective independent Palestinian State and the Israeli State coexisting side by side. These issues, including the proposed frontiers of the two States, territorial inviolability, and legitimate security concerns of both peoples, have not been addressed by the Advisory Opinion. By asking the Court to examine the policies and practices of one of the parties, while ignoring the policies and practices of the other party or those of interested third States, such as the Arab neighbours, and by asking the Court to determine the legal consequences of Israel's policies and practices, the Court cannot arrive at a balanced view that is in keeping with its judicial function and character. The practical and realistic solution is a consensual one, jointly arrived at by both parties to the conflict through good faith negotiations within the existing negotiation framework and implementation of existing Security Council resolutions.

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[93] Internal self-determination refers to the right of the people within a State to govern themselves without outside interference. It is a principle that promotes democratic freedoms and autonomy for minority groups within sovereign States. This concept is distinct from external self-determination, which relates to the right of peoples to determine their own political status and potentially form an independent State.

[94] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 566.

81. International law arguably supports the right of Arab-Palestinians to self-determination but leaves it to the concerned parties (including the State of Israel which currently claims sovereignty over the disputed territory by virtue of *uti possidetis juris*) to agree upon the choice of means to fulfil that right. As is reflected in Security Council resolutions 242 and 338, international law does not allow the right to self-determination to conflict with the sovereign rights of an existing sovereign State, including its rights to territorial security and integrity, political independence and existing borders. If, pursuant to *uti possidetis juris*, all the territory covered by the Mandate of Palestine in May 1948 became the sovereign territory of Israel, then Palestinian self-determination will necessarily take a form of autonomy that does not conflict with Israel's sovereignty and territorial integrity.

82. In view of the foregoing, any discussion regarding Israel's alleged occupation or annexation of Palestinian territory or its alleged prejudice to the rights of the Arab-Palestinians to self-determination, but which fails to consider the foregoing historical facts and principles of customary international law, is one-sided, imbalanced, and is unlikely to assist the General Assembly and Security Council in finding a permanent solution to the Israeli-Palestinian conflict.

I. Concerns over Israel's Withdrawal from the Disputed Territories and Its Security

83. Although the General Assembly's questions are aimed at prompting the Court to recommend an "immediate end to Israel's occupation" and an "immediate and unconditional withdrawal" from the OPTs, the issue of Israel's ending the occupation and its withdrawal from the OPTs is more nuanced. It requires an assessment of the legal rights and obligations of both parties under the Oslo Accords, as endorsed by the Security Council resolutions 242 and 338. As recalled above, those resolutions recognized that the end of Israel's occupation entailed the fulfilment of *two interdependent conditions*, namely, "Israel's withdrawal from territories it had seized in the conflict" on the one hand, and "Palestine's recognition of Israel's sovereignty, territorial integrity and right to live in peace within secure and recognized boundaries free from threats or acts of force", on the other[95]. In other words, both Israel and Palestine need to move in tandem to secure the necessary conditions — for Israel to withdraw from the Arab-occupied territories and for Palestine to provide the assurances and conditions that allow Israel to feel secure in so doing.

[95] Security Council resolution 242 of 22 November 1967.

84. A balanced advisory opinion would inevitably need to examine both these conditions, especially given the latest attack by Hamas of Israel on 7 October 2023 and the ensuing Gaza war, a matter that is *sub judice* before the Court in contentious proceedings[96]. Clearly, the Advisory Opinion in subparagraph 4 of the operative clause looks at the obligation of Israel to rapidly withdraw from the OPTs whilst completely ignoring the security concerns of Israel and her citizens, including the settlers.

J. Indiscriminate Application of the Law of Belligerent Occupation to the West Bank, Gaza and West Jerusalem

85. Article 42 of the Hague Regulations, which reflects customary international law[97], states that "territory is considered occupied when it is placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."[98] There are many examples of territories in the world that could be regarded as "occupied" under the Fourth Geneva Convention, including: Western Sahara, Northern Cyprus, Abkhazia, Eastern Ukraine and Crimea. Yet State practice has not been as critical of the occupations in these examples as it has in the case of Palestine.

K. An Occupation through the Lawful Use of Force (Self-Defence) Is Not Unlawful

86. Security Council practice does not provide any support for the view that "the notion of 'illegal occupation' may extend to occupation resulting from a lawful use of force"[99]. Given the circumstances of Israel's occupation of the territories in question in 1967, this should suffice. Although several General Assembly resolutions specifically addressing the Israeli occupation of Arab territories refer to the occupation as "illegal", a review of the voting records shows that none of the Western democracies supported the resolutions asserting the illegality of the Israeli occupation[100].

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[96] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, filed before the ICJ on 29 December 2023.

[97] Regulations Annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, Art. 42, The Hague, 18 October 1907, 36 Stat. 2295, 205 Consol. TS 277.

[98] *Ibid.* See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, pp. 229-302.

[99] A. Zemach, "Can Occupation Resulting from a War of Self-Defense Become Illegal?" (2015), *Minnesota Journal of International Law*, Vol. 316, at p. 327 citing, in relation to the Israeli-Palestinian conflict, Security Council resolution 242 (1967), Security Council resolution 252 (1968), Security Council resolution 478 (1980) and Security Council resolution 497 (1981).

[100] *Ibid.*, pp. 327-332.

