

Case No. 2023/7

International Court of Justice

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

Written Statement Submission by  
B'nai B'rith International  
B'nai B'rith Office of United Nations Affairs  
B'nai B'rith World Center in Jerusalem  
and B'nai B'rith Canada

Representations Submitted in  
Accordance With The International Court  
of Justice Practice Direction XII

Respectfully Submitted By:

B'NAI B'RITH INTERNATIONAL  
B'NAI B'RITH OFFICE OF UNITED AFFAIRS  
B'NAI B'RITH WORLD CENTER IN JERUSALEM



Richard D. Heideman, Esq.\*  
Joseph H. Tipograph, Esq.  
Heideman Nudelman & Kalik, PC  
5335 Wisconsin Avenue, Suite 440  
Washington, DC 20015  
Telephone 202 463-1818  
Telefax 202 463-2999  
Email: [rdheideman@HNKlaw.com](mailto:rdheideman@HNKlaw.com)  
Email: [jhtipograph@HNKlaw.com](mailto:jhtipograph@HNKlaw.com)

David Matas, Esq.  
Counsel for B'nai B'rith Canada

Counsel for B'nai B'rith International, B'nai B'rith Office of United Nations Affairs and the  
B'nai B'rith World Center in Jerusalem, Israel

\*Richard D. Heideman is Honorary President, B'nai B'rith International

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## Preface

The International Court of Justice Practice Direction XII provides:

1. Where an international non-governmental organization submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered as part of the case file.
2. Such statements and/or documents shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain.
3. Written statements and/or documents submitted by international non-governmental organizations will be placed in a designated location in the PeacePalace. All States as well as intergovernmental organizations presenting written or oral statements under Article 66 of the Statute will be informed as to the location where statements and/or documents submitted by international non-governmental organizations may be consulted."

B'nai B'rith International is a US-based non-profit, non-governmental organization and is the oldest Jewish organization in continuous existence in the United States, having been founded in 1843. B'nai B'rith International was invited to participate in the founding ceremonies of the United Nations, and enjoys long-standing relationships, offices and operations at the United Nations. B'nai B'rith International has a grassroots presence in countries throughout the world, has established and maintains the B'nai B'rith Office of United Nations Affairs and the B'nai B'rith World Center in Jerusalem, as well as geographic organizational entities and affiliates throughout North America, Latin America, Europe, Australia/New Zealand and elsewhere. B'nai Brith Canada is an accredited organization of B'nai B'rith International and operates the League of Human Rights in Canada. The various referenced parties are hereinafter collectively referred to as B'nai B'rith, which submits this written representation under this Practice Direction on their own initiative to provide relevant information for review regarding the referral by the United Nations General Assembly of the request to the International Court of Justice for

consideration of the issuance of an advisory opinion. We invite all interested States, in their written and/or oral statements, insofar as they agree with any of the positions set out, to refer to these written representations in their written and/or oral statements.

### **Context of this Submission and the request**

1. The United Nations General Assembly adopted by resolution in November 2003 a request to the International Court of Justice to render an advisory opinion in an earlier question referred to as Legal Consequences Arising from Israel's Construction of the Wall, otherwise referred to as the Terrorist Prevention Security Fence. Over the objections of the State of Israel, a Member-State of the United Nations, and others who contested the jurisdiction of this Court to have accepted jurisdiction and to issue an Advisory Opinion, this Court issued its Advisory Opinion on July 9, 2004. Said Advisory Opinion, although Advisory by its definition and nature, has been misapplied by various entities, courts, governments and parties seeking to elevate the Advisory Opinion to having the force of law, which it does not enjoy.

2. The issues related to and arising from the long-standing conflict between the State of Israel and the Arab Palestinians located in the West Bank of the Jordan River and Gaza are political in nature and not subject to adjudication by this Court.

3. Notwithstanding the foregoing, and consistent with the pattern of the Arab Palestinians to utilize the United Nations, and this international court, to advance the political purposes of the Palestine Liberation Organization and/or the Palestinian National Authority (collectively the "PA", which by executive order of the President of the PA is now known as The State of Palestine, a non-member state of the United Nations), and at its request to the United Nations General Assembly ("UNGA"), on December 30, 2022 the UNGA by vote of less than a majority of the member-states of the United Nations, decided to request the International Court of Justice to render a second advisory opinion on these 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 in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?"

United Nations document number A/RES/77/247

4. The first question(s) the Court has to decide is whether or not it has, and should in the exercise of its discretion, accept jurisdiction over the issues/questions presented in the referral, which are political in nature, and to which Israel as a member-state of the United Nations has not consented; and whether or not the Court is capable of the issuance of the Advisory Opinion without fact-finding, which is neither possible nor properly before this Court.

5. The Court must further determine what are the requests which are being made. As the questions presented by the UNGA referral are compound in nature and presented in a vacuum without regard to the political nature of the issues between the parties on the ground, a necessary first step in answering the request is stating exactly what request is being made.

6. The request itself inappropriately expresses legal opinions. There are at least ten different legal opinions that the request asserts. They are based upon various assumptions, presumptions and assertions that, *arguendo*,

- (1) there is an ongoing violation by Israel of the right of the Palestinian people to self-determination,
- (2) Israel occupies Palestinian territory,
- (3) this territory has been occupied since 1967,
- (4) Israel has settled in Palestinian territory,
- (5) Israel has annexed Palestinian territory,
- (6) Israel has adopted measures aimed at altering the demographic composition of Jerusalem,

- (7) Israel has adopted measures aimed at altering the character of Jerusalem,
- (8) Israel has adopted measures aimed at altering the status of Jerusalem,
- (9) Israel has adopted discriminatory legislation, and
- (10) Israel has adopted non-legislative discriminatory measures.

7. The request in the General Assembly resolution has been framed to advance the political purposes of the PA, notwithstanding its obligations under the Oslo Accords and other agreements to which it is a party, and notwithstanding the fact that Israel has not consented, as a Member-State of the United Nations, to the submission of the request to the Court.

8. The request in the General Assembly resolution does not ask the Court whether these opinions, assumptions, presumptions and assertions embedded in the resolution are correct. The Court is expected to assume that these opinions are correct, and to draw legal consequences from the assumptions. If the Court were to engage in the exercise of determining whether the opinions embedded in the question were correct, the Court would be answering questions not asked. Given that the questions asked cannot be answered without addressing these other issues, and given also that the General Assembly has not asked the Court to answer these other questions, either expressly or by implication, the question asked becomes unanswerable without the Court making ill-advised political determinations.

9. However, if the Court were not to engage in the exercise of determining whether the opinions embedded in the questions were correct, and confined itself only to answering the questions asked, the Court would be answering hypothetical questions which are political in nature, a task which is outside the purview of this Court. Moreover, in doing so, the Court would essentially be facilitating the narrative of one affected political party to a dispute that has been ongoing at least since the adoption by the United Nations of the Partition Resolution in November 1947, which led to the May, 1948 Declaration of Independence of the State of Israel. The Court would further be effectuating the re-writing of history, which is beyond the scope and authority of any court, including but not limited to the International Court of Justice.

10. Without examining the assumptions on which the stated questions were based, the Court would be addressing the question of the legal consequences of an assumed violation by Israel of the right of "the Palestinian people," a term not defined in International law, to self-determination, whether that violation was in fact happening or not, an assumed Israeli occupation of Palestinian territory, whether that occupation has occurred or not, and so on. These assumptions find their grounding in politically biased UN General Assembly Resolutions, including the Resolution referring this Request for An Advisory Opinion to this Court, sponsored and passed by a vote among mostly authoritarian countries. Their validity has never been tested by the application of law to evidence by a competent court of law. The countries sponsoring the resolution that presents this question to this tribunal believe this tribunal will analyze these allegations as if they are proven facts, which they are not, and which this Court is not entitled to assume.

11. Practically, answering these sorts of hypothetical questions is an impossible and inappropriate undertaking, an affront to the integrity of this tribunal and a threat to the world order. It is impossible to give sound legal advice premised on a flawed, biased, unchallenged and untested set of facts. Examples of such hypothetical questions include: As the presence of Israel for security purposes in various areas of the lands referenced in the Oslo Accords was and is pursuant to the agreement of both the PA and Israel, such presence by agreement cannot be deemed to be an illegal occupation. Accordingly, as a matter of law there is a legal occupation, the questions as presented to the Court are based upon false premises.

12. If there is only a legal occupation, if there is no discrimination, and so on, there are no legal consequences which flow from these conditions. Legal consequences follow only from legal wrongs. The legal consequences of the assumptions must depend on whether the assumptions are factually accurate or not. To adjudicate otherwise, is to operate in a paradigm in which truth is irrelevant and the tyranny of some plurality is permitted to dictate the global order.

13. The Court needs to determine whether in light of the agreement of the parties consenting

to the presence of Israel for security purposes in the areas in question there is a violative occupation, whether there is discrimination and so on, to determine legal consequences. Yet, if the Court is to make these high-level determinations, it must have a proper case and complete facts in front of it, with parties presenting proven facts and evidence capable of adjudication. Failing that, the Court is compelled to reject acceptance of jurisdiction over the Request; and as a matter of jurisprudence should refrain from speculating on any matter or issuing any opinion, even advisory, with regard to the political issues being presented to it for review.

14. If, notwithstanding the deficiencies inherent in the lack of jurisdiction and evidence, the Court determines to proceed to consider issuing an advisory opinion, it must necessarily look beyond the political and other assumptions of the resolution and open them up to question. Once it does, it will see they are built on a house of cards – decades of targeted discriminatory resolutions against Israel and the ongoing well-funded, well-organized effort to demonize and efforts to delegitimize the State of Israel.

15. Before any legal consequences can be proposed, the Court must address and challenge the assumptions as to the questions themselves, to decide whether those assumptions are accurate and, if so, provide a proper evidentiary basis for this Court's consideration in the issuance of any opinions, much less a formal Advisory Opinion. Put another way, the questions asked by the General Assembly can be answered, but only in a proper procedural way. The procedural legal consequence arising from the accusations advanced in the General Assembly's request is that the substantive legal consequences must be decided by the Security Council. The Court could provide substantive advice on legal consequences to the Security Council, which is seized of the issue and if requested to do so, but otherwise cannot and should not respond to this referral from the UNGA. There is little doubt that enforcement of a decision of the Court on matters of international peace and security rests with the Security Council. But, when the Security Council has not asked the question, has no apparent interest in the answer, and has made no prior determination on many of the assumptions advanced by the referring resolution, any determination by the Court becomes little more than an empty and improper exercise. It is an affront to the Security Council and

its exclusive powers over matters of international peace and security. The sponsors of the draft resolution could have submitted a more balanced and judiciously worded resolution to the Security Council, especially considering that the Security Council has seized itself of the Arab-Israeli peace process and the issues related thereto. They did not. Instead, they opted to submit the resolution to the General Assembly, and then directly to this Court, in a cynical attempt to circumvent the Security Council, its proper venue and jurisdiction, and its concerns. In furtherance of this attempt, the General Assembly referred the matter to this Court under the guise of a request for an "advisory opinion."

16. A similar problem arose in an earlier request for an advisory opinion, about Namibia. There the request asked: "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"

Security Council resolution 284 (1970)

17. Mr. Justice Dillard in that case wrote:

"When these [political] organs do see fit to ask for an advisory opinion, they must expect the Court to act in strict accordance with its judicial function. This function precludes it from accepting, without any enquiry whatever, a legal conclusion which itself conditions the nature and scope of the legal consequences flowing from it. It would be otherwise if the resolutions requesting an opinion were legally neutral."

I.C.J. Reports 1971, page 151

18. The problem also arose in a Court case addressing the above-referenced previous request for an advisory opinion from the General Assembly, also about Israel. That request too had conclusory assumptions and that Court had to answer the question of how to deal with them. The previous request about Israel took much the same form as the present request, inappropriately asking the Court to address the legal consequences of assumed facts and law.

19. The question in the earlier case relating to Israel was, in pertinent part, "What are the

legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, ...?" That question assumed that what was, in fact, mostly a fence was a wall. It further assumed that Israel was an occupying power and that there was a territorial entity named "Occupied Palestinian Territory," which there is not.

UNGA Resolution ES-1012

20. The 2004 case was problematic in a number of different respects, most of which related to other components of these submissions. However, what actually makes the case relevant here is that in the almost twenty years since the issuance of the Court's previous Advisory Opinion, the PA has repeatedly refused to comply with its obligations under the Oslo Accords, repeatedly refused to confer in good faith directly with the State of Israel, in spite of the good efforts by successive Presidents of the United States, officials of the European Union, the Secretary-General of the United Nations, the Quartet, and numerous other initiatives designed to achieve resolution to the various political questions dividing the PA and the State of Israel.

21. The anti-Israel and anti-Zionist vocabulary utilized in numerous resolutions of the UN General Assembly, which votes on the basis of one-country one-vote, and which is majority-aligned with the political interests of the PA, is replete with misnomers, denials and fabrications. Calling a barrier a wall which is more than 96% a fence built solely for the purpose of fencing out the terrorists in keeping with Israel's right and obligation to defend her people, is one small part of this pattern of obfuscation.

"Saving Lives: Israel's anti-terrorist fence-Answers to Questions", "Question 3. Is it a 'wall' or a 'fence'?"

Ministry of Foreign Affairs, Government of Israel

<https://embassies.gov.il/MFA/FOREIGNPOLICY/Terrorism/Palestinian/Pages/Saving%20Lives-%20Israel-s%20anti-terrorist%20fence%20-%20Answ.aspx>

22. In the 2004 case, Mr. Justice Koojmans wrote:

"In the present case the request is far from being 'legally neutral'. In order not to be precluded, from the viewpoint of judicial propriety, from rendering the opinion, the Court therefore is duty bound to reconsider the content of the request in order to uphold its judicial dignity."

Paragraph 26 page 227

23. Here too it is apparent that the request is far from being legally neutral. The Court has to determine whether the assumptions embedded in the questions asked are accurate and justiciable.

24. In consequence, what looks to be just two questions is, in reality, are multiple questions. There are, first of all, the ten questions embedded in the request as assumptions. The first set of ten questions is "are these assumptions accurate or not?"

25. If the Court finds that none of them are accurate, or if even one of them is inaccurate and not supported in fact or under the law, there are no legal consequences, and the case is to be concluded. If, in contrast, the Court finds that all ten assumptions are accurate, there are then multiple further questions.

26. The second set of questions is "what are the legal consequences arising from the findings of accuracy of the assumptions?" The third set of questions is "how do each of the ten assumptions, insofar as they are Israel policies, affect the legal status of the occupation, (which the Court, we are assuming here, has found to exist without distinguishing between a legal and illegal occupation)?" A fourth set of ten questions is, "how do each of the ten assumptions, insofar as they are Israel practices, affect the legal status of the Court found occupation?" A fifth set of questions is "what are the legal consequences which arise for all States from the status of the Court found occupation, without distinguishing between a legal occupation consented to by the parties and an illegal one, as affected by Israeli policies and practices relating to the ten assumptions in the request." A sixth and final set of questions is "what are the legal consequences which arise for the United Nations from the status of Court found occupation, without distinguishing between a legal occupation consented to be the

parties, and a claimed illegal one as affected by Israeli policies and practices relating to the ten assumptions in the request."

In positing the Resolution as submitted to this Court, the PA has caused the UNGA to assume facts not in evidence, and not appropriate for adjudication, particularly in light of the fact that the PA is not a member-state of the UN and Israel, a member-state, has not consented to the jurisdiction of this Court.

### **The Purpose of the Request**

1. In order to determine what the Court is being asked, the Court should approach the request purposively. The request for an advisory opinion is embedded in a resolution with fifty preambular paragraphs, nine pages, almost 4,000 words, twenty footnotes and eighteen operative paragraphs. The request for an advisory opinion is one operative paragraph in this massive text. In determining the purpose of the request for the advisory opinion, the whole text of the resolution in which it is found is relevant.

2. In reading the text as a whole, one can see that it is consistent with the request for the advisory opinion in the sense that it is tendentious. It expresses a point of view. It is inherently political in nature. It presumes facts which are not evidentiary and presents no controversy which is ripe for review by this Court, particularly considering that the parties themselves, the Quartet and the UN Security Council are each seized of the issue(s). The request for the advisory opinion is not an expression of uncertainty about the law. Rather, as the text of the resolution makes clear, the request for an advisory opinion is a request to this Court to endorse a view of the law held by those voting in favor of the resolution.

3. What that intent is, what the opinion is that the supporters of the resolution want the Court to endorse, is clear from reading the resolution. First of all, the authors of the resolution do not want the Court to question the assumptions on which it is based - whether there is an illegal occupation, whether there is discrimination, and so on.

4. The request is limited to asking about legal consequences. Yet, even here, the resolution

shows no uncertainty about what those legal consequences should be. The operative paragraphs have a very long list of unanswered issues that would, in any court of jurisprudence either be submitted as stipulated facts or generally disputed matters. Such is not the case here, as there are no parties before this Court; only the UNGA asking this Court to assume power and authority beyond the scope of responsibility of any prudent court, including this one. The operative paragraphs present conclusory opinions embedded in the request, inappropriate for consideration by this Court and incapable of proper adjudication in the form of an Advisory Opinion, which the Court should not issue under the circumstances. Among them are included the following:

5. One is that certain measures and actions taken by Israel be declared to have no validity. Operative paragraph one.

6. A second is that Israel cease certain listed measures. Operative paragraph 2.

7. A third is that certain urgent measures be taken. Operative paragraph 3

8. A fourth is suggested United Nations efforts. Operative paragraph 4

9. A fifth is that Israel cooperate fully with all mechanisms and inquiries of the UN Human Rights Council.

Operative paragraph 5

10. A sixth is that Israel cease certain listed activities. Operative paragraph 6

11. A seventh is urgent attention to the rights of Palestinian prisoners. Operative paragraph 7

12. The eighth is condemnation of certain forms of use of force by Israeli forces. Operative paragraph 8

13. A ninth is a condemnation of "all acts of violence by militants and armed groups, including the firing of rockets, against Israeli civilian areas"

Operative paragraph 9

14. A tenth is implementation of a particular Security Council resolution. Operative paragraph 10

15. An eleventh is an Israeli cessation of the construction of the wall, presumably meaning not just the less than 3-4% which is a wall but also the approximately 96% which is a fence, and also its dismantlement.

Operative paragraph 11

16. A twelfth is respect for the contiguity and integrity of all of "the Occupied Palestinian Territory".

Operative paragraph 12

17. A thirteenth is an Israeli cessation of its imposition of closures and economic and movement restrictions.

Operative paragraph 13

18. A fourteenth is the need to address a health crisis in the Gaza strip. Operative paragraph 14

19. A fifteenth is a continuation by member states of the United Nations of emergency assistance to the Palestinian people.

Operative paragraph 15

20. A sixteenth is the support and assistance by all States of the Palestinian people.

Operative paragraph 16

21. A seventeenth is the preservation and development of the Palestinian institutions and infrastructure.

Operative paragraph 17

22. The resolution then, read in its entirety, sets forth multiple and compound assumptions and presumes facts which are political in nature, are not properly before this Court and does not just ask questions. It answers the questions as embedded and asserted conclusions, as if they were based upon proven facts, which they are not. It tells the Court what the legal consequences should be of the violations it assumes exists. The resolution is a self-contained piece of work, with questions and answers, all based on assumptions but neither upon established and uncontroverted facts nor applicable law.

23. Ideally, a request for an advisory opinion should be a request to answer a question where the General Assembly is uncertain about the answer and needs the assistance of the expertise of the Court to determine the answer. This request for an advisory opinion is not that. Here the General Assembly claims it knows the answer and seeks the rubber stamp of the Court to increase the authority of the answer it has propounded in its attempt to circumvent all other avenues of resolution of the conflicts between the PA and Israel, and to codify into "international law" the politically charged, unproven "findings" of the referring resolution, and does so in an attempt to avoid, evade and circumvent the responsibilities of the PA and Israel in accordance with the Oslo Accords, specifically including but not limited to the obligation of the parties to commence, continue and/or recommence direct negotiations on what is generally referred to as final-status issues, many of which are inappropriately embedded into the questions presented by the Resolution.

24. That sort of request is an abuse of the advisory opinion procedure and an affront to the ICJ tribunal. For the Court to undertake this mission weakens the independent judiciary nature of this Court in accordance with its enabling statute. The advisory opinion procedure was devised for the purpose of giving advice where advice is needed, not to increase the authority of General Assembly resolutions, and the purview of the General Assembly itself, by this Court agreeing to answers already givento and embedded within questions asked by the GA simply seeking a ratification of its predetermined and biased questions.

25. Another feature of the resolution, if one looks at it as a whole, is how unbalanced it is.

Israel is called on to do or not to do many things. The Palestinian Authority is not called onto do or refrain from doing anything, not to tamp down terror, not to provide security, not to provide aid and assistance to the people under its control, not to cease dealing with designated Foreign Terror Organizations, not to cease providing incentives and financial rewards for murder and terror, and not even to convene directly or indirectly with the State of Israel in any good faith effort to resolve issues between neighbors, particularly with regard to the essence of issues that the PA agreed to negotiate with Israel, which the PA is duty-bound to do. Israel is presumed to be the enemy, the occupier, the offender, the criminal, rather than being the administrator over a long-standing and simmering conflict during which Israel has been attacked by various neighboring countries and resident terror organizations who use murder, maiming and threats as their mantra, rather than diplomacy.

26. Importantly, the resolution in preambular paragraph 43 calls for an end to terrorism without attributing that terrorism to any particular entity. The resolution in operative paragraph 8 condemns terrorism "especially" by "the Israeli occupying forces" without any holding of responsibility for the terrorist attacks perpetrated by HAMAS, Hezbollah, Palestinian Islamic Jihad and other Foreign Terrorist Organizations operating within the West Bank and Gaza, with the support of the Islamic Republic of Iran and the Syrian Arab Republic, both of which are on the US Department of State list of State Sponsors of Terror. It is that terror to which Israel necessarily responds. Israel's response cannot be defined as terrorism itself which is a misnomer without findings that link any activity carried out by Israeli forces to any accepted definition of terrorism.

27. By contrast, the resolution, as noted, in operative paragraph 9, condemns acts of violence by militants and armed groups against Israeli civilian areas without indicating who these militants and armed groups might be and without characterizing these acts of violence as terrorism, even though the intentional violent acts against innocent Israeli civilians and even people visiting or working in Israel, a sovereign nation, and carried out by Palestinian terrorist organizations for the purpose of coercing the Israeli government to change its policies falls squarely within the classic terrorist "triangle" that the UN itself broadly recognizes for the

purpose of defining terrorism. See [https://www.unodc.org/documents/e4j/18-04932\\_CT\\_Mod\\_01\\_ebook\\_FINALpdf.pdf](https://www.unodc.org/documents/e4j/18-04932_CT_Mod_01_ebook_FINALpdf.pdf).

28. The expressly worded language and implications of the resolution is that Israel is a perpetrator and Palestinians are innocent victims. The resolution shows no recognition of the existence of an opposing narrative—one backed by substantial evidence—that Palestinian entities are perpetrators committed to the use of acts of heinous murder as mantra to advance their political agendas; and that the Israelis are innocent victims.

29. Israel has been met with opposition to its existence since its inception. The opposition is straight bigotry, stemming from the fact that Israel is a Jewish state, that it is neither Arab nor Muslim and notwithstanding the fact that citizens of Israel include people from all walks of life, without regard to their race, religion, gender, sexual orientation, age or any other discriminatory factors. No mention exists of the commitment expressed by PA President Mahmoud Abbas that the lands of the PA shall be Judenrein: free of Jews; while, at the same time, the PA and Abbas accuse Israel of committing “apartheid” upon its people, an accusation clearly false and which can best be viewed by a walk through the streets of Jerusalem, any city in Israel, and through such healthcare facilities as Hadassah Hospital in Jerusalem, which provides quality healthcare for all people, without regard to their religion, race, national origin, gender, sexual orientation or for any other illegitimate reason. The truthful facts about Israel as a country committed to human rights and the dignity and betterment of all people are ignored in the votes of the UN General Assembly, various other UN organizations, including the UN Human Rights Council, and in the adoption of the resolution referring the Request to this Court.

30. History to be told, it is the Jewish people with uncontested ancestral roots and rights in the lands of Israel, the lands of the ancient Hebrews, and the land of the Bible. It is the Jewish people who have secured since 1967 the rights of freedom of access to all of the Holy Places, and the sanctity of churches, mosques and synagogues throughout Jerusalem and all of the areas which are part of the State of Israel in keeping with the various agreements it has signed with its peace partners, Egypt and Jordan as well as the agreements signed with

the PA itself.

31. One cannot forget that upon the establishment of the State of Israel, the opposition initially took the form of armed invasions. When those armed invasions failed, anti-Zionists changed their strategy to delegitimization through economic and academic boycotts, manipulation of diplomacy to promote demonization and terrorism. Many criticisms of human rights violations by Israel are misleading because they focus on Israeli counter-terrorism measures decontextualized from the anti-Zionist terrorism which prompted them.

32. The current General Assembly resolution is an example of this strategy of attempted delegitimization through demonization. Another example is the above-referenced request for the earlier advisory opinion on the barrier, misleadingly called the wall, notwithstanding the fact that it is in reality an effective terrorism-prevention security fence.

33. The barrier was constructed as an anti-terrorism measure, to prevent infiltration of terrorists from the West Bank into Israel, a prevention which has been largely effective. The reason for the use of concrete in portions of the "wall," rather than a chain link fence, in minimal parts of the length of the barrier was that those are populated areas where snipers could engage in terrorist activity by shooting or launching stones through the fence. Between September 27, 2000, and January 29, 2004, 78% of Israeli fatalities were non-combatants killed by Palestinians while only 36% of Palestinian fatalities were non-combatants killed by Israeli forces. Meanwhile, almost 50% of Palestinian fatalities were combatants or non-combatants killed by Palestinians.<sup>1</sup> Since construction of the barrier/fence ("Barrier" or "fence") began in 2003, the numbers associated with terrorism have decreased across the board: suicide attacks decreased by 100 percent, terror attacks by over 90 percent, Israeli civilian deaths by over 70 percent, and Israeli civilians wounded by more than 85 percent.<sup>2</sup>

34. At the time of the submission to this Court of the request for the 2004 Advisory Opinion,

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<sup>1</sup> See International Policy Institute for Counter-Terrorism, Interdisciplinary Center Herzliyah: *available at* [www.ict.org.il](http://www.ict.org.il).

<sup>2</sup> Richard Heideman, *The Bloody Price of Freedom* at 33, (Gefen 2021)

various litigants in Israel had pending numerous cases seeking relief from such issues as the routing of the Barrier. In fact, prior to the issuance of this Court's 2004 Advisory Opinion, the Israeli High Court of Justice, Israel's Supreme Court, issued an opinion specifically relevant to issues that were presented to this Court, which should have given deference to the Israeli Court's decision. Yet, the Israel High Court of Justice and the International Court of Justice reached differing conclusions on the legality of the fence because of different analyses performed by the two courts. The Israeli High Court analyzed the facts on the ground, studying how the path of the fence interfered with the ability of Palestinian Arabs to travel freely between their homes and places of work, and ordering a rerouting of the fence where such interferences were found. The International Court of Justice, by contrast, looked mostly at UN General Assembly resolutions to make its factual determinations. Because Israel did not participate in advisory opinion proceedings about the barrier, other than jurisdictionally, and presumably would not participate in these proceedings, other than perhaps jurisdictionally, a decision Israel will make for itself, the same problem is likely to surface here.

Mara'abe v. The Prime Minister of Israel HCJ 7957/04

35. A consideration of the request for the advisory opinion in the context of the resolution as a whole gives an additional reason why this Court should decline to accept jurisdiction over or otherwise provide advice or an "answer" to the requested questions. The Court will be presented with one side only in a contentious debate. It is impossible for the Court to decide properly in those circumstances, nor should it do so, absent the consent of the parties to the controversies between them, and particularly considering that the parties have an agreed-upon path toward their own resolution. And, even if Israel were to determine for itself that it would be a party in the future to proceedings before this Court, the court has no ability to make political determinations, but only to address purely legal issues. The Resolution before the Court is not subject to such determinations by this Court.

36. If the Court were to assume jurisdiction to answer the request for an advisory opinion and Israel does not participate, the principle of *audi alteram partem*, hear both sides, is violated. If Israel were faulted for not participating, the principle that the Court should not assume

jurisdiction over a dispute between States when one state has not acceded to the jurisdiction of the Court is violated. So, unless Israel decides to participate in the proceedings in their entirety, the Court should not answer in substance the political issues which make up the request for an advisory opinion. The use of the advisory opinion procedure of the ICJ to refer this issue to the Court is a transparent attempt to bypass the fundamental principle, enshrined in Article 36 of the Court's Statute, that contentious issues can only be brought before the Court with the consent of all sides, which is clearly absent in this case. Moreover, in an advisory capacity, there is no mechanism for this Court to render opinions or decide actual political issues which are not properly before the Court, but rather are in the hands of the parties themselves.

37. The Court should also consider the efficiency of use of Court resources. In a dispute between parties, where one side is not participating and, because of that, the Court will not have all relevant facts before it, and where the other side is firm in their convictions, regardless of the outcome, answering the questions asked serves no useful purpose. Answering the questions asked would be a waste and inappropriate use of the Court's time and effort, including risking further deterioration to the reputation of this Court. Indeed, this Court ill-advisedly saw utility in such an exercise in its 2004 Advisory Opinion, and while the security barrier has proven effective at saving lives, the utility of the Advisory Opinion condemning the barrier remains not only questionable but blatantly unfair to Israel, having also provided fuel for the fire of the PA to continue to pursue terror as its method of resistance, under the guise of freedom-fighting, rather than diplomacy as its method of resolution.

38. Also relevant is the effect on the status and reputation of the Court. For the Court to answer the request for the advisory opinion will, in the circumstances, not satisfy one party to the dispute or the other, may not satisfy potentially both and is inconsistent with the in-place agreements between the parties. For the Court to parrot a politicized General Assembly resolution would once again bring the administration of international justice into disrepute. For the Court to diverge from that resolution is bound to displease the supporters of the

resolution. This Court should refrain from giving advice on a set of purely political and judgmentally unsound questions.

39. The dispute between Israel and those supporting the request for the advisory opinion is not essentially legal. For the opponents of Israel, using the law against Israel is a strategy. It is an extension of the wars against Israel by other means, lawfare instead of warfare. It is an alternative to terrorism as a means of attacking Israel. But the animus against Israel is not based on law. Attempting to use the law is merely one means to act out that animus.

In that context, answering the questions asked, however they are answered, does nothing to advance the peaceful settlement of the dispute between the parties and will surely only inform and inflame the rhetoric of the PA as it beats the drums against all things Israel in its attempt to achieve unilaterally what it has declined to seek to achieve by negotiation in accordance with its obligations under Oslo and other agreements.

## **Jurisdiction**

1. The second question that needs to be addressed is whether the Court has the jurisdiction to answer the request for the advisory opinion which was made. In principle, a request for an advisory opinion cannot be used to resolve a dispute between parties or states which have not submitted to the jurisdiction of the Court to resolve the dispute. Yet, that is what is happening here.

2. In the prior section of this submission, in discussing the Fence case, we had referenced the terminological dishonesty in which the anti-Israel and anti-Zionist cause engages and the regrettable tendency of both the UN General Assembly and this Court to accept without a prior basis and continue to repeat that terminology. Another example is relevant here, the reference to the Palestinian Authority as the State of Palestine, it being noted that from all available sources the Palestinian Authority is a quasi-governmental organization created and arising from the agreements reached between the Palestine Liberation Organization and the State of Israel during the Oslo Accords process; and that it was Mahmoud Abbas, as

President of the PA, who signed an executive order unilaterally changing the name of the PA to the State of Palestine.

3. The 1933 Montevideo Convention on the Rights and Duties of States sets out four criteria for statehood - a permanent population, a defined territory, government, and a capacity to enter into relations with the other states. The Palestinian Authority meets none of the legal prerequisites for statehood. This Court has made no finding to the contrary.

Montevideo Convention

<https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties=states.xml>

David Matas "Submission to the UN Commission of Inquiry on 'the Occupied Palestinian Territory, including East Jerusalem,' and Israel" at page 54 and following <https://drive.google.com/file/d/1LfzXulzi1sDRpeXP6r8nQ27oTIwoBvtr/> page 54 and following.

4. A pre-trial chamber of The International Criminal Court in February 2022 ruled that the Palestinian Authority, which had signed on to the Court statute in the name of the state of Palestine, had the legal capacity to do so. The Court based that, not on the Montevideo Convention criteria for statehood, but rather on the vote of the United Nations General Assembly which gave Palestine non-member state observer status.

5. The fact that the Court in that case preferred politics over law, a vote of the General Assembly over the Montevideo Convention, bodes ill for the prospect of a legally sound answer to the request for the advisory opinion in this case. We nonetheless persist in making legal submissions and hope that the Court will be receptive of them. In doing so, as in the case of the Fence which is misleadingly called a wall, we will stick to accurate terminology and refer to the entity which shares control of the land area located on the West Bank of the Jordan River, with Israel in accordance with the Oslo Accords, as the Palestinian Authority or the PA.

6. The Palestinian Authority, under the misleading adoptive name of the State of Palestine, is not a party to the Court's statute, although it has given the Court authority to address these issues. Israel has not consented and as a member-state of the United Nations, and a

sovereign state, reserves its own right to make its own determinations as to whether or not it will participate or submit anything in any proceedings. Israel in the General Assembly opposed the request for an advisory opinion. Israel has not accepted the jurisdiction of the Court on the matters raised in the request for an advisory opinion. The questions posed by the request ask the Court to give an opinion on political matters in dispute between the Palestinian Authority and Israel, as if they were legal matters in dispute between the parties, which they are not; and which legally could not be brought before the Court under its compulsory jurisdiction.

7. The Court, jurisdictionally, cannot do indirectly what it cannot do directly. It cannot, through assuming jurisdiction over a request for an advisory opinion, adjudicate a dispute unless both parties have agreed to submit the dispute to the Court for adjudication. That is not the case here. The advisory question in this case sets out items in an ongoing, dynamic and ever-changing political dispute between Israel and the Palestinian Authority. These matters require political resolution by the parties for the parties, and are neither ripe nor proper for legal adjudication, and certainly not for this court to render legal advice or issue an Advisory Opinion.

8. In 1923, in the Eastern Carelia case, the Permanent Court of International Justice declined to render an advisory opinion requested by the League of Nations. The request concerned a dispute between Finland and Russia and Russia was not a member of the League of Nations. The Court applied the principle that no State can, without its consent, be compelled to submit its disputes with other States to any kind of judgment or opinion by the Court. Status of the Eastern Carelia, Advisory Opinion No. 5, File F. c. VII, Docket III. 3

9. In the 1950 advisory opinion The Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, the Court observed that in the Status of the Eastern Carelia case the question put to the Permanent Court of International Justice was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties, and that at the same time it raised a question of fact which could not be elucidated without hearing both parties. Page 72

10. In its 1950 advisory opinion, the Court agreed to comply with the request of the General Assembly for an advisory opinion despite the opposition of all three concerned states - Bulgaria, Hungary and Romania. In doing so, the Court noted that the Court was considering only the applicability of a procedure for the settlement of disputes and was not pronouncing on the merits of these disputes. The implication of that reasoning is that the Court in that case may well have refused to answer the request for an advisory opinion if it had been asked to pronounce on the merits of a dispute amongst the States concerned. *Interpretation of Peace Treaties, Advisory Opinion*. I.C. J. Reports 1950, page 65

11. Here there is no doubt that the Court is asked to pronounce on the merits of a dispute between Israel, the Palestinian Authority and other States. The reasoning in the 1950 opinion militates against answering the question in this case.

12. The International Court of Justice in the Western Sahara case in 1975 also agreed to comply with a request of the General Assembly for an advisory opinion, this time on the legal status of the Western Sahara despite the objections of Spain. At the time there was a dispute between Spain and Morocco on the attribution of territorial sovereignty of that territory.

*Western Sahara, Advisory Opinion*, I.C.J. Reports 1975, page 12

13. The Court, in agreeing to comply with the request, observed that the purpose of the reference was to assist the General Assembly in its own functions of decolonization and not to bring before the Court a dispute between states, and that the legal position of Spain could not be compromised by the Court's answer to the questions submitted. The Court in that case, it is apparent, would have declined to answer the question asked if the answer could have compromised the legal position of Spain.