87. Historically, Israel assumed control over the disputed territories (i.e. the West Bank, the Gaza Strip and Jerusalem) in June 1967 in response to a clear and present threat, initiated by a group of Arab States, intent on annihilating the Jewish State. The legitimacy of Israel's control of these territories at that time was generally uncontested as it was understood that it had done so within the framework of the legitimate exercise of its right of self-defence. While the international community did eventually develop a framework for the resolution of this war (UN Security Council resolutions 242 and 338, discussed above), it was not contended at that time that Israel's control of these territories, pending such resolution, was illegal. Accordingly, it is difficult to ascertain at what point in history, and pending a negotiated settlement, when Israel's presence in and control of the disputed territory, became an illegal occupation, as opined by the majority.

L. A Lawful Occupation Does Not Become Unlawful Due to Passage of Time

88. State practice and *opinio juris* do not support the existence of a rule of customary international law providing that a lawfully created occupation may subsequently become illegal on account of passage of time. In its Advisory Opinion of 2004 on the *Wall*, the Court found Israel responsible for several breaches of the law of belligerent occupation, but it refrained from characterizing the Israeli occupation as "illegal", or otherwise to opine on the legality of Israel's presence in the West Bank. The issue of whether and how to limit the duration of occupation, with emphasis on the Arab-Israeli situation, was a focus during the drafting process of the Additional Protocols. While Additional Protocol I did not contain a provision proscribing the length of an occupation, it did not adopt the approach of Article 6 (3). Instead, the drafters included Article 3 *(b)* which mandated application of the Conventions and the Protocol until the "general close of military operations and, in the case of occupied territories, on the termination of the occupation". According to the commentaries, it was argued that this provision would then supplant Article 6 (3). Neither the Hague Regulations nor the Fourth Geneva Convention limits the duration of the occupation, nor requires the occupant to restore the territories to the sovereign before a peace treaty is signed. Judge Rosalyn Higgins has similarly noted that "there is nothing in either the [UN] Charter or general international law which leads one to suppose that military occupation, pending a peace treaty, is illegal"[101]. It is indisputable that Israel's continued presence in the disputed territories is in large part due to genuine security concerns, as well as due

[101] R. Higgins, "The Place of International Law in the Settlement of Disputes by the Security Council", *AJIL*, Vol. 64, pp. 1, 8 (1970).

to its own sovereignty claims to those territories, which can only be settled through negotiations.

M. Israel's Settlements in the Disputed Territories Accord with Article 6 of the Mandate

89. The view that Israel's establishment of settlements in the disputed territories is illegal and amounts to unlawful "annexation" rests entirely on Article 49, paragraph 6, of the Fourth Geneva Convention, which provides that "the Occupying Power shall not deport or transfer parts of its own civilian population into territory it occupies". The Court has no probative evidence before it that (except possibly members of the Israel Defense Forces), any of the Israeli citizens that have moved into the disputed area since 1967 were forced or coerced to do so by the Israeli Government. It is quite possible that some of the residents in these areas have legitimate title deeds predating 1967. Labelling all settlements in East Jerusalem and the West Bank as "illegal" both misrepresents the spirit and letter of Article 49, paragraph 6, of the Fourth Geneva Convention. Moreover, such a view contradicts Article 6 of the Mandate for Palestine which encouraged Jewish settlements throughout the Mandate and is wholly inapplicable based on Israel's claim to sovereignty pursuant to *uti possidetis juris*.

N. The Negotiation Framework and Not the Unilateral Recognition of Palestine Remains the Only Avenue for a Permanent Solution to the Israeli-Palestinian Conflict

90. As stated earlier, Israel and the representatives of the Arab-Palestinians chose to negotiate the terms of Palestinian autonomy or self-determination under the terms and conditions set out in the Oslo Accords which instruments remain valid and binding, notwithstanding that their practical implementation and impact have been significantly hindered by ongoing wars, change in Palestinian leadership and other political developments. Israel alone is not to blame for the decades-long impasse, as has been illustrated by the numerous wars and attacks that have been directed against that State by its adversaries. Final status issues, including permanent borders of a prospective Palestinian State, the administration of Jerusalem, and the return of refugees, are amongst the issues that the parties to the conflict agreed would be determined through negotiation. Seeking or obtaining unilateral recognition of Palestinian statehood

or independence within the territory of a sovereign State breaches the Oslo Accords and can only exacerbate the conflict.

91. The complex arrangements made under the Oslo Accords dividing the disputed territories into Areas A, B and C, have arguably resulted in a special legal régime (*lex specialis*) in relation to the post-1967 territories. As instruments of international law, they impose a complex matrix of mutual rights and obligations, limiting the application of the general principle of law. The Oslo II Accord prohibits both parties from initiating "any step that will change the status of the West Bank [, including East Jerusalem,] and the Gaza Strip pending the outcome of permanent status negotiations". The future status of these territories and the nature of an independent or autonomous Palestinian entity can only be settled through good-faith negotiations reflecting a balance of competing interests.

VII. Conclusion

92. For all the above reasons, I am of the view that the Court should have declined to give its Advisory Opinion in the present case. Instead, Israel and Palestine, the two parties to the conflict, should be encouraged to return to the negotiating table and to jointly find a lasting solution. The United Nations, and the international community at large, should support these two parties to do so. In rendering its Advisory Opinion, the Court should have been careful to guard its judicial character and integrity by ensuring that the nuanced and more complex issues that require resolution through negotiation are left to the negotiation framework already agreed upon by the parties to the Israeli-Palestinian conflict.

(Signed) Julia SEBUTINDE.