14. That is certainly not true with this request for an advisory opinion. The legal position of Israel, as a UN member-state, would potentially be compromised by the answer the Court gives to the question submitted. Such was the case in 2004 when the Court issued its

Advisory Opinion on the Fence question, over the objection of Israel and other UN member-states, as to jurisdiction, procedure and substance, yet this Court proceeded. One must ask the Court to ask itself: why does it treat Israel different than other Member-States of the United Nations? Why did this Court accept jurisdiction over, and issue its Advisory Opinion with regard to the political issues then pending between Israel and the PA, without giving deference to the Israeli High Court of Justice which had the primary and proper jurisdiction over the litigation matters pending before it; and why did this Court issue its Advisory Opinion castigating Israel and exonerating the PA notwithstanding the clearly established and known use by the PA of heinous murder and terror against Israel? No State should be subjected to a double standard; all UN Member-States should be treated equally, with respect and deference; and no State should be discriminated against because of any reason, as discrimination against a State is intolerable and unconscionable. This Court is urged to reject both jurisdiction and jurisprudence with regard to involving itself in the ongoing political disputes between the PA and Israel. Fundamental fairness demands no less.

15. In the South West Africa case, the formal dispute was between the United Nations and South Africa and not amongst States. Namibia did not participate in the proceedings. The League of Nations had mandated South Africa to administer South West Africa. The United Nations General Assembly terminated this mandate. The Security Council adopted resolutions declaring the continued presence of South Africa in Namibia illegal. The Court was asked to determine the legal consequences of the termination of the mandate. In the course of answering the question, the Court held that the United Nations was the successor to the League of Nations for the purpose of the mandate.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, page 16.

16. In this case, unlike the South West Africa case, there is no Security Council endorsement of an underlying position of the General Assembly. It may well be that the Court can and should give an advisory opinion on a matter of international peace and security on the request of

the General Assembly where the Security Council approves of the request or approves of the underlying political position on which the request is based. But the matter is different where the Security Council says nothing either on the request or the underlying political position on which the request is based. Moreover, as with the 2004 question, the Security Council itself is seized of the issue and regularly addresses matters involving Israel and the PA. This Court is not permitted to intervene in those political processes or questions that are properly before the parties themselves, who have in fact agreed to convene for all final status negotiation issues, including the very matters embedded in the UNGA Resolution.

17. There is a question of propriety arising from the request in this case, whether it is appropriate for the Court to answer the questions asked, even if the Court has jurisdiction to do so. Nonetheless, there is, before that, a jurisdictional question whether the Court can, through the advisory opinion procedure, adjudicate a dispute between parties to the Court statute who have not both consented to the jurisdiction of the Court to do so.

18. The answer is clear from a legal viewpoint: the Court has no jurisdiction to do so. The advisory opinion procedure cannot be used as a run around, a vehicle for getting around the obstacle to deciding a dispute at issue between parties where one of the parties declines to submit the dispute to the Court.

19. This Court, in the 2004 advisory opinion, did assume jurisdiction though the request for an advisory opinion was similar in form to the request here, an attempted runaround of the compulsory jurisdiction procedure by embedding what was and is a dispute between the Palestinian Authority and Israel in a request for an advisory opinion and, to boot, wrongly telling the Court what its own decision on that dispute should be. The Court opinion, as Judge Rosalyn Higgins in a separate opinion observed, was "strikingly silent" on the issue.

Paragraph 13

20. In a separate concurring opinion Judge Rosalyn Higgins did address the issue, not as one of jurisdiction, but as one of discretion. She considered whether the Court should, in its discretion, decline to answer the question in light of the fact that the advisory opinion asked the

Court to decide a dispute between international actors. She ended up "with considerable hesitation" signing on to the Court's advisory opinion, even though she did not agree with all of it and justified her signature by writing that she agreed with "almost all" of it.

Reasons paragraph 20

21. The Court is not bound by its prior decisions where they are wrong. The Court should recognize its prior error, deny deference to any presumed precedent and stand up against the continued political onslaught against Israel. Arguably, it can give an advisory opinion today different from the one in 2004 on the very same questions asked in the 2004 case.

Court statute article 59

22. The question, nonetheless, arises: what distinction, if any, is to be made between the 2004 case and this case on the issue of jurisdiction. The answer is that there is a significant difference in the scope, complexity and detail of the questions asked.

23. This is a matter which the Court did address in its 2004 advisory opinion. The Court there noted a submission that there is "the fundamental principle that permanent status issues must be resolved through negotiations". The Court responded, "It is not clear, however, what influence the Court's opinion might have on those negotiations." This statement alone is a basis for this Court to defer to the negotiation and political process and not rubber stamp the UN's continuous effort to castigate Israel as an outcast rather than as a member of the family of nations.

Reasons paragraphs 53 and 54

24. If the Court in this case answered all of the legal questions embedded in this advisory request, whether there is or is not an illegal occupation, whether there is or not discrimination, and so on, those answers would influence directly negotiations between Israel and the Palestinian Authority. Whichever party in the dispute the Court favors in answering their myriad of questions before the Court would predictably refer to and rely on, in negotiations, the reasoning which supports their position. Whichever party in the dispute the Court

disfavors would be cast as being in violation of international law, as has been the case with Israel as a result of the 2004 advisory opinion.

25. The Court added "It was also put to the Court by certain participants that the question of the construction of the wall was only one aspect of the Israeli- Palestinian conflict". The Court responded: "the question that the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall".

26. Judge Rosalyn Higgins described the Court reasoning this way:

"What should a court do when asked to deliver an opinion on one element in a larger problem? Clearly, it should not purport to 'answer' these larger legal issues. The Court, wisely and correctly, avoids what we may term 'permanent status' issues, as well as pronouncing on the rights and wrongs in myriad past controversies in the Israel-Palestine problem."

Paragraph 17

27. Yet, that is precisely what is happening here. The Court is not here being asked to deliver an opinion on one element in a larger problem. It is asked, through an advisory legal opinion, to address the larger problem. It is being asked to address permanent status issues, which the Court should refrain from doing. The request is to pronounce on the rights and wrongs in a myriad of controversies in the Israel Palestine conflict.

28. The 2004 advisory opinion was ill-advised, ill-considered and has led to immense adverse consequences, including acquiring an elevated claimed status in international law, as if this Court had adjudicated controversies presented to it by parties competently before it. One such consequence is the very request for an advisory opinion we see here. Not declining to answer the request answered in the 2004 case, specific though the request might have been, led inevitably to this much larger request.

29. Nonetheless, even if one agrees with everything written in the 2004 advisory opinion, answering this request is not consistent with it. The Court in 2004 answered the request

made to it because it determined that it was specific. This one is not. It is as wide as all outdoors. While there are many reasons why this request should not be answered, on either jurisdictional or discretionary grounds, simply accepting and applying the reasoning of the 2004 advisory opinion, without conceding matters related therein, provides a proper basis to reject this request and for the Court to judiciously decline to proceed to the issuance of a second advisory opinion relating to the controversies at issue between the PA and Israel.

30. Five judges of the Court - Judge Abdulqawi Ahmed Yusuf of Somalia, Judge Patrick Lipton Robinson of Jamaica, Judge Xue Hanqin of China, Judge Julia Sebutinde Uganda, and Judge Nawaf Salam of Lebanon - come from countries which voted in favour of the General Assembly resolution. Three of the judges of the Court - Judge Hilary Charlesworth of Australia, Judge Georg Nolte of Germany and President Joan E. Donoghue of the United States of America - come from countries which voted against the General Assembly resolution.

31. The rules of the International Court of Justice provide: "When an advisory opinion is requested upon a legal question actually pending between two or more States, Article 31 of the Statute shall apply, ..."

Rule 102(3)

32. Article 31 provides in part: "If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge." Subarticle 2.

33. The Court statute provides:

"Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court."

Article 31(5)

34. The Court statute uses the term "party" to refer to both parties to the Court statute and parties to Court cases. In the context, of Article 31, the term "party" is meant to refer to

parties to the case and not parties to the Court statute.

35. In light of the fact that the Court includes upon the Bench judges of five of the countries which voted for the General Assembly requesting the advisory opinion and only three against, combined with the one-sided nature of the resolution itself, Israel, in principle should have a right to choose two persons to sit as judges. Israel, nonetheless, is unlikely to make this request as it has not consented to these proceedings. The question which arises is what, if anything, flows therefrom. The Court should take its own steps to be sure the Court is not impartial nor influenced by virtue of the votes in the General Assembly of their respective countries.

36. Although Rule 102 refers to legal questions pending between States, Article 31 refers to parties. The right to choose a judge or judges applies only to parties to the case, and not to States who are not parties. If Israel is not a party to the advisory opinion proceedings, it would not have a right to name one ad hoc judge, let alone two.

37. The power to name an ad hoc judge in advisory opinion proceedings is contingent upon being a party to a proceeding highlights the difference between compulsory jurisdiction proceedings and non-compulsory advisory opinion proceedings. In compulsory jurisdiction proceedings, States with pending legal disputes are inevitably parties to the proceedings. In non-compulsory advisory opinion proceedings, that is not so.

38. One explanation for the fact that the provision about ad hoc judges applies in advisory opinion proceedings only to parties to the proceedings is that there is a presumption that the proceedings would not go ahead in the absence of one of the parties to the dispute. That explanation and that presumption make sense in light of the unfairness of going about attempting to resolve a dispute between parties to a dispute in the absence of one of the parties to the dispute and the difficulty in doing so.

## **Independence**

1. The Court should decline to give the advisory opinion requested because the General Assembly, in its request for the opinion, does not respect the independence of the Court. The request is not neutral, but rather expresses a number of opinions which the General Assembly imposes upon and expects the Court to endorse.

2. Surely the judges of the International Court of Justice who are chosen to nine-year renewable terms by the General Assembly, the very body which is asking for endorsement of its views by the Court, are committed to sitting as an independent judiciary. Without question, this Court will resist any pressure from any country, including their own, with regard to the views which their home country may have expressed in the General Assembly regarding the pending request for an advisory opinion and not permit any country to impliedly threaten the members of the Court with regard to having their terms renewed or their views influenced, as that is the essential nature of an independent court.

3. Notably, because of the large number of abstentions and states not voting, the General Assembly resolution which requested the advisory opinion was adopted by a minority of members of the United Nations General Assembly, 87 states out of 193.

4. It is well recognized that a person cannot be considered as a candidate for membership in the Court unless nominated by a national group of the country of which the candidate is a national. The members of each national group are appointed by the government of the state which the national group represents. This intermediation allows states to decline to renominate a judge eligible for re-election, since states can instruct their national groups. Surely, the Judges on this Court will insulate themselves from such considerations and pressures. Statute of the International Court of Justice article 4

5. Some of the states from which judges come do not have an independent judiciary. While this may raise concern with some about the independence of those such judges on this tribunal from the political objectives of their home countries, it is our hope that the judges of this tribunal can safely decide this matter with integrity and on the merits – as set forth in this memorandum – including by properly viewing UN General Assembly resolutions as

political instruments rather than statements of fact or law.

6. Other judges of the Court come from countries which voted in favor of the resolution requesting the advisory opinion. There is a legitimate concern, particularly if they come from countries where the independence of the judiciary is questionable, as to the consequences they may face should they reject the opinions expressed in the request for an advisory opinion.

7. These issues necessarily hang over the whole Court, but this Court should resist political pressure of any kind, from the UN, from their home countries, and in fact from anyone; and should neither feel compelled to accept jurisdiction of the questions presented, nor to issue any Advisory Opinion, much less a faulty one.

8. As a majority of the Court comes from countries which voted in favor of the resolution, the attack on the independence of even one judge of the Court should not be tolerated. This advisory opinion is an attack on the independent standing of the whole Court.

9. Basic Principles on the Independence of the Judiciary adopted by the United Nations General Assembly in 1985 state in part:

"(1) It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

(2) The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."

10. The current General Assembly resolution asking for an advisory opinion violates the second principle. It embeds and conveys indirect improper influences, inducements, pressures, threats and interferences, by telling the Court what their opinion should be on a myriad of issues, even though the institution telling the Court is the very institution which elects the judges and decides on the extension of their terms. Any factual findings that rely on UNGA resolutions will not be made impartially on the basis of facts, but rather will be

improperly influenced by a long-standing effort to demonize and delegitimize Israel's standing as a country, so long as it holds itself out as the homeland of the Jewish people.

11. A component of judicial independence is security of tenure.

Valente v. The Queen, 1985 CanLII 25 (SCC), [1985] 2 SCR 673,

United Nations Document Number CCPR/C/121/D/2203/2012, International Covenant on Civil and Political Rights, 1 February 2018, Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2203/2012,

12. Security of tenure encompasses security of renomination and re-election when a judge has a limited term. A judge of the International Court of Justice who seeks re-election is not entitled to renomination. A judge of the Court who is renominated to another term is not entitled to re-election. Yet, considerations on re-nomination or re-election should be limited to objective factors "in particular ability, integrity and experience" and we trust that the members of this Court will resist all such pressures.

Basic Principles on the Independence of the Judiciary, Principle (13)

13. Renomination and re-election should not be based on whether the judge joins in the issuance of a certain opinion or agrees or disagrees with an opinion of the General Assembly.

14. The practice of term limits for judicial appointments with the possibility of reappointment is widespread. For the Court to accept to answer the request for the advisory opinion in its current form would undermine the independence of the judiciary worldwide. Tom Ginsburg, "Term Limits and Turnover on the U.S. Supreme Court: A Comparative View" Testimony for the Presidential Commission on the Supreme Court, July 20, 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/07/Ginsburg-Testimony.pdf>

15. The judges of this Court, presumably, would reject the notion that they would be influenced by implied threats or inducements in arriving at their decision in this case or any case. Yet, the problem is not only the reaction to the threat or inducement. It is the threat or inducement itself. The Court should give thought as to the anticipated reaction of the UNGA

if the Court rejected its question: there would be an outcry against the Court and put the Judges in a difficult position regarding their tenure; that, in itself, proves that the Court is necessarily capable of being influenced by the overwhelming political nature of the referred question; and establishes another basis for this Court to reject the effort to impose upon the Court this request to issue an advisory opinion on the political issues inherent in the request and the question(s).

16. It is impossible to say, given the nature of the request and the legal structure of re-appointment, that this implied threat or inducement does not exist. That in itself is an affront to the independence of this Court and all courts where judges have term limits and can be re-appointed; and we trust that this Court will resist the natural temptation to consider such factors.

In sum, the Court should resist and reject the effort by politicized nations to draw this independent court into political decision making, albeit advisory.

## **Voting**

1. The United Nations General Assembly vote in favor of the request to the Court for an advisory opinion was 87 for making the request, 26 against making the request, 53 abstentions and 27 not voting. The total eligible to vote was 193.

United Nations Digital Library <https://digitallibrary.un.org/record/3999158?ln=en>

2. There were accordingly 106 state members of the United Nations that did not vote for the resolution, significantly more than a fifty percent majority of the nations seated at the UN. The resolution was adopted by a minority of the UN General Assembly. 87 states requested the advisory opinion. 106 states did not request the advisory opinion.

3. Freedom House classifies states and territories as not free, partly free or free. The territories they consider are not voting members of the United Nations. Freedom House classified 67 states and territories not free. Of those 67 states and territories, 37 were states that

voted in favour of the request to the Court for an advisory opinion. None of these states classified as not free voted against the request for the advisory opinion. If we remove from the total of states requesting an advisory opinion those states not free, we are left with 50 states requesting an advisory opinion, hardly sufficient for jurisdiction to be imposed upon this Court.

Freedom House: Countries and Territories

<https://freedomhouse.org/countries/freedom-world/scores>

4. There are 30 states which do not recognize the State of Israel. Seven of those states classified by Freedom House as either free or partly free voted for the resolution. No state which does not recognize Israel voted against the resolution. If we remove those seven states from the total in favor of the resolution, we have only free and presumably non-biased 43 states requesting the advisory opinion, far less than any conceivable majority of the United Nations.

5. The point of differentiating between the not free on the one hand and the free or partly free on the other hand, and differentiating between those states which recognize Israel and those who do not is to highlight the political nature of the resolution. As is evident from the resolution itself, the proponents and authors of the resolution are not asking the Court for their opinion on a question that has puzzled them. They are asking the Court to give particular pre-defined answers to the political questions asked, seeking for the Court to rubber stamp the views of the countries inherently biased against Israel.

6. Why would they do this? Why ask the Court to answer a question to which they think they already have the answer? For those states who do not recognize Israel, the answers may be obvious – continued demonization and increasing attempts at delegitimization.

7. The armed invasions having failed and terrorism having generated counterterrorism, anti-Zionists essentially seek the destruction of the State of Israel by other means, the demonization and delegitimization of the State. Having the International Court of Justice join them in this delegitimization campaign would be, for anti-Zionists, a definite plus. It would give credibility

to something that is, on its face, nothing more than a particular, modern, variation of state-sponsored and UN endorsed antisemitism.

8. Of the 37 states which, according to Freedom House are not free, fourteen also do not recognize Israel. Why would the other 23 states which are not free vote in favor of the resolution? It cannot be out of concern for a victim population, since of these states each has their own homegrown victim population. The answer is reciprocity. States which are not free seek immunity. To achieve immunity, they need allies and they need to be able to point the finger at another accused offender, utilizing decisions of this Court to absolve themselves through the Court's action against Israel. By blaming Israel for all ills, they deflect focus upon their own conduct. By supporting the anti-Zionist cause, they expect and receive reciprocity in UN circles in avoiding scrutiny for their own oppression.

9. The double standard from which Israel suffers at the United Nations is in large measure attributable to this reciprocity. The states which truly deserve attention at the United Nations for repression of their own populations are able either to avoid or minimize that attention in exchange for ganging up on Israel. Repressive states know that all they have to do is vote against Israel and the states who do not recognize Israel will vote for them.

10. Yet there is a small, but significant minority of states which join the anti-Zionist cause which are neither in the column of states considered not free nor in the column of states refusing to recognize the existence of Israel. The current request for an advisory opinion had 44 such states.

11. What explains the behavior of such states? One explanation is that they are dupes to the engineered victimization by anti-Zionists of the Palestinian population and the efforts by anti-Zionists to shift the blame for that victimization from themselves to Israel.

See David Matas "Submission to the UN Commission of Inquiry on 'the Occupied Palestinian Territory, including East Jerusalem,' and Israel" at page 38 and following <https://drive.google.com/file/d/1LfzXulzi1sDRpeXP6r8nQ27oTIwoBvtr/>

12. Although the resolution containing the current request for an advisory opinion is lengthy in the extreme, it can be summarized in one highlighted word – “occupation,” without regard to making a distinction between a legal occupation permitted under international law, as agreed to between the parties, as we have here, and the established facts that it has not been, and is not, Israel which has refused to move to the next and ultimate steps of the Oslo Agreement, to wit, “final status negotiations”, but rather the PA itself. Moreover, the focus on the “occupation” permits the PA to avoid any scrutiny, or responsibility, for the contrary one word - “terrorism.”

13. The advisory opinion of the International Court of Justice on the security barrier mentions the word “occupied” or its variations 184 times. The opinion mentions the word “terrorism” and its variations **three** times. The opinion does not mention the word “counter-terrorism” even once.

Yet, that was the whole point of the security barrier, to counter terrorism. The Court gave no consideration to whether the security barrier was a necessary counter-terrorist measure. The right to self-defense is a well-established principle in international law, recognized in the UN Charter and customary international law. According to Article 51 of the UN Charter, countries have the inherent right to individual or collective self-defense if an armed attack occurs against them. This means that if a country is subject to an armed attack, it has the right to use necessary and proportionate force to defend itself. However, in its first opinion relating to Israel and the PA, the Court reasoned that “Article 51 of the Charter thus recognizes the existence of an inherent right of self-defense in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State. . . . Consequently, the Court concludes that Article 51 of the [UN] Charter has no relevance in this case.” Notably, Article 51 of the Charter does not require that an armed attack be carried out by another state. The Court literally rewrote the law to declare that Israel cannot defend her citizens from acts of terrorism through the non-violent act of building a barrier. This staggering effort by the Court at judicial pretzel-twisting and display of judicial activism does not just reflect poorly on this tribunal’s integrity, it poses

a threat to international peace, security and world order.

14. There is, regrettably, within the Court, as noted elsewhere in these submissions, a tendency to defer to the UN General Assembly, even though the General Assembly is a political and not a legal body. One can hope that in this case that tendency would be mitigated by the shallow support given in the General Assembly for the request for this advisory opinion and the questionable basis for the support received by the relatively small number of countries supporting the resolution's request to this Court.

## **Opinions**

1. The resolution is rife with opinions. The resolution regrets or condemns or deplores or expresses concerns about a myriad of accusations against Israel which the Court is wrongly asked to wrongly assume as facts to be interpreted under applicable law, when indeed each of the subpart issues contained within the resolution and questions presented require independent evidentiary review and consideration before any Court could issue any opinion on the varied politically-biased presented assumed elements of the Questions presented to this Court, including but not limited to the following:

- 1) the 55 years that have passed since the onset of the Israeli occupation, notwithstanding the effect of the agreement between the parties that established a legal occupation pursuant to the Oslo Accords
- 2) the negative trends on the ground
- 3) any failure to respect the historic status quo,
- 4) the use of security measures alone to remedy the escalating tensions, instability and violence,
- 5) continuing systematic violation of the human rights of the Palestinian people by Israel,

- 6) excessive use of force and military operations causing death and injury to Palestinian civilians, including children, women and non-violent, peaceful demonstrators, as well as journalists, medical personnel and humanitarian personnel
- 7) the arbitrary imprisonment and detention of Palestinians, some of whom have been imprisoned for decades
- 8) the use of collective punishment
- 9) the closure of areas
- 10) the confiscation of land
- 11) the establishment and expansion of settlements
- 12) the construction of a wall in the Occupied Palestinian Territory in departure from the Armistice Line of 1949
- 13) the destruction of property and infrastructure
- 14) the forced displacement of civilians, including attempts at forced transfers of Bedouin communities
- 15) all other actions by Israel designed to change the legal status, geographical nature and demographic composition of the Occupied Palestinian Territory
- 16) the ongoing demolition by Israel of Palestinian homes, as well as of structures, including schools, provided as international humanitarian aid, in particular in and around Occupied East Jerusalem, including if carried out as an act of collective punishment in violation of international humanitarian law, which has escalated at unprecedented rates,
- 17) the revocation of residence permits and eviction of Palestinian residents of the City of

## Jerusalem

18) the conflicts in and around the Gaza Strip and the high number of casualties among Palestinian civilians in the recent period, including among children,

19) the disastrous humanitarian situation and the critical socioeconomic and security situation in the Gaza Strip,

20) the prolonged closures and severe economic and movement restrictions that in effect amount to a blockade and deepen poverty and despair among the Palestinian civilian population,

21) the widespread destruction and continued impeding of the reconstruction process by Israel on the human rights situation,

22) the unsustainable situation in the Gaza Strip

23) the lack of progress in a durable ceasefire agreement leading to a fundamental improvement in the living conditions of the Palestinian people in the Gaza Strip,

24) the lack of progress in sustained and regular opening of crossing points,

25) the lack of progress in ensuring the safety and well-being of civilians on both sides,

26) serious human rights violations and grave breaches of international humanitarian law committed during the successive military operations in the Gaza Strip

27) the need for protection of human rights defenders engaged in the promotion of human rights issues in the Occupied Palestinian Territory, including East Jerusalem, to allow them to carry out their work freely and without fear of attacks and harassment

28) the Israeli policy of closures and the imposition of severe restrictions,

- 29) hundreds of obstacles to movement, checkpoints and a permit regime,
- 30) obstruction to freedom of movement of persons and goods, including medical and humanitarian goods,
- 31) obstruction to the follow-up and access to donor-funded projects of development cooperation and humanitarian assistance, Jerusalem,
- 32) impairment to the Territory's contiguity, consequently violating the human rights of the Palestinian people and negatively impacting their socioeconomic and humanitarian situation,
- 33) the dire situation in the Gaza Strip,
- 34) impairment to the efforts aimed at rehabilitating and developing the Palestinian economy,
- 35) thousands of Palestinians, including many children and women, as well as elected representatives, continue to be held in Israeli prisons or detention centers under harsh conditions, including unhygienic conditions, solitary confinement,
- 36) the extensive use of administrative detention of excessive duration without charge and denial of due process,
- 37) lack of proper medical care and widespread medical neglect, including for prisoners who are ill, with the risk of fatal consequences,
- 38) denial of family visits, that impair the prisoners' well-being,
- 39) the ill-treatment and harassment and all reports of torture of any Palestinian prisoners
- 40) the hunger strikes by Palestinian prisoners in protest of the harsh conditions of their imprisonment and detention by the occupying Power,
- 41) the practice of withholding the bodies of those killed,

- 42) acts of violence, harassment, provocation and incitement by extremist Israeli settlers and groups of armed settlers, especially against Palestinian civilians, including children, and their properties, including homes, agricultural lands and historic and religious sites, including in Occupied East Jerusalem,
- 43) the violation of the human rights of Palestinians by Israeli settlers, including acts of violence leading to death and injury among civilians,
- 44) the absence of an international presence to monitor the situation, to contribute to ending the violence and protecting the Palestinian civilian population and to help the parties to implement the agreements reached,
- 45) the unilateral decision by the Government of Israel not to renew the mandate of the Temporary International Presence in Hebron,
- 46) the absence of measures to guarantee the safety and protection of the Palestinian civilian population throughout the Occupied Palestinian Territory,
- 47) Israel violations of the human rights of the Palestinian people,
- 48) Israeli killing and injury of Palestinian civilians,
- 49) Israeli arbitrary detention and imprisonment of Palestinian civilians,
- 50) Israeli forced displacement of Palestinian civilians,
- 51) Israeli attempts at forced transfers of Bedouin communities,
- 52) Israeli transfer of its own population into the Occupied Palestinian Territory, including East Jerusalem,

- 53) Israeli destruction and confiscation of civilian property, including home demolitions, including those carried out as collective punishment
- 54) Israeli obstruction of humanitarian assistance,
- 55) the absence of urgent measures to ensure the safety and protection of the Palestinian civilian population in the Occupied Palestinian Territory, including East Jerusalem,
- 56) Israeli settlement activities,
- 57) Israeli construction of the wall
- 58) all Israeli measures aimed at altering the character, status and demographic composition of the Occupied Palestinian Territory, including in and around East Jerusalem,
- 59) the grave and detrimental impact of Israeli measures on the human rights of the Palestinian people, including their right to self-determination,
- 60) the grave and detrimental impact of Israeli measures on the prospects for achieving without delay an end to the Israeli occupation that began in 1967,
- 61) the grave and detrimental impact of Israeli measures on the prospects for achieving without delay an end to the Israeli occupation that began in 1967 and a just, lasting and comprehensive peace settlement between the Palestinian and Israeli sides,
- 62) the plight of Palestinian prisoners and detainees in Israeli jails, including those on hunger strikes
- 63) the use of force by the Israeli occupying forces against Palestinian civilians, particularly in the Gaza Strip, including against journalists, medical personnel and humanitarian personnel, which have caused extensive loss of life and vast numbers of injuries, including among children and women,

- 64) the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem,
- 65) damage caused by the construction of the wall, which has gravely impacted the human rights and the socioeconomic living conditions of the Palestinian people
- 66) imposition of prolonged closures and economic and movement restrictions, including those amounting to a blockade on the Gaza Strip,
- 67) long overdue and massive reconstruction needs and economic recovery in the Gaza Strip
- 68) the continuing health crisis in the Gaza Strip,
- 69) the increasing caseload of injuries requiring complex treatment in the Gaza Strip
- 70) the dire socioeconomic and humanitarian situation, particularly in the context of the protests in the Gaza Strip
- 71) the continued denial and violation of the human rights of the Palestinian people.

Simply put, neither this Court nor any Court can or should undertake the issuance of an Advisory Opinion based upon the presentation of such politically-charged issues requiring independent review and consideration.

2. This list merits a number of comments. One is that it is extremely long and repetitious. The second is that inherent in the points is significant and continuously present overt and subvert condemnation of Israel, but silence by name about the wrongdoing of HAMAS, which is the acronym for the Islamic Resistance Movement, PIJ, which is the acronym for the Palestinian Islamic Jihad, which by their very nature oppose all aspects of the very existence of Israel and are committed to its destruction, and have used violence as a strategy to derail peace efforts. Nor is there reference to any wrongdoing of the Palestine Liberation Organization, which remains listed as a designated Foreign Terror Organization, nor of the Palestinian

Authority itself, which teaches and preaches hate toward Israel, Zionism and the Jewish people, or any of the multitude of terrorist anti-Zionist organizations operating in the West Bank and Gaza.

3. Third, although this summary refers to Israel, the resolution itself uses a different name for the country. In the resolution, the country is called "Israel, the occupying power", twelve times. The phrase "the Israeli occupation" is repeated six times, without any reference to the distinction between a legal occupation under international law, as agreed to between the parties. The phrase "the Occupied Palestinian Territory" is repeated 31 times. This constant repetition is more than just a sequence of opinions. It is the clear expression of bias inherent in the referred Questions.

4. The resolution condemns incitement. Yet, the resolution, by its one sidedness and name calling, is incitement itself. The resolution calls for de-escalation of provocative rhetoric. Yet, the resolution itself is a form of provocative rhetoric.

5. The resolution constantly refers to Israeli victimization of Palestinian civilians. It says nothing about Palestinian victimization of Israeli citizens. It fails to recognize the use by HAMAS of human shields, the use by Palestinian terrorist organizations of children in combat, the launching of terror balloons and rockets toward Israeli towns, and people, the Palestinian Authority's pay-for-slay program that provides compensation, incentives and rewards to terrorists who are imprisoned or the survivors of terrorists who are killed committing acts of terror as well as the fact that Palestinian terrorists do not dress in military uniform and do operate under the guise of civilian activity.

6. The resolution makes no distinction between innocent civilians and terrorists not dressed in military uniform. The resolution does call for respect for the principle of distinction, but in a vacuum, without reference to anyone or any entity. The resolution says nothing about the funding of terrorism against Israel, nor incitement to terrorism against Israel.

7. The resolution does condemn acts of violence by militants and armed groups, including the

firing of rockets, against Israeli civilian areas, resulting in loss of life and injury. The reference is to militants and armed groups, not to terrorists. None are named.

8. Although the resolution requests an advisory opinion from the International Court of Justice, the resolution already gives the opinion(s) it seeks. There is no uncertainty or curiosity expressed in the resolution either about the law or the facts. It is replete with opinions not only of Israeli wrongdoing, but also what the consequences of those wrongs should be.

9. The resolution does not question whether the opinions expressed might be wrong. If the Court rejected the opinions expressed in the resolution, it is fair to say that the supporters of the resolution would be horrified.

10. Given the nature of the resolution, it is also fair to conclude that what the supporters of the resolution want is an assumption that the opinions of Israeli wrongdoing expressed in the resolution are correct, accepting as a given every opinion expressed in the resolution, with, if possible, supporting additional arguments. It is also fair to say that the supporters of the resolution would want the endorsement by the Court of every recommendation for action in the resolution. Such a request for an advisory opinion is an abuse of the Court process.

11. The form of the resolution is to ask the Court, in light of all the opinions expressed, for the legal consequences of the assumed wrongdoing of Israel. The resolution does not ask the Court to determine whether Israel did anything wrong. The resolution asks the Court to accept that there was wrongdoing and asks only what are the legal consequences of that accepted wrongdoing.

12. Yet, even when it comes to consequences, the resolution is far from a blank slate. On the contrary, the resolution itself states a whole series of consequences that the authors and supporters of the resolution believe should follow.

13. The resolution is akin to a request to the Court to agree to a proposed punishment for an assumed crime in the absence of the accused. It is improper to ask any Court and in particular this Court to answer such a request.

14. The very request shows a lack of awareness of the judicial process. A judicial process should presume innocence and determine right and wrong based upon facts and law and not based upon any assumed wrongs.

15. A judicial process should determine consequences based on its own review of the facts on the ground and not simply endorse proposed findings and consequences based only on the views of the accuser. A judicial process should make its determinations in the presence of and with the participation of the accused, and not with the participation only of the accuser.

16. These various opinions are unusual in a request for an advisory opinion in the sense that they give the answers to the questions asked. It is apparent that the authors and supporters of the resolution want a Court order that Israel stop every alleged activity of Israel about which the resolution complains.

17. It is no coincidence that so many non-democratic states supported the resolution, because that is exactly what happens in those states. Courts are a façade, a procedure used to endorse Government edicts. The request from the non-democratic states to this Court in the advisory opinion is exactly that, a request for a Court imprimatur on their decisions and certainly not a questioning of those decisions.

18. Article 96 (1) of the UN Charter provides:

"The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any **legal question.**" (emphasis added)

19. This provision grants authority to request an advisory opinion on a legal question. It does not grant authority to the Court to grant a request to issue opinions on inherently political, not legal, questions, nor to approve or assume or accept a legal answer already given in the request. Because of the nature of the request made in this advisory opinion, the Court has no authority to grant it and should reject doing so.

20. The Court could turn the myriad of opinions found in the request into many questions,

questions whether, one by one, the opinions in the request are or are not factually sound and subject to determination as a legal question. That would be a huge task given the many opinions in the resolutions, and the time and resources that would necessarily go into investigating and assessing their validity.

21. While that exercise, of assessing all the various opinions in the resolutions to determine whether they are accurate, could lead to answering questions, here too the Court would have no jurisdiction. The Court can answer only legal questions asked. The Court cannot turn a request in the form of the resolution addressed here into a series of questions, because the Court has no jurisdiction to answer questions neither asked nor legal in nature.

22. The question of consequences cannot be answered without first answering the question whether the assumptions embedded in the many opinions of the resolution are both valid accurate. The acceptance of that result cannot lead to answering the questions embedded in the opinions, since the Court has no jurisdiction to do that. The acceptance of that result must lead to the declining of jurisdiction to answer the question of consequences.

### **Agreements, Standards and International Law**

1. The resolution refers to these agreements:

1) the Sharm el-Sheikh understandings,

2) the Quartet road map to a permanent two-State solution to the Israeli-Palestinian conflict, S/2003/529, annex.

3) the Agreement on Movement and Access 15 November 2005

4) the Agreed Principles for the Rafah Crossing, 15 November 2005

5) agreements reached on conditions of detention in Israeli prisons

6) the tripartite agreement facilitated by the United Nations to allow for the sustained and regular movement of persons and goods and for the acceleration of reconstruction needs and economic recovery in the Gaza Strip, and

7) the agreement signed in Cairo on 12 October 2017, S/2017/899. annex.

2. Missing is specific reference to Oslo II, which divides the West Bank into three areas, one under the control of the Palestinian Authority, one under the control of Israel and one under joint control, and which also allocates specific areas of Gaza to sole Israeli control, and accordingly not only establishes a legal occupation by consent and agreement, but denies the claim of occupation. The resolution does stress "the need for full compliance with the Israeli-Palestinian agreements reached within the context of the Middle East peace process." However, whereas other agreements and documents executed by non-parties, as noted above, are specifically mentioned, Oslo II—an agreement between the Government of the State of Israel and the PLO/PA—is not.

3. Also missing are references to the Joint Communiqués from the February 26, 2023 meeting in Aqaba, Jordan and the March 19, 2023 meeting in Sharm El Sheikh. This omission was inevitable, since the Communiqués post-date the General Assembly resolution. They are nonetheless worth highlighting, because they undermine and contradict the General Assembly request for this advisory opinion, as explained later in these submissions.

4. The resolution refers to these standards:

1) the Universal Declaration of Human Rights,

2) the International Covenant on Civil and Political Rights,

3) the International Covenant on Economic, Social and Cultural Rights

4) the Convention on the Rights of the Child,

5) the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, and in particular articles 146, 147 and 148

6) the principle of the inadmissibility of the acquisition of territory by force

7) the right and the duty to take actions in conformity with international law and international humanitarian law to counter deadly acts of violence against their civilian population in order to protect the lives of their citizens,

8) the obligation to respect the historic status quo, the special significance of the holy sites

9) the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) Resolution 70/175, annex.

10) the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) Resolution 65/229, annex.

11) the prohibition under international humanitarian law of the deportation of civilians from occupied territories

12) the right of peaceful assembly

13) the principle of the inadmissibility of the acquisition of territory by force

5. What are the consequences of a legal occupation, agreed to between the parties under Oslo, and the issues presented to the Court in the resolution are factual issues requiring determination but for which this Court has no mechanism to accomplish. Absent the consent of the parties and submissions that determine unbiased facts and evidence, the Court is essentially incapable of and should not undertake the adjudicating of such complex, unproven and inherently biased attempt to circumvent the agreements of the parties.

6. Worthy of note is what is not mentioned, as well as what is mentioned. The International

Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 are all not mentioned.

7. Israel is a party to the first two instruments. The Palestinian Authority is not. The Palestinian Authority, under the name of Palestine, is a party to the third instrument; Israelis not.

8. These three instruments are treated asymmetrically. There is no suggestion in the resolution that the Palestinian Authority is legally responsible for the suppression of terrorist bombings or financing terrorism, a glaring omission.

9. The resolution "condemns .. all acts of terror, ...[and] incitement ..., especially any use of force by the Israeli occupying forces against Palestinian civilians in violation of international law, particularly in the Gaza Strip, including against journalists, medical personnel and humanitarian personnel, which have caused extensive loss of life and vast numbers of injuries, including among children and women". The phenomenon of anti-Zionist terrorism is ignored. Israel alone is mentioned in the operative paragraph addressing terrorism.

10. Although Israel is not a state party to Protocol I of the Geneva Convention, which stands against occupation of a people, the resolution assumes that the prohibition against occupation of a people applies to Israel. These representations submit elsewhere that there is no occupation. However, even if there is an occupation, the occupation is that of the Palestinian people not of either Jordan or Egypt, which have essentially ceded control to Israel of the territories they held before the 1967 war, notwithstanding King Hussein's subsequent relinquishment to the PLO. Accordingly, the resolution applies to Israel an international instrument, on occupation, to which Israel is not a party although the Palestinian Authority is a party, and does not apply to the Palestinian Authority instruments, on terrorism, to which Israel is a party and the Palestinian Authority is not.

11. The resolution, surprisingly in a request for an advisory opinion from the International Court of Justice, asserts a number of international law opinions, including from this Court's 2004 Advisory Opinion. They are:

1) All States have the right and the duty to take actions to counter deadly acts of violence against their civilian population in order to protect the lives of their citizens.

2) Full respect for international law includes the protection of civilian life, as well as for the promotion of human security, the de-escalation of the situation, the exercise of restraint, including from provocative actions and rhetoric, and the establishment of a stable environment conducive to the pursuit of peace.

3) all measures and actions taken by Israel ... contrary to the relevant resolutions of the Security Council, are illegal and have no validity.

4) There should be full respect for the international law principles of legality, distinction, precaution and proportionality.

5) The killing and injury of civilians, the arbitrary detention and imprisonment of civilians, the forced displacement of civilians, including attempts at forced transfers of Bedouin communities, the transfer of its own population into the Occupied Palestinian Territory, including East Jerusalem, the destruction and confiscation of civilian property, including home demolitions, including if carried out as collective punishment and any obstruction of humanitarian assistance are all measures contrary to international law.

6) International law requires urgent attention to the plight and the rights of Palestinian prisoners and detainees in Israeli jails, including those on hunger strike.

7) All acts of violence, including all acts of terror, provocation, incitement and destruction, especially any use of force by the Israeli occupying forces against Palestinian civilians, particularly in the Gaza Strip, including against journalists, medical personnel and humanitarian personnel, violate international law.

8) Israel has a legal obligation under international law to cease immediately the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, dismantle forthwith the structure situated therein, repeal or render ineffective all legislative and regulatory acts relating thereto, and make reparations for all damage caused by the construction of the wall.

4. Much of the content of what the resolution claims to be international law is questionable.

For instance, alleged terrorism by Israel is characterized as a violation of international law. Actual terrorism by PA supported terror organizations and anti-Zionist entities is referred to as militancy or armed conflict and is not referred to as a violation of international law.

5. The suggestion in the resolution that actions taken contrary to resolutions of the Security Council are illegal at international law and have no international law validity is legally incorrect. There is no such international law.

6. The resolution refers to the international law principle of proportionality. Yet there is no such international law principle.

7. Terrorists attack innocent Israeli citizens. Israel responds. The PA and other anti-Zionists often take these responses out of context and describe them as gratuitous acts of violence against Palestinians. Insofar as anti-Zionists acknowledge that Israel is responding, the response is described as disproportionate, in violation of international law. Yet, neither the word disproportionate nor its variations is found in any of the international instruments relating to response to armed attack or counter-terrorism.

8. There is a requirement in Protocol I to the Geneva Conventions on the Laws of War which prohibits responses that would be "excessive in relation to the concrete and direct military advantage anticipated." This standard, though it is the basis for the use of proportionality language, does not itself use that language and for good reason. The language of proportionality is misleading because it suggests that a mere imbalance can violate the law of

war.

9. "Disproportionate" suggests too much. But that is not the standard. The standard is "excessive", that is to say, way too much. A response can be disproportionate without being excessive. Where that happens, there is no violation of the laws of war. In any case, Israel is not a party to the Protocol and not bound by it.

10. Even if the Court puts the errors of international law in the resolution to one side, the mere presence in the resolution is unusual in a request for an advisory opinion. A request for an advisory opinion is supposed to ask a question or questions about law - international law. Here we have answers. What the resolution wants is not some information its supporters did not have before, but rather agreement with what is stated in the resolution.

11. A resolution requesting an advisory opinion which answers the very questions it asks is not truly asking a question. That sort of question, answered in the resolution asking the question, does not fall within section 96(1) of the Charter of the United Nations.

12. The Vienna Convention on the Law of Treaties provides that a treaty shall be interpreted in light of its purpose. The purpose of section 96(1) of the Charter was to have the International Court of Justice provide answers to unanswered questions, questions for which advice was needed, not to rubber stamp answers already given in the request for advisory opinion.

### **Sources and Recommendations**

1. The resolution requesting the advisory opinion identifies these sources:

1) Report of the Special Political and Decolonization Committee (Fourth Committee) (A/77/400, para. 14)

2) UNGA resolution 75/98 of 10 December 2020,

- 3) Resolutions adopted at its tenth emergency special session
- 4) Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories A/77/501
- 5) Report of the Secretary-General on the work of the Special Committee A/76/333
- 6) Report of the Special Rapporteur of the Human Rights Council on the situation of human rights in the Palestinian territories occupied since 1967 A/HRC/49/87
- 7) Report of the independent international commission of inquiry established pursuant to Human Rights Council resolution S-30/1, A/77/328
- 8) Report by the Economic and Social Commission for Western Asia on the economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and the Arab population in the occupied Syrian Golan, A/77/90-E/2022/66.
- 9) UNGA resolution 2625 (XXV) of 24 October 1970
- 10) Advisory opinion rendered on 9 July 2004 by the International Court of Justice on the legal consequences of the construction of a wall in the Occupied Palestinian Territory, in particular the Court's reply, including that the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime are contrary to international law, See A/ES-10/273 and A/ES-10/273/Corr.1.
- 11) UNGA resolution 67/19 of 29 November 2012,
- 12) Statement of 15 July 1999 and the declarations adopted on 5 December 2001 and on 17 December 2014 by the Conference of High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory,

including East Jerusalem, A/69/711-S/2015/1, annex.

13) United Nations country team report of August 2012, entitled "Gaza in 2020: a livable place?"

14) Statement by the President of the Security Council of 28 July 2014, S/PRST/2014/13

15) Resolutions and Decisions of the Security Council, 1 August 2013-31 July 2014 (S/INF/69).

16) Security Council resolution 1860 (2009) of 8 January 2009 and General Assembly resolution ES-10/18 of 16 January 2009

17) Reports regarding serious human rights violations and grave breaches of international humanitarian law committed during the successive military operations in the Gaza Strip,

A/63/855-S/2009/250; S/2015/286, annex; A/HRC/12/48; and A/HRC/29/52.

18) Report of the Secretary-General on the protection of the Palestinian civilian population A/ES-10/794.

19) Security Council resolution 904 (1994) of 18 March 1994.

2. These sources, including the Advisory Opinion on the Israel security barrier, are all political. Moreover, many of them are like the present and previous request for an advisory opinion to the International Court of Justice, one-sided, indicating in the document mandating in the resolution/request what the result should be.

3. The personnel who compile these reports are as well, often, persons with an anti-Zionist history. The reports are one-sided focusing on and endorsing the anti-Israel/anti-Zionist perspective.

4. Israel does not participate in the processes leading to the results, realizing the results are determined against them in advance. In the result, the reports are tendentious and ill informed.

5. In a nutshell, the anti-Zionists inherently biased against and opposed to the very existence of Israel engage in incitement to terrorism, funding of terrorism, and terrorist attacks. Israel responds. The response is decontextualized from the terrorism which precipitated it and, in consequence, Israel is accused of an endless litany of wrongs.

6. One can see this with the International Court of Justice advisory opinion on the security barrier. Neither the word "counterterrorism" nor its variations appear in the advisory opinion at any point. The opinion ruled only that the international law defenses of self-defense and necessity did not apply. Whether the security barrier was a reasonable counter-terrorist effort was not addressed.

7. The very title of the advisory opinion is invidious. The Court is entitled to call the advisory opinion whatever they want. They called it "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory". Yet the security barrier is a wall only in less than 3% of its length and is essentially a fence, built and designed to fence out the terrorists in keeping with Israel exercising its right and meeting its obligation to protect and defend its people. This fact is nowhere mentioned in the advisory opinion.

8. The security barrier is located partly within Israel and partly within the West Bank. The Court was well aware of this fact, mentioning it in their advisory opinion. Yet the title the Court gives the case suggests that the security barrier is located entirely within what the Court refers to as Occupied Palestinian Territory. To anti-Zionists, all of Israel is anti-Zionist territory. By the name the Court gave the case, the Court appears to be endorsing that anti-Zionist claim.

9. The issue of occupation is dealt with elsewhere in this submission. Suffice it to say here that reference to Occupied Palestinian Territory in the name the Court gave the case is not neutral

terminology.

10. The present resolution requesting an advisory opinion, in addition to many negative comments about Israel, also, calls for a wide variety of specific actions. The resolution calls for or calls upon or demands that or stresses or emphasizes the need to or urges a multitude of acts, each of which require independent review, analysis, evidence and consideration as to their validity or appropriateness in the issuance of an advisory opinion on legal question(s), including:

- a) the de-escalation of the situation, the exercise of restraint, including from provocative act and the establishment of a stable environment conducive to the pursuit of peace;
- b) full respect for the principles of legality, distinction, precaution and proportionality;
- c) the full lifting of restrictions identified as to movement, checkpoints and a permit regime throughout the Occupied Palestinian Territory, including East Jerusalem;
- d) full and immediate implementation of agreements reached on conditions of detention in Israeli prisons;
- e) respect for the United Nations Standard Minimum Rules for the Treatment of Prisoners and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders;
- f) the release of the bodies that have not yet been returned to their relatives;
- g) urgent measures to ensure the safety and protection of the Palestinian civilian population in the Occupied Palestinian Territory, including East Jerusalem;
- h) continued efforts within the United Nations human rights framework regarding the legal protection and safety of the Palestinian civilian population;

- i) full cooperation by Israel with the relevant special rapporteurs and other relevant mechanisms and inquiries of the Human Rights Council, including the facilitation of entry to the Occupied Palestinian Territory, including East Jerusalem, for monitoring and reporting on the human rights situation therein according to their respective mandates;
- j) Israel cease all of its settlement activities, the construction of the wall and any other measures aimed at altering the character, status and demographic composition of the Occupied Palestinian Territory;
- k) the full respect and implementation of all relevant General Assembly and Security Council resolutions, including Security Council resolution 2334 (2016) of 23 December 2016;
- l) urgent attention to the plight and the rights, in accordance with international law, of Palestinian prisoners and detainees in Israeli jails, including those on hunger strike;
- m) efforts between the two sides for the further release of prisoners and detainees;
- n) Israel cease its imposition of prolonged closures and economic and movement restrictions, including those amounting to a blockade on the Gaza Strip;
- o) Israel fully implement the Agreement on Movement and Access and the Agreed Principles for the Rafah Crossing, both of 15 November 2005;
- p) addressing the continuing health crisis in the Gaza Strip, including by ensuring the provision of adequate infrastructure, medical supplies and equipment, alongside expertise, to deal with the increasing caseload of injuries requiring complex treatment in the context of the protests in the Gaza Strip;
- q) Member States of the United Nations should continue to provide emergency

assistance to the Palestinian people to alleviate the financial crisis and the dire socioeconomic and humanitarian situation, particularly in the Gaza Strip;

- r) all States and the specialized agencies and organizations of the United Nations system should continue to support and assist the Palestinian people in the early realization of their inalienable human rights, including their right to self-determination, as a matter of urgency;
- s) preservation and development of the Palestinian institutions and infrastructure for the provision of vital public services to the Palestinian civilian population and the promotion of human rights, including civil, political, economic, social and cultural rights; and
- t) the implementation of the agreement signed in Cairo on 12 October 2017.

13. The resolution presents its own version of the facts, asserts the sources and the law, and draws its own conclusions. The opinion of the Court requested is already formulated, in its entirety, in the resolution. If the Court agrees, there is nothing left for the Court to do but – yet again – rubber stamp the United Nations in its biased political processing of pressure upon Israel.

14. The very fact that the resolution presents, in effect, the very advisory opinion requested indicates that there is something else going on here besides uncertainty about the law. As well, a request for an advisory opinion that presumes the issue of a predetermined advisory opinion falls outside section 96(1) of the UN Charter. The authority granted by that subsection to the Court was meant to allow for the provision of answers to real questions, and not nods of agreement to rhetorical biased and political ones.

### **The Accusation of Occupation**

1. For us to go through all the many questions and elements built into the questions posed by the request for an advisory opinion would exhaust our time and the patience of the reader. To illustrate the problems posed by addressing these questions in the context of a Court attempt to answer the request for an advisory opinion, we will at this time address only one of these questions, whether Israel occupies the Palestinian Authority.

2. The first point to note is that the accusation that Israel illegally occupies the Palestinian Authority, which denies reliance upon the essential agreements between the parties reached in the Oslo Accords and is a misnomer. The Palestinian Authority, although it last held public elections more than fifteen years ago, has its own security forces, quasi-governmental functions, ministers, provides public services and functions. It is neither controlled nor occupied by Israel.

3. Similarly, with regard to the accusation that Israel occupies territory of the Palestinian Authority is also a misnomer, fully rejected by the Government of Israel. Whether Israel occupies Palestinian territory is a matter of controversy, with Israel on one side of that controversy and the proponents of the request for the advisory opinion on the other. It would be inappropriate for this Court to pronounce on that issue in the absence of the consent of Israel to be the subject of such an adjudication, which said consent Israel has not given nor can one expect the presence of Israel in these proceedings, thereby turning this request for an advisory opinion into the exercise of compulsory jurisdiction of the Court.

4. Second, the material in the resolution requesting the advisory opinion which is cited in support of the embedded assumptions, including the assumption that Israel occupies Palestinian territory is, in large part, bootstrapping. The supporters of the present General Assembly resolution have in the past gone from one UN agency to another, engineered the appointment of one friendly expert after another, to reproduce their pronounced positions. A large part of what the supporters of the resolution assert as authority for their position is just their quoting themselves or their echoes.

5. Third the accusation of occupation is wrongly presumed even though undefined and uncertain. What territory is supposed to be Palestinian? For some it would include all of Israel. For others,

it would include all of Jerusalem, if not all of Israel. The resolution does not say. The Court is left not just with answering the question, but also defining the question, asking the question. Yet, no matter what question the Court decides to answer about Palestinian territory, there are bound to be some who disagree, who would say that the Court got the territory wrong. The question is not asked with sufficient precision to be answerable.

6. Let us assume that the resolution intends to refer to the West Bank, Gaza and East Jerusalem only. Let us further assume that East Jerusalem is meant not to refer to something east of the current unified City of Jerusalem, but rather the eastern component of the current Jerusalem.

7. On its face, this territory does not look occupied, nor is it in fact "occupied" beyond what was agreed to between the parties. There are no Israeli forces in Gaza, from which Israel unilaterally withdrew in 2005. There are Egyptian and Israeli forces at the border of Gaza. Yet, every state controls its borders. That control does not make it an occupier of the neighboring territory. After Israel evacuated Gaza in 2005, there were many statements by HAMAS leaders that Gaza had been liberated, that the occupation of Gaza had ended; and such remains the case: simply put, Israel does not "occupy" Gaza; much to the contrary, HAMAS conquered and occupies Gaza since at least 2007 and deprives the Palestinian Authority from rendering its quasi-governmental functions.

8. The West Bank, according to the Oslo accords, is divided into three components - area A under the control of the Palestinian Authority, area B under joint Israeli - Palestinian control and area C under Israeli control. The phrase "Occupied Palestinian Territory" on its face refers to territory the Palestinian Authority claims as its own but is not presently supposed to, and does not control. Even area C, which is under sole Israeli control, is controlled by Israel in accordance with the written and signed Israel-PLO/Palestinian Authority agreement. That is a legal, and agreed-to "occupation". No distinction is made with regard to the agreements made through the Oslo Accords. It is not so "occupied" without the express agreement of or against the will of the Palestinian Authority. So, the phrase "Occupied Palestinian Territory," if it is meant to refer to the West Bank and Gaza, is deniable on its face as untrue, unfounded and not

based upon evidentiary fact or law.

9. Jerusalem has been a unified city since 1967, prior to which it was divided in a way that precluded Israelis who were of the Jewish faith to have access to pray at Judaism's holiest sites. East Jerusalem is governed and administered as an inherent part of Israel, and its residents have the same rights as other citizens. Proponents of the resolution would say that Jerusalem was a wrongful annexation. Whether there is wrongful annexation is a different issue from whether there is occupation and no "occupation" as defined under applicable international law exists

10. The claim of "illegal" occupation is even more puzzling when one considers the history of the West Bank and Gaza. Except for basic human rights standards which require certain minimum treatment of everyone, the Geneva Conventions on the Laws of War apply to international armed conflict. When there is an occupying power, there is also an occupied State. The Fourth Geneva Convention uses and defines the phrases "Occupying Power" and "Occupied State".

11. A protocol to the Geneva Conventions, relating to the protection of victims of international armed conflict, does recognize the possibility of the occupation of a people. However, Israel is not a party to the Protocol. A treaty binds only signatory states. Because Israel is not a party to the Protocol, it is not bound by its terms.

Article 1(4)

12. Before the 1967 war, the West Bank and Gaza were under the control of Jordan and Egypt, respectively, each of which have abrogated their rights to the properties.

13. When those territories were controlled by Jordan and Egypt, they were never labelled "Occupied Palestinian Territory." The notion that the territory transformed to "Occupied Palestinian Territory" the moment it shifted from two controlling states to a third controlling state is untenable. If the West Bank, Gaza and East Jerusalem were not occupied Palestinian territory before 1967, they cannot now be defined as occupied Palestinian territory since 1967

merely because the state controlling the territories, to the extent Israel has control of these territories, has changed.

14. The International Court of Justice, when it gave its advisory opinion on the Israeli security barrier, identified Jordan as the occupying power of the West Bank. The judgment moved on from this legal reasoning to labelling the West Bank as Palestinian occupied territory rather than Jordanian occupied territory. But this labelling was based on the ethnic composition of the West Bank, requiring political determinations, and not on its legal status.  
Paragraph 101

15. The notion that territory can be considered occupied if the residents of that territory form a people and claim their own right to self-determination is not a component of international law. The notion, if a legal reality, would apply to a wide range of regions across the world.

16. It is wrong to consider the West Bank today as the occupied territory of Jordan. Jordan and Egypt do not today lay claim to the West Bank or to Gaza. They have signed peace treaties with Israel that assert no continuing claim to the West Bank and Gaza. Even if Jordan and Egypt were once partially occupier States, they are no longer.

17. Judge Koojmans of the International Criminal Court, in his separate reasons which form part of the advisory opinion on the Israeli security barrier, called the West Bank before 1967 Jordanian controlled territory or territory under the authority of Jordan. Similarly, one can call the West Bank today, by virtue of the Oslo Accords, at least partially Israeli controlled territory or partially as territory under the authority of Israel. That is different than "occupation" under international law.

Paragraph 10

18. Yet, Judge Koojmans endorsed a shift in terminology calling the West Bank controlled territory when Jordan was in possession and occupied territory when Israel is in possession. Judge Koojmans wrote that he failed to understand why the Court in its majority opinion

omitted consideration of the legal status of the West Bank before 1967 though the Court majority purported to engage in a legal historical review of the West Bank. But Judge Koojman's own reasoning, which filled in its gap, should explain the Court's omission.

#### Paragraph 9

19. The legal status of the West Bank both before and after 1967 is almost the same. Only the parties have changed, not the principles to be applied. Moreover, Israel has less control over the West Bank since the implementation of the Oslo Accords in 1993 than Jordan had before 1967. For those parts of the West Bank where Israel, under the Oslo Accords, has sole control, the state in control has changed. But that is all. And, such control is with the express consent of the PLO/PA by virtue of signed agreements.

20. If Israel is going to be considered the occupier of the Palestinian people after the 1967 war, then Jordan must be considered to have been the occupier of the Palestinian people before the 1967 war. If Jordan is not considered to have been the occupier of the Palestinian people before the 1967 war, then Israel cannot be considered to be the occupier of the Palestinian people after the 1967 war. The Court avoided and presumably wanted to avoid either of those conclusions. So, the Court neither discussed nor considered the subject.

21. If the Court did not want to discuss the subject then, they would also presumably not want to discuss it now. Yet, if they assumed jurisdiction and proceeded to plough through this new request, addressing this complex question in its totality is required.

22. Not every occupation is illegal under international law. The second question asked in the request for an advisory opinion is clearly misphrased, requiring the Court to decline to address it. The question is "How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?"

23. Here too it is worth noting the leading nature of the question. There is no question

whether "the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation." It is just wrongly assumed that an occupation is in effect, a clearly contested matter not subject to determination by this Court in an advisory opinion absent consent of the parties.

24. Moreover, there is no doubt what those who posed the question want the answer to be, that "the policies and practices of Israel referred to in paragraph 18 (a) above" render the occupation illegal. The question in substance is a request to affirm the views of the author of the resolution that what they characterize as the violations of Israel have made the occupation illegal, if it ever was legal.

25. UK Lawyers for Israel, B'nai Brith UK, the International Legal Forum, the Jerusalem Initiative and the Simon Wiesenthal Centre made a joint submission to the International Criminal Court on the "Situation in the Alleged State of Palestine". That submission made four different points.

See

[https://uklfi.com/wp-content/uploads/2020/03/Observations-on-jurisdiction-by-UKLFI-BBU\\_K-ILF-JI-and-SWC-16-March-2020-Final.pdf](https://uklfi.com/wp-content/uploads/2020/03/Observations-on-jurisdiction-by-UKLFI-BBU_K-ILF-JI-and-SWC-16-March-2020-Final.pdf)

26. One was that "Israel, as the State of the Jewish people fulfilling the principal object of the Mandate for Palestine of reconstituting the Jewish national home in Palestine west of the Jordan/Arava line, now has sovereignty over the whole of Jerusalem and the strongest claims to Judea, Samaria and the Gaza Strip."

Paragraph 41

27. A second was that "In light of the doctrine [of *uti possidetis*, that the frontiers of newly independent states are to follow the administrative boundaries of the administrative entity from which they emerge] a new Arab State between the Jordan and the Mediterranean can only be constituted with agreement from Israel.

Paragraph 50

28. A third was that there are "fundamental contradictions in official Palestinian submissions before international forums regarding their status under international law, and the scope of the Palestinian territorial claim. Paragraph 51

29. A fourth was that there are adverse implications from accepting the arguments of the International Criminal Court Office of the Prosecutor on the jurisdiction of that Court over the "Situation in the Alleged State of Palestine", both on the stability of states and on the legal status of Arabs in Jerusalem. This submission adopts all those submissions without repeating them here.

30. An occupation that came about legally, as the parties to the PA-Israel conflict agreed in Oslo which contains an agreed upon path toward resolution of the issues between them, is not subject to adjudication by this Court or this Court invoking international law which will be used by the PA in its continued refusal to meet its obligations under its agreements with Israel.

31. The Court can avoid the question whether the occupation is illegal by finding that there is no occupation. But it would be a lot simpler just to decline to accept to address the request for the advisory opinion in its entirety. It would avoid the impossible and improper task of delving into all the political nuances and determinations embedded in the inherently biased question presented to the Court.

### **Addressing victimization**

1. The resolution identifies a real problem, the plight of Palestinians, but presents a wrong analysis, a misleading statement of many facts, some incorrect legal assertions and an inappropriate solution. Palestinians are victims, but their victimizer is not Israel. Their victimizer is rather the PA itself, as part of the group of anti-Zionists who engineer the victimization of Palestinians and shift the blame to Israel in order to justify their outright hatred and complete rejection of Israel and Zionism.

2. This engineered victimization happens in a number of different ways. One of them is

terrorism. Terrorism victimizes Israelis initially. However, the Israeli response and induced precautions in turn harm Palestinians.

3. Most if not all of the actions of which the resolution complains are Israeli responses to or precautions against terrorism committed against Israelis, people, communities and lands within the State of Israel. The resolution, as noted elsewhere, though it complains mightily about the Israeli response and precautions, decontextualizes them from the anti-Zionist terrorism which precipitated them. Terrorists are not even called terrorists, let alone named, but rather militants and armed groups, without reference to what they are militating against – the existence of Israel – or what they have been armed to do – inflict terrorist attacks under the guise of freedom-fighting – gently called “resistance.”

4. The request for an advisory opinion is a component of a comprehensive anti-Israel and anti-Zionist strategy. The goal of the Israel-haters is, through a second advisory opinion adverse to Israel, to continue their deadly demonization and delegitimization campaign. In reality, such additional advisory opinion will fuel the resolve of the PA to disengage further from any Oslo negotiations or final status negotiations, and instead will serve to encourage terrorism and continued mutual victimization of both Israelis and Palestinians.

5. This advisory opinion request, even if it generates the answers the supporters of the resolution want, at best will serve no purpose and more likely will be harmful to both Palestinians and Israelis by fanning terrorism and counter responses. The request for the advisory opinion, as an attempt to be helpful to either Palestinians or Israelis, is misguided.

6. But what is the way out of this impasse? There is clearly an obstacle to peace between Palestinians and Israelis. It is not the specifics of boundaries or the technicalities of the terms of an agreement, the path to which has long been settled between the parties.

7. The obstacle is the basic taught, promoted and advocated hatred of Israel and Zionism, not just the ideology, but also the reality. It is terrorist attacks and delegitimization efforts, of which this resolution is an example, which drives the continuation of the conflict. End the terrorism, the

incitement to terrorism, the funding of terrorism, the seemingly endless efforts at the United Nations and elsewhere at delegitimization through demonization of Israel, and hope that the PA will have a quasi-government that is committed to peace and not power, and then a pathway to peace will again become achievable. The International Court of Justice, by declining to answer such a tainted request for an advisory opinion, could make its own small contribution to a peaceful solution to the conflict.

8. Alternatively, the Court could throw overboard all the propaganda of the requesting resolution and tackle head on the present situation in Israel, the West Bank and Gaza, by addressing this question: "What legal steps, if any, would be useful to end the conflict?" To answer that question, we suggest these answers:

- a) Constantly referring to Israel as an occupier is not legally correct and not useful. It is a form of incitement and provocation. First of all, as noted, in the section on Occupation, Israel is present in the West Bank by agreement with the Palestinians under the Oslo Accord II and not present in Gaza at all. The resolution requesting the advisory opinion is self-contradictory by both asking for agreements to be respected, which includes Oslo II, and calling Israel an occupier. Second, the only reason Israeli forces remain in the West Bank is to protect against the threat of terrorism. End the threat of terrorism and the Israeli forces could leave.
- b) All terrorist entities should be banned. The Palestinian Authority has been discussing a draft penal code since 2011, but it has not yet been adopted. The Penal Code should prohibit terrorism generally, and also the existence and membership in designated entities. The banning of terrorist entities should be part of the law not just of Israel, but also of the Palestinian Authority.

Specifically, the Palestinian Authority should prohibit the existence of, and membership in:

- a. HAMAS
- b. Hezbollah

- c. Palestine Liberation Front
- d. Palestinian Islamic Jihad
- e. Popular Front for the Liberation of Palestine, and
- f. ISIS – The Islamic State, as well as
- g. Other entities supported by the Islamic Republic of Iran, the world's worst sponsor of terror.

i. These organizations are all listed as prohibited terrorist entities by several member states of the United Nations. The listing should be in the same by the Palestinian Authority.

- c) Terrorist organizations should not be allowed to compete in elections, nor hold government positions. HAMAS won the last Palestinian election and, if an election were to be held tomorrow, would likely win the next one. An agreement by the Palestinian Authority to end terrorism is not tenable when there is a terrorist entity in the wings ready to take over the government from the current governing party.
- d) As part of the Palestinian penal code, terrorist incitement should be prohibited. Again, this is a common legislation in many jurisdictions.
- e) Terrorist funding should itself be an offence. This should be so both for direct and indirect funding. Anti-Israeli and anti-Zionist NGO fronts with non-terrorist objectives or activity have been found to funnel funds to terrorist organizations. A terrorist funding law should address this abuse.
- f) The law should address terrorist glorification. In West Bank and Gaza there are memorials to terrorists, streets, schools, and other buildings named in honor of terrorists, inappropriately called martyrs. Terrorism and terrorists should not be glorified.
- g) The Palestinian Authority should abrogate its policy and regulations promoting and even mandating the funding of families of detained or dead terrorists, simply on the basis that they are family members of terrorists. This sort of funding constitutes incentives and

rewards for the commitment of murder, maiming and other unacceptable purposes of terrorism.

- h) Notwithstanding the beliefs and advocacy of Mahmoud Abbas with regard to Holocaust denial and distortion, the Palestinian Authority should enact legislation that prohibits Holocaust denial and distortion. Again, there are laws in many jurisdictions to that effect. Holocaust denial and distortion are a significant component of anti-Zionist propaganda.
- i) No governmental or international agency, including The United Nations Relief and Works Agency (UNRWA), should be funding education which denies the existence or rights of Israel. Yet that is happening in both the West Bank and Gaza. Those who fund education should mandate against incitement to terrorism, hatred and war propaganda.
- j) Accordingly, the Palestinian Penal Code, when enacted, should prohibit incitement to hatred and war propaganda. The Code should come with enforcement guidelines indicating that anti-Israelism and anti-Zionism falls within the ambit of these laws.

9. Though the resolution fulminates against occupation with an endless stream of repetition, the troubles the Palestinians face, even when accurately articulated, are not caused by what the resolution refers to as Israeli occupation and what in reality are Israeli security measures. Occupation/ security measures are a symptom of the problems Palestinians face, not the cause, not the disease. The proximate causes are terrorism and hatred. The ultimate causes, the disease, are antisemitism, anti-Israelism and anti-Zionism. Remove the hatred, the acts of anti-Zionism, end the terrorism and the stringent Israeli security measures will disappear.

10. For Israeli forces to withdraw from the West Bank the way they did from Gaza and Southern Lebanon, leaving those territories controlled by anti-Zionist terrorists is a non-starter. For Lebanon and Gaza, the Government of Israel considered their forces to be better able to deal with the threat of terrorism from those territories from within Israel. The West Bank

is too close to central Israel for that sort of withdrawal. Before the Israeli military presence from the West Bank can be removed, the threat of terrorism from the West Bank directed against Israel itself has to be removed.

11. Terrorism and counter-terrorist measures create a vicious cycle. Counter-terrorist measures prompt those who fail to see their value to further terrorism. The way to breakout of this vicious cycle is the measures outlined above and certainly not the advisory opinion requested by the resolution.

12. Attacking a symptom as if it were a cause, does nothing to remove the cause, or indeed even the symptom. Attacking a symptom as if it were a cause makes the disease worse through neglect and misdirection. That is what we would see if the International Court of Justice were to answer the pending request for an advisory opinion and give the answer the supporters of the resolution would like.

### **The Security Council**

1. The Court in 2004, in the request for an advisory opinion on the Israeli security barrier, exercised its discretion in favor of answering the request from the General Assembly notwithstanding the fact that the Security Council was seized of the matter and both the Israelis and the PA had accepted the President George W. Bush Roadmap to Peace, endorsed by the Quartet and the Security Council itself. The Court should not have done so then; nor should it do so now, particularly as the UN Security Council is indeed seized of the issue today.

2. A Security Council resolution adopted 23rd December 2016, referred in a preambular paragraph to the Court advisory opinion on the Israeli security barrier. The resolution engages the Security Council a lot more directly in the Israeli-Palestinian peace process than it had been engaged at the time of the earlier advisory opinion.

Resolution 2334

3. The resolution "Calls upon all parties to continue, in the interest of the promotion of peace

and security, to exert collective efforts to launch credible negotiations on all final status issues in the Middle East peace process ...

Urges in this regard the intensification and acceleration of international and regional diplomatic efforts and support aimed at achieving, without delay a comprehensive, just and lasting peace in the Middle East ...

Confirms its determination to support the parties throughout the negotiations and in the implementation of an agreement Requests the Secretary-General to report to the Council every three months on the implementation of the provisions of the present resolution; Decides to remain seized of the matter."

4. The most recently released quarterly report to the Security Council of the UN Secretary-General pursuant to the resolution, the 24th such report, is dated December 22nd, 2022.

That report is extensive, consisting of twelve pages, ninety paragraphs and almost 6,400 words. UN document number S/2022/945

5. Despite the extensive nature of the report, there is no mention in the report of the resolution from the General Assembly requesting an advisory opinion from the Court. The adoption of the resolution, admittedly, postdates the report. Nonetheless, the public tabling of the resolution, November 7, 2022, pre-dates the publication of the report, substantially, by over a month.

Special Political and Decolonization Committee, Fourth Committee, Seventy-seventh session, Agenda item 47, "Israeli practices and settlement activities affecting the rights of the Palestinian people and other Arabs of the occupied territories, UN Document number A/C.4/77/L.12.

6. Mahmoud Abbas, in 2011, as president of the Palestinian National Authority, wrote an opinion piece in the New York Times stating:

"Palestine's admission to the United Nations would pave the way for the internationalization of the conflict as a legal matter, not only a political one. It would also pave the way for us to pursue claims against Israel at the United Nations, human rights

treaty bodies and the International Court of Justice."

"The Long Overdue Palestinian State" May 16, 2011,

<https://www.nytimes.com/2011/05/17/opinion/17abbas.html>

7. The remarks of Abbas make it clear that the conflict is indeed a "political One", in which this Court should not engage. The stance of Chairman Abbas refers to internationalization of the conflict, not the resolution of the conflict. The current initiative from the General Assembly asking the Court for this advisory opinion is the implementation of the strategy Mahmoud Abbas set out, the internationalization of the conflict as both a political and a legal matter. However, an advisory opinion is to be based upon a legal question, not a political one.

8. The authors of the most recent report of the Secretary General to the Security Council were presumably aware of this stance of the Palestinian Authority and the tabling of the resolution in the Fourth Committee asking this Court for the advisory opinion. The part of the report which addresses the resolution, albeit without mentioning it explicitly, is this: "There is no substitute for **a legitimate political process** that will resolve the core issues driving the conflict." (emphasis added). The International Court of Justice should pay heed.

9. In the advisory opinion on the Israeli security barrier, the majority opinion of the International Court of Justice examined the issue whether the General Assembly resolution requesting the advisory opinion about the barrier was legally proper in light of the primary responsibility vested in the Security Council under Article 24 of the UN Charter for the maintenance of international peace and security. Although the discussion in the majority opinion on this matter goes on for some length, the upshot is that the General Assembly can do something when the Security Council is doing nothing.

10. Whatever one can say about that view of Article 24 or the activity of the Security Council at the time of the prior advisory opinion, the situation is different now. The Security Council is a lot more engaged now than it was then. The Court, applying the very criterion for exercise of discretion that it applied in the previous advisory opinion, should accordingly decline to

answer the questions asked.

11. Also relevant is Article 12 of the UN Charter. That Article provides, in subsection 1: "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

12. The previous General Assembly request for an advisory opinion on the Israeli security barrier was tendentious, suggesting an answer to the question asked. The Court nonetheless ignored the bias of the question and decided that the request for the advisory opinion was not a recommendation.

13. For the Court to do that now, to turn the myriad of assumptions and charges against Israel in this request for an advisory opinion into a sequence of neutral questions, would, as pointed out elsewhere, not answer the questions that the General Assembly resolution asked, and involve the Court in a lengthy, expensive and inevitably fruitless exercise, in the absence of participation of Israel. And, as also noted elsewhere, Israel has no obligation to participate in these proceedings, did not participate in the previous proceedings except on the matter of jurisdiction, and is unlikely to participate in these proceedings.

14. The current request for an advisory opinion should be taken at face value for what it is, a request to this Court to endorse the opinions expressed in the request. That form of request for an advisory opinion is a recommendation. Because of Article 24 of the Charter and because the Security Council is now exercising in respect of Palestinian/ Israeli disputes the functions assigned to it in the present Charter, the General Assembly resolution was improperly made and the Court should not countenance the effort to again drag the Court into the political controversies which are to be determined through direct negotiations between the parties involved.

15. There are two issues here. One is whether the General Assembly had the legal authority to adopt the resolution adopting the current request for an advisory opinion. We submit, in light

of Articles 12 and 24 of the UN Charter, that there was no such authority.

16. Second, even if the General Assembly had the legal authority to do what it did, the question arises whether the Court, in the exercise of its discretion, should answer the questions asked. We say that the Court should not do so.

17. The active engagement of the Security Council in the matters raised in the request for an advisory opinion is up to date. Because of the current Security Council engagement in the issue, the General Assembly had no business getting involved. The Court, using this same criterion for the exercise of its discretion that it used in addressing the request from the General Assembly on the Israeli security barrier, Security Council activity, should, if the Court is reasoning consistently, exercise its discretion this time to decline to answer the questions asked by the General Assembly.

## **Peace**

1. This submission has already noted that the General Assembly resolution requesting the advisory opinion did not mention the Oslo accords. That silence says more than all the almost 4,000 words of the resolution combined.

2. The resolution, in a preambular paragraph stresses

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

3. The Oslo Accord of 1993 refers to "a permanent settlement based on Security Council Resolutions 242 and 338," "negotiations on the permanent status [that] will lead to the implementation of Security Council Resolutions 242 and 338," "issues that will be negotiated in the permanent status negotiations" and several times to "permanent status negotiations." The Accord, at no point, refers to the International Court of Justice.

4. While the Sharm el-Sheikh understandings and the Quartet Road Map are important for the peace process, the Oslo Accords are the foundational documents. There is legal debate on the issue, but it is at least arguable that the Oslo Accords are binding international legal agreements. That cannot even arguably be said for the Sharm el-Sheikh understandings and the Quartet road map.

See for instance G.R. Watson, "Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements", New York: Oxford University Press, 2000

5. The omission of explicit reference to the Oslo Accords in the resolution requesting an advisory opinion is, we suggest, no mere oversight and is an affront to this Court. The resolution is an attempt to avoid the peace negotiation process and instead impose a non-permitted but substituted forced legal process. The Court, as a creation of the UN Charter, and as an intended instrument of peace, should have nothing to do with such a flagrant attempt to convert political questions to legal processes.

6. The pathway to peace is negotiations, not litigation. Carl von Clausewitz in 1832 wrote that war is the continuation of policy with other means. For anti-Zionists, litigation is the continuation of war against the existence of Israel with other means, lawfare instead of warfare. The origins of anti-Zionism and how it has infected the United Nations must be properly understood. Following unsuccessful wars against Israel in 1949, 1956, 1967, and 1973, the Arab states launched a newly designed propaganda/political/diplomatic concentrated endeavor to malign and castigate Israel in the United Nations, in international law and in the court of public opinion. Having forged a powerful voting bloc in the UN General Assembly, which operates on the basis of one vote per country, the 19 countries that then comprised the Arab League used their newfound leverage against Israel by sponsoring together and pushing through the passage of United Nations General Assembly Resolution 3379, which infamously and disgustingly advanced their transparent agenda to paint Israel as an apartheid, racist, criminal state by equating Zionism with racism. Although Resolution 3379 was eventually rescinded in 1991, the damage of "Zionism equals racism" had already been done; it remains a rallying cry even today.

7. One has to distinguish here between Israel-haters and Palestinians. Not all Palestinians object to the existence of the State of Israel as a Jewish state, as the re-establishment of the Jewish people in its ancient and biblical homelands, an expression of the right to self-determination of the Jewish people. But all anti-Zionists do. Indeed, that is what anti-Zionism is, objection to the existence of the State of Israel as the expression of the right to the lands, history, culture, religion and self-determination of the Jewish people.

8. Those who reject the very existence of Israel have pursued a variety of strategies to destroy the Jewish state - armed invasion, terrorism and delegitimization. Each strategy has its incitement counterpart - war and propaganda, incitement to terrorism and demonization. The current resolution forms a part of this delegitimization/demonization strategy, which is inconsistent with the objective of seeing Jews and Arabs living side by side, securely in peaceful coexistence.

9. Demonization of the Jewish state victimizes Jews everywhere as actual or presumed supporters of this supposedly demon state and promotes hatred and acts of violence and antisemitism against the Jewish people spread throughout the world. Anti-Zionism is a form of antisemitism.

10. The hateful acts of anti-Zionists also victimize the Palestinians. Anti-Zionists engineer and then instrumentalize Palestinian victimization for their anti-Zionist purpose.

11. Anti-Zionists, for instance, use Palestinians as human shields in defense against Israeli responses to terrorist attacks. Anti-Zionists launch terrorist attacks from Palestinian civilian sites and attempt to blend into the Palestinian civilian population, putting that population at risk when Israel responds to terrorist attacks. Anti-Zionists prevent resettlement or local integration of Palestinian refugees. Anti-Zionists maintain Palestinians, artificially, as refugees in a wildly expanded definition of refugee status, as that term is defined by UNRWA, as opposed to the UN Refugee Convention. Anti-Zionists incite, train, and arm child suicide bombers and then glorify them as martyrs. Anti-Zionists organize boycotts, divestment and sanctions nominally against Israel but practically against the Palestinian economy and Palestinian employment. And so on.

12. One way in which anti-Zionists victimize Palestinians is pushing them away from the peace process. Peace would serve the interests of Palestinians. But a peace which allows for and accepts the existence of the State of Israel as a Jewish state, as an expression of the right to the re-establishment of Israel as the ancestral and biblical homeland, and self-determination, of the Jewish people, do not serve the interests of anti-Zionists.

13. The strategy of anti-Zionists is neither a strategy for peace nor a strategy of indifference to peace; it is rather a strategy of active hostility to peace. Anti-Zionists do what they can, through a series of terrorist attacks, to discourage Israeli interest in peace. Through these attacks they hope to create the impression amongst Israelis that peace is impossible. The message they try to give to Israelis is that any autonomous Palestinian state adjoining Israeli would be nothing more than a terrorist free zone, a site for unending unimpeded terrorist attacks against Israel.

14. Nonetheless, their main point of leverage is the Palestinian people, with their own dreams, desires, rights and hopes for the future. It is obvious to Israelis that anti-Zionists do not work in their interests. Anti-Zionists, by definition, intend to work against the interest of Israelis and the connection of the Jewish people with their ancestral homeland. They use the Palestinians as pawns to achieve their own means of exporting and expounding hatred toward Israel, Judaism, Zionism and the Jewish People. Though Zionism was a term coined in 1897, the sentiment that anti-Zionism embodies is as ancient as Judaism, a faith borne from a nationality - reunified with the creation of Israel in 1948. To deny the connection of the Jewish people to the land of Israel is to deny the faith itself. As its Declaration of Independence states, the State of Israel proclaims that it will be "open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations."

15. Since Israel's founding, the people and their elected leaders have sought peaceful coexistence with the local Arab populations, and indeed there are Arab citizens of Israel who serve in the country everywhere from the Army to the High Court and the Knesset – Israel's Parliament. On several occasions, Israel has sought a peaceful land division with the Arab populations residing in the ancient lands of Judea, Samaria and Gaza, with each overture rejected by the PA's leaders—all of whom are by definition anti-Zionists.

16. It is not so obvious that anti-Zionists do not work in the interests of Palestinians. Though realistically, that is not the case, it is important for anti-Zionists that Palestinians believe that this is so. Anti-Zionists need to leverage the Palestinians to pursue their anti-Zionist agenda. Without Palestinians in support, the anti-Zionist agenda goes nowhere.

17. A key aspect of this leveraging is pushing away and keeping away Palestinians from peace negotiations. The silence in the General Assembly resolution asking the International Court of Justice for an advisory opinion on the Oslo Accords is more than a mere lapse. Because the Oslo Accords are a step on the road to peace, because the Oslo Accords set out a final settlement peace process, these Accords are anathema to anti-Zionists. They are not mentioned because anti-Zionists want them ignored.

18. Of course, for anti-Zionists to ignore the Oslo Accords does not, on its own, pose an obstacle to the peace process. Palestinians must do so. That is where this request for advisory opinion comes in.

19. Litigation serves the purpose of anti-Zionists as an attempt to delegitimize the existence of the State of Israel. This sort of litigation, when it is successful, gives anti-Zionists some propaganda points to add to their already existing barrelful, but has no impact on Israeli attitudes. Those who accept the existence of the State of Israel are not going to be persuaded by this sort of propaganda.

20. If the Court gives to anti-Zionists the legal opinion their resolution requests, that would

make traversing the path to peace exceedingly difficult. Such an opinion would fortify anti-Zionists in their conviction that their strategy of delegitimization is working. Any victory the Court would give to anti-Zionists, in pursuing their strategy of delegitimization, would reinforce to them the value of that strategy and encourage them to continue on with it.

21. Why would anti-Zionists give up on their goal of destroying Israel if the Court joins them in helping them realize that goal? The answer is there is no reason, with Court support, that they would do so. How does Court support for anti-Zionism help achieve peace? The answer is that it does not help achieve peace. It works contrary to peace.

22. Any opinion the Court gives which endorses, in legal terms, the anti-Zionists propaganda in the resolution, would prompt anti-Zionists to say to Palestinians, do not negotiate away your rights, insist on recognition of what the Court says is the law. An anti-Zionist success in Court does nothing to further negotiations. Indeed, it has the opposite effect, fortifying anti-Zionists in extreme, inflexible positions and spurring anti-Zionists to prompt Palestinian negotiators to boycott the peace table and do the same. By saying to anti-Zionists that they are legally right on any stance they take, the Court gives the anti-Zionists and the Palestinian negotiator over whom they have leverage reason to refuse to budge on those stances, even an inch.

23. A Court advisory opinion of the sort requested by the General Assembly resolution also has a rebound effect. Any institution which endorses this delegitimization strategy is, in the eyes of those who accept the existence of the State of Israel, itself delegitimized.

24. For anti-Zionists, a Court opinion giving the advice the resolution seeks, would, as noted, reinforce the anti-Zionist delegitimization strategy. For those who accept the existence of the State of Israel, a Court opinion giving the advice the resolution seeks would have the opposite effect. It would instead undermine the legitimacy of the International Court of Justice. It would also discourage and delay peace negotiations directing those negotiating with Israel towards extreme non-negotiable positions.

25. One can see this dynamic at play with the International Court of Justice advisory opinion on the Israel security barrier. The opinion did not lead to the dismantlement of the barrier, even in part, or halt the construction of the barrier, even for a minute. The Court opinion failed to acknowledge the effectiveness of the security barrier in preventing terrorism and consequently did nothing to discourage the terrorism which the security barrier was built to prevent.

26. What that opinion did was add another drop to the barrel of anti-Zionist propaganda. The opinion undermined support, among Palestinians potentially negotiating peace with Israel, for counter-terrorist efforts, of which the security barrier is a significant part, and consequently for peace negotiations themselves.

27. The opinion further envenomed relations between the potential negotiating parties, inevitably making those Palestinians potentially negotiating with the Israelis more intransigent in unrealistic demands. On top of all that, and because of all that, the opinion worked to bring the administration of justice, as administered by the International Court of Justice, into disrepute.

28. The opinion worked directly contrary to the Charter of the United Nations, viewed purposively. The opinion was an instrument of war propaganda, not peace. The opinion further undermined one of the founding institutions of the UN to serve that peace purpose, the International Court of Justice itself.

## **Discretion**

1. The statute of the International Court of Justice provides that "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." The operative word here is "may", not "must". For the Court, answering a request for an advisory

opinion is discretionary, not obligatory.

#### Article 65

2. By its very nature, a discretionary opinion can be exercised in more than one way. If, legally, the request to the Court has only one possible outcome, the issue of the exercise of discretion does not come into play.

3. Much of the rest of this submission argues that the Court legally cannot answer the questions asked by the General Assembly in their request for an advisory opinion, for a variety of reasons. Let us assume that all these submissions are legally incorrect. That assumption does not mean that the Court should answer the questions asked.

4. Even if the Court does have the legal authority to answer the questions asked in the General Assembly resolution, as well as any questions the Court may formulate by turning the myriad of tendentious assumptions in the resolution into neutral questions, the question arises whether the Court, in its discretion, should do so. We say that the Court should exercise its discretion against answering the questions posed in the resolution for a variety of reasons.

5. One is that the resolution requesting the advisory opinion is not neutral. While the Court could, in theory, neutralize the resolution by turning its tendentious assumptions into neutral questions, there are just too many of these assumptions for the Court to respect the intent of the resolution.

6. Second, answering not only the questions posed in the resolution, but also the many questions which could be posed by reformulating the tendentious assumptions in the resolution into questions, is a mammoth piece of work. Asking the Court to answer not only the questions posed in the resolution, but also the many questions which could be posed by reformulating the tendentious assumptions in the resolution into questions, is asking too much.

7. Third, the substance of the disputes between Israel and the Palestinians is political, not

legal. Answering a wide-ranging sequence of questions explicitly asked or implied by the resolution, many of which are central to the disagreements between Palestinians and Israelis, with only one side participating, does nothing to resolve political differences and may exacerbate them.

8. Fourth, the Security Council is actively involved now in attempting to facilitate agreement and peace. When the Security Council is involved, the Court should refrain and indeed decline.

9. Fifth, even if we put to one side the current Security Council and Secretary-General activity in the matter, answering the questions asked would do nothing to advance the peace process and would likely hinder it. If one considers the function of the Court purposively, within the context of the UN Charter as a whole, the Court is to serve as an instrument of peace. That purpose would not be served by addressing the content of the two explicit questions asked and the myriad of implied questions raised.

10. Sixth, the resolution, even if not an attack on the independence of the Court, is an affront to the Court. General Assembly resolutions asking for advisory opinions should in principle be legally neutral and not telling the Court what its answers should be to the questions asked.

11. This is particularly so in light of two facts. One is that the General Assembly chooses the judges and decides on their reappointments after expiry of their original terms. The other is that several of the judges have been nominated and potentially could be renominated by a national group of a country which both voted in favor of the resolution and has a poor record on judicial independence.

12. Seventh, even if one puts to one side the disrespect to the Court emanating from the resolution by its many embedded opinions, it remains nonetheless true that the point of the advisory opinion procedure is to resolve legal conundra, not endorse political points of view with legal arguments in support. Deciding against answering the questions posed and implied by

the resolution because of the polemical and one-sided nature of the resolution would have a salutary effect on the posing of later requests for advisory opinions and accordingly work in the interests of justice.

13. Eighth, going ahead without Israel would violate the fundamental legal principle *audi alteram partem*, hear the other side. Israel cannot be faulted for not showing up and should not be disadvantaged if it does not show up, since that fault or disadvantage would turn a request for an advisory opinion into compulsory jurisdiction, which it is not. It is the Court rather that can be faulted with going ahead to answer a question where only one side the dispute shows up.

14. Ninth, even if one puts to one side the unfairness to Israel in answering the questions posed or implied by the resolution requesting the advisory opinion, the Court is severely hampered in answering the long list of questions embedded in the resolution when hearing from only one side. Israel has shown no indication that it will participate in these proceedings and appears unlikely to participate. Even if the Court has the legal authority to proceed without the participation of Israel, it would be unwise to do so. Deciding a contentious case after hearing only one side is a recipe for disaster. The simplest way to avoid the hazard of error that hearing from only one side poses is not to hear the case at all if both sides are not to be present.

15. Tenth, a substantial majority of the General Assembly did not ask the Court to answer the questions posed. The fact that only a plurality and not a majority voted in favor of the resolution does not invalidate the resolution. Yet, it is a relevant consideration in the exercise of discretion. Not answering the questions posed and implied would leave the majority of the General Assembly unconcerned.

16. Eleventh, though this request for an advisory opinion bears some similarity to the previous request for an advisory opinion on the Israeli security barrier, in the sense that both

are tendentious and that the previous proceeding did not involve the participation of Israel on the merits and this proceeding would also likely not involve the participation of Israel, there are significant differences. One is the wide-ranging nature of the current request contrasted with the specificity of the previous request. A second is the current activity of the Security Council on the issues, contrasted with the comparative lesser activity of the Security Council at the time of the previous request.

17. Twelfth, many courts have a leave process, determining whether to hear a case before they actually hear it. These leave considerations take into account the individual cases, but also the general workload of the Court. One has to ask whether this particular case, in light of all other matters before the International Court of Justice, justifies the time and attention of the Court. We suggest not.

### **Propriety**

1. The Court, when addressing requests for advisory opinions, systematically considers factors of judicial propriety, whether it would be judicially proper to answer the questions asked. Answering a request for an advisory opinion would be judicially improper when the giving of the opinion would be incompatible with the Court's judicial character. More generally, the Court will consider answering a request for an advisory opinion improper when there are compelling reasons for the Court to decline to respond.

2. The Court has discretion whether or not to answer a request for an advisory opinion. Whether it would be judicially improper for the Court to decline to answer a request for an advisory opinion is a particular consideration relevant to the exercise of discretion. Because of the importance the Court has given to this particular discretionary factor, it is treated separately here.

3. In the Western Sahara Advisory Opinion, the Court considered as matters of judicial

propriety two factors. One was whether answering the questions asked "are devoid of any useful object." The second was "the absence of an interested State's consent to the exercise of the Court's advisory jurisdiction."

I.C.J. Reports 1975, page 12, paragraph 21

4. In the Chagos advisory opinion, the Court considered as valid and addressed two concerns about propriety. One was, as in the Western Sahara case, that the questions asked arguably related to a pending dispute between two States, which have not consented to its settlement by the Court. The other was that advisory proceedings are not suitable for determination of complex and disputed factual issues.

Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, page 95

5. In the Western Sahara case, Judges Gros and Dillard addressed as a consideration of propriety whether the questions asked were "loaded." Judge Dillard elaborated, considering whether the questions asked were "leading in any case to the answer awaited in this particular instance."

6. If one addresses these considerations of propriety in the instant case, they apply with force. The questions asked in this advisory opinion are loaded in that, in conjunction with the resolution in which they are embedded, they lead to the answers awaited.

7. Answering the questions asked goes beyond being useless. Answering the questions asked would be positively harmful by circumventing negotiations and the peace process.

8. As well, the questions asked arguably related to a pending dispute between Israel, which is a state, and the Palestinian Authority which the Court, even if wrongly, considers to be a state. And these two entities have not both consented to the jurisdiction or settlement of their dispute by the Court.

9. On the contrary, the two disputing entities, Israel and the Palestinian Authority have agreed to the opposite. On February 26, 2023, Egypt, Jordan, Israel, the Palestinian Authority and the U.S. in Aqaba, Jordan agreed:

“1. The two sides (Palestinian and Israeli sides) affirmed their commitment to all previous agreements between them, and to work towards a just and lasting peace.

7. The participants stressed the importance of the Aqaba meeting, the first of its kind in years. They agreed to continue meeting under this formula, maintain positive momentum and expand this agreement towards wider political process leading to a just and lasting peace.”

<https://www.state.gov/aqaba-joint-communique/>

10. In March 19, 2023, the same five parties – Egypt, Jordan, Israel, the Palestinian Authority and the U.S., in Sharm El Sheikh, Egypt, agreed:

“5. The two sides [The Government of Israel and the Palestinian National Authority] reaffirmed their commitment to all previous agreements between them, and reaffirmed their agreement to address all outstanding issues through direct dialogue.”

<https://www.state.gov/joint-communique-from-the-march-19-meeting-in-sharm-el-sheikh>

11. For the Court, in the circumstances, to answer the advisory questions would not be judicially proper. Because of the ongoing dialogue and the determination of the disputing parties “to address all outstanding issues through direct dialogue”, for the Court to answer the questions asked by the General Assembly would be incompatible with the Court’s judicial character. The ongoing mutual commitment to previous agreements, and to seeking a path toward peace are compelling reasons why the Court should decline to respond to the request of and questions presented to the Court by the General Assembly.

12. Addressing the questions presented in the General Assembly resolution would circumvent the peace negotiations by determining through legal analysis final status issues at a time

when the disputing parties have chosen to continue, and hopefully renew, a negotiation process to resolve their differences, a process which as recently as February and March of this year, in cooperation with Egypt, Jordan and the US is active, ongoing and post-dates the General Assembly resolution. In the circumstances, the only appropriate response of the Court to the request for an advisory opinion is to defer to the path the parties have determined for themselves, to ask all interested states to assist the negotiating parties in resolving their differences, and to ask the negotiating parties to live up to and not breach the obligations to which they have agreed.

13. Should the two negotiating parties both want to ask the Court specifics of what their mutually agreed obligations entail, the Court could reasonably indicate that the Court would be happy to assist. In the absence of such a request from both parties, the Court should leave the parties, with the assistance of interested states, to the committed and agreed process of resolving their differences between themselves.

### **Rebuttals: Objections and Responses**

1. Because parties to this submission legally cannot be parties or interveners to the Court proceedings, we are unable to answer objections to our submissions after they are made. We accordingly here, based on past advisory opinions of this Court, attempt to anticipate what those objections might be and provide answers. In particular, for possible objections, we draw on the Security Barrier, Kosovo and Chagos advisory opinions where objections that, in theory, could be raised here were rejected.

Israeli Security Barrier, Advisory Opinion, I. C. J. Reports 2004, p. 136

Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion I.C.J. Reports 2010, p. 403

Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 95

2. The potential and anticipated objections to the positions in this submission, drawn from these three advisory opinions, include these:

- a) the Court's response would assist the General Assembly in the performance of its functions;
- b) the threats to international peace and security which are before the Security Council on the subject matter of the request for the advisory opinion do not bar action by the General Assembly in respect of the questions asked;
- c) the questions asked do not relate to a pending dispute between two States which have not consented to its settlement by the Court;
- d) the questions asked are not merely bilateral but rather concern the United Nations as a whole;
- e) the effect, if any, on answering the questions asked on peace negotiations is speculative;
- f) advisory proceedings are suitable for determination of the factual issues which arise in this case; the evidence before the Court is sufficient to answer the questions asked;
- g) the questions asked are clear enough for the Court to answer them;
- h) the questions asked are legal, not political; the fact that the questions asked have political aspects do not deprive them of their character as legal questions; the Court is not concerned with the political motives behind a request; the Court is further not concerned with the political implications which its opinion may have;
- i) the questions can be answered without the need to reference domestic law;
- j) only compelling reasons should lead the Court to decline to exercise its judicial function and there is no compelling reason for the Court not to use its discretionary power to give an advisory opinion; and
- k) an Advisory Opinion does not create binding law, therefore there is no harm in the ICJ issuing one—regardless of the circumstances.

3. Objection: The Court's response would assist the General Assembly in the performance of its functions.

Response: Exactly what function of the General Assembly does this objection have in mind? We

are left to guess. The resolution requesting the advisory opinion came out of the Fourth Committee of the General Assembly. The official name of the Committee is "The Special Political and Decolonization Committee."

4. The present resolution has nothing to do with decolonization. The word "decolonization," despite its extensive length, is not mentioned in the resolution, other than by naming the Committee from which the resolution emanated. British Mandate Palestine was decolonized in 1948. The United Kingdom has no continuing control over what was the territory of British Mandate Palestine.

5. The website for the Committee describes the mandate of the Committee as covering "a broad range of issues covering a cluster of five decolonization-related agenda items, ... as well as a review of special political missions, ...Israeli Practices and settlement activities affecting the rights of the Palestinian people and other Arabs of the occupied territories, ..."The resolution requesting the advisory opinion is admittedly a political issue and as such fits within the description of the political missions that the Fourth Committee has given itself.

6. Nonetheless, the International Court of Justice should not be assisting the General Assembly in its political functions. The Court is intended to be a legal body, not a political body. Indeed, it is duty of the Court and the Rule of Law to protect against the tyranny of politics, and in this case the politics of tyrants whose countries always vote against all-things-Israel as well.

7. As well, what is the specific political function the General Assembly is performing in addressing "Israeli Practices and settlement activities affecting the rights of the Palestinian people and other Arabs of the occupied territories"? The title of the function speaks for itself. It is a one-sided focus on Israel. The rights of the Jewish people are not mentioned. Thereference to "occupied territories" as noted elsewhere, is itself an expression of a political opinion which Israel does not share.

8. There is no doubt that there are political opinions adverse to Israel. Yet, the Court should have

nothing to with assisting the General Assembly in furthering those opinions. Joining a political campaign, assisting a political campaign, even where that campaign is endorsed by a plurality of the General Assembly is not a proper function for the Court.

9. Objection: The threats to international peace and security which are before the Security Council on the subject matter of the request for the advisory opinion do not bar action by the General Assembly in respect of the questions asked.

Response: The comprehensive nature of the resolution itself answers this question. The advisory opinion on the Israeli security barrier was specific, dealing only with the security barrier. This request is general. It overlaps entirely with the threats to international peace and security which are before the Security Council on the subject matter of the request for the advisory opinion.

10. Objection: The questions asked do not relate to a pending dispute between two States which have not consented to its settlement by the Court.

Response: Israel disputes more or less every assumption on which the resolution asking for the advisory opinion is based. Israel would dispute the answers the Palestinian Authority would give to the questions asked as well as the answers that any State which sides with the Palestinian Authority would give. Israel has not consented to the settlement of these disputes by the Court.

11. Objection: The questions are asked are not merely bilateral but rather concern the United Nations as a whole.

Response: The fact that there are several States which have supported the position of the Palestinian Authority does not make the Palestinian Authority - Israeli Government dispute generic. The matters at issue between the Palestinian Authority and Israeli Government are specific and not matters of general concern to the United Nations as relating to a wide category of disputes.

12. While it is possible to draw some analogies between the disputes between the Palestinian Authority - Israeli Government disputes and other disputes, whatever analogy one

draws would have to point out differences as well as similarities. The request for the advisory opinion itself asks no generic questions. The request for the advisory opinion here is, in substance, addressing a bilateral dispute.

13. Objection: The effect, if any, on answering the questions asked on peace negotiations is speculative.

Response: There is a difference between speculation and reasoned inference. It is reasonable to infer that, if the Court gives the answers the Palestinian Authority wants to the questions asked, those answers will be used either in negotiations or in pre-conditions for recommencement of negotiations. Moreover, those answers on which the Palestinian Authority will rely will not be answers with which the Israeli government agrees.

14. The result will either a block to recommencement of negotiations, because Palestinian Authority preconditions are not met, or Palestinian Authority intransigence in negotiations, because of their insistence on Israeli Government acceptance of the International Court of Justice advisory opinion views, an insistence to which Israel is unlikely to accede. Answering the questions asked, particularly if they coincide with Palestinian Authority views, will either prevent the recommencement of peace negotiations or impede their successful conclusion.

15. Objections: The advisory proceedings are suitable for determination of the factual issues which arise in this case. The evidence before the Court is sufficient to answer the questions asked.

Response: Whatever one can say about other advisory opinions which accepted this objections, that is not the case here. There is admittedly a voluminous amount of material supporting the positions articulated by the resolution requesting the advisory opinion. The trouble with that material is that it is, almost entirely, one-sided invective, false facts, anti-Zionist delegitimization efforts, perpetual recycling of the same anti-Zionist myths and decontextualization of Israeli counter-terrorist responses from the terrorism which precipitated them.

16. The Court will surely receive significant supposedly accurate, but clearly not unbiased, factual

material on one side of the issue, with facts on the other side almost entirely absent, because of the understandable reluctance of the Israeli government to convert an advisory opinion into a bilateral compulsory jurisdiction dispute resolution. Israel will decide for itself how to respond to such situation, but clearly proceeding on that basis is a recipe for error.

17. Objection: The questions asked are clear enough for the Court to answer them.  
Response: The term "the Occupied Palestinian Territory, including East Jerusalem," used throughout in the resolution, is not clear. The resolution does not come with a map. As noted earlier, it is our position that the term "Occupied Palestinian Territory, including East Jerusalem" encompasses no territory, since there is no such territory as that term is defined in international law.

Whatever the claims of the Palestinian Authority turn out to be on the meaning of the phrase "Occupied Palestinian Territory, including East Jerusalem," one can rest assured that Government of Israel does not consider East Jerusalem to be "Occupied Palestinian Territory." The reality is that the Israeli Government and the Palestinian Authority have not reached agreement on the boundaries of a possible future Palestinian state. The Court cannot determine in advance what that agreement will be, what those boundaries will be.

18. In order to address the many components of the resolution requesting the advisory opinion which refer to "Occupied Palestinian Territory, including East Jerusalem," the Court will have to make some determination what that territory is. Yet, any such determination, in the absence of agreement from the Government of Israel, is bound to be arbitrary, meaningless.

19. Objections: The questions asked are legal, not political; the fact that the questions asked have political aspects do not deprive them of their character as legal questions; the Court is not concerned with the political motives behind a request; the Court is further not concerned with the political implications which its opinion may have.

Response: Whether a question is legal or political is not merely a matter of form. It is a matter of substance. A question can be legal in form and political in substance. A question can also be political in form and legal in substance.

20. How does one determine whether a question which is legal in form is political in substance? Political motivation and political significance are relevant, albeit not determining considerations. There is no doubt here that the legal questions posed have political aspects, are politically motivated and would have political significance. But there is more.

21. When interpreting any text, a proper interpretative approach is purposive. Are the purposes of the resolution requesting the advisory opinion, the text of the resolution, the specific questions, asked legal or political? The answer to that question is straightforward.

22. We can see the answer from the content of the resolution, which is one-sided in the extreme. We can see the answer from the fact that the resolution answers the very questions it asks. We can also see the answer from the title and mandate of the Committee which generated the resolution. We can further see the answer from the strategy of the Palestinian Authority which generated the resolution.

23. The one-sided nature of the resolution asking for the advisory opinion telegraphs its political nature. This resolution is not asking the Court to resolve a legal conundrum; it is asking for a legal stamp of approval on a political opinion. This is not just our view; it is the view of the authors of the resolution asking for the advisory opinion. As Palestinian Authority Mahmoud Abbas himself said, the purpose of the present international strategy of the Authority is "the internationalization of the conflict as a legal matter". The aim of the Authority is to drag the Court on to one side in a political conflict.

24. The resolution is not just political; it is blatantly so. If the Court were to find this request for an advisory opinion not political, it is hard to imagine what could possibly be political. To hold this resolution not political would void the distinction between political and legal of meaning.

25. Objection: The questions can be answered without the need to reference domestic law. Response: There are several aspects of the resolution which rely on domestic law. The resolution expresses "grave concern about ... actions by it [Israel] designed to change the legal

status, ... of the Occupied Palestinian Territory." This looks to be a reference to a change in Israel law. Presumably a change in legal status is a change in the relevant law.  
Preambular paragraph 26

26. The resolution calls "for full respect for ... the principles of legality ..." Whether or not Israel respects the principle of legality necessarily involves consideration of Israeli law.  
Preambular paragraph 26

27. The resolution "Demands that Israel ... comply with its legal obligations under international law." Whether Israel in fact does or does not do so is a question both of Israelilaw and the facts on the ground.  
Operative paragraph 1

28. The resolution "Demands that Israel ... repeal or render ineffective all legislative and regulatory acts relating" to "the construction of the wall in the Occupied Palestinian Territory." Addressing that "demand" necessarily involves referencing Israeli legislative and regulatory acts.  
Operative paragraph 11

29. Objection: Only compelling reasons should lead the Court to decline to exercise its judicial function and there is no compelling reason for the Court not to use its discretionary power to give an advisory opinion.

Response: If the responses to the previous objections are compelling, they and the ongoing negotiations to which reference was earlier made constitute compelling reason for the Courtnot to use its discretionary power to give an advisory opinion.

30. Objection: An Advisory Opinion does not create binding law, therefore there is no harm in the ICJ issuing one—regardless of the circumstances.

Response: The 2004 Advisory Opinion concerning Israel's security barrier—in addition to providing little value towards promoting peace or resolving the conflict—has shown to have

widespread unintended consequences. It has been a foundational document for further initiatives to promote anti-Zionism, including through the Russell Tribunal on Palestine, and the Boycott, Divestment and Sanctions movement. The opinion has been a catalyst for the spread of antisemitism on college campuses, in the media, in the corporate sector, the world of entertainment and the court of public opinion. It has also been cited in various legal fora, including the United States Court of Appeals for the Sixth Circuit (US v. Fawzi Mustapha Assi), the UK's Supreme Court of Judicature Court of Appeal (MT v. Home Secretary), the International Criminal Court (Côte D'Ivoire Prosecutor v. Laurent Gbagbo), the International Center on the Settlement of Investment Disputes (EDF International S.A., et al. v. Argentine Republic; ADC Affiliate Limited et al. v. The Republic of Hungary) and the International Criminal Tribunal for the Former Yugoslavia ("ICTY").

31. At the ICTY in particular, the 2004 Advisory Opinion has been a foundational resource for courts looking to depart from essential legal principles. In one ICTY case, it was cited to support circumventing standard principles of international law in order to assume jurisdiction where consent by the parties was lacking. Prosecutor v. Ante Gotovina et al., IT-06-90-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia, April 5, 2011). In another ICTY case, it was cited to reject a State's right to self-defense against "an armed attack," on the grounds that "the concerned operation" was not "against an action by another state." Prosecutor v. Boškoski & Tarčulovski, case no. IT-04-82, Appeals Chamber Judgment, 13, footnote 116 (May 19, 2010).

32. With an even broader proposed scope when compared to the 2004 Advisory Opinion, the question referred to this Court could result in an advisory opinion that poses an even bigger threat to the world order, as answering the question present would require this Court to even further divorce itself from evidenced-based reasoning, which can only result in findings that would give rise to greater, unimaginable injustices.

## SUMMARY AND CONCLUSIONS

Every question that is presented to the International Court of Justice is a test of its capacity

to administer justice responsibly, intelligently and with integrity. This particular question and the resolution in which it was adopted, asks this Court to accept the determinations advanced and agreed upon by a minority of UN General Assembly members. The majority of members voting for the resolution represent governments that themselves do not allow for free elections or independent judiciaries. It is an unfortunate reality, but a natural consequence of the structure of the General Assembly and the world order of today.

The International Court of Justice is not bound by this structure and in fact has no mechanism within its enabling Statute to undertake the extensive unbiased fact-finding that is essential in the true administration of justice. Clearly, the absence in the referring Resolution of any reference to the essential historical documents executed in Oslo, and the agreements reached between the parties on numerous issues, including legally occupying for security purposes and setting forth an agreed-upon path for negotiations of all final status issues, evidences the very bias of the Resolution, its adoption, its proponents, and the motivation of the sponsors to seek an Advisory Opinion of this Court as a means and method to avoid the agreed-upon path for the parties and to castigate, demonize and attempt to delegitimize The State of Israel.

Consequently, the justices of this Court have the privilege and responsibility of taking into account the inherent flaws of the General Assembly, and questioning whether those flaws have given rise to an outcome that run counter to the stated purpose of the United Nations – that is “to maintain international peace and security, develop friendly relations among nations, achieve international cooperation, and serve as a centre for harmonizing the actions of nations.”

Each of the individual justices who sits on this tribunal will define how he or she carried out the duties that come with the prestigious opportunity. One choice is to take the resolution at face value, ignoring that it is a byproduct of a cadre of dictators who have figured out how to weaponize the General Assembly to target a single country in order to divert international attention from their authoritarian ways. Another choice is to look critically at

the resolution, analyze whether its underpinnings are grounded in facts or propaganda, and choose to be a speaker of truth and a true administrator of justice.

In 2003, Uganda abstained from the resolution that referred the question of Israel's security fence to the ICJ. In so doing, Ugandan Ambassador Charles W.G. Wagaba "said his country remained a firm supporter of the Palestinian cause. It also supported the two-nation policy, whereby the States of Israel and Palestine would exist side by side in peace, within internationally recognized and secure borders. It was within that context that the conflict in the Middle East should be addressed. . . . The international community — and especially the United Nations — should be part of the solution, not part of the problem. Passing resolutions to condemn one side only hardened attitudes. The United Nations should, instead, endeavor to bring the two sides together. United Nations resolutions should not be perceived as solutions, but as viable means to find a solution . . . If passing resolutions did not produce the desired results, another mechanism should be found — in this case, the solution was to be found in a settlement negotiated by both parties. For that reason, moreover, referring the issue to the ICJ would not serve the cause of peace."

May this Court find wisdom in Wagaba's words of 2003 and decline to consider the question before it for the betterment of mankind.