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**M E M O R A N D U M**

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**To:****Date:****Subject:        Procedures for bringing proceedings before the ICJ and UN diplomacy**

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**Introduction:**

This memorandum provides an overview of options that the Palestinian leadership may wish to consider in relation to requesting an advisory opinion from the International Court of Justice (ICJ) and securing resolutions at the United Nations General Assembly and Security Council in order to safeguard Palestinian interests in permanent status issues.

The memo is divided into two parts: the first part of the memo concerns the ICJ, while the second discusses resolutions of the UN's General Assembly and Security Council.

**I: PROCEEDINGS BEFORE THE INTERNATIONAL COURT OF JUSTICE****What is the ICJ?**

The ICJ is the principal judicial organ of the UN and is based in The Hague, Netherlands. It was established in June 1945 by the Charter of the United Nations and began work in April 1946. The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.

The Court may entertain two types of cases:

- legal disputes between States submitted to it by them (contentious cases) and
- requests for advisory opinions on legal questions referred to it by United Nations organs and specialized agencies (advisory proceedings).

**Contentious cases**

Only States (States Members of the United Nations and other States which have become parties to the Statute of the Court or which have accepted its jurisdiction under certain conditions) may be parties to contentious cases.

Palestine holds only permanent observer status at the UN. Accordingly, it is unlikely that the PLO and the PNA are able to be a party to a contentious case.

**What is an advisory opinion?**

Advisory proceedings before the Court are open solely to five organs of the United Nations and to 16 specialized agencies of the United Nations family.

The United Nations General Assembly and Security Council may request advisory opinions on “any legal question”. Other United Nations organs and specialized agencies which have been authorized to seek advisory opinions can only do so with respect to “legal questions arising within the scope of their activities”.

When it receives a request for an advisory opinion, the Court is empowered to hold written and oral proceedings, certain aspects of which recall the proceedings in contentious cases. In theory, the Court may do without such proceedings, but it has never dispensed with them entirely.

A few days after the request is filed, the Court draws up a list of those States and international organizations that will be able to furnish information on the question before the Court. Those States are not in the same position as parties to contentious proceedings: their representatives before the Court are not known as agents and, crucially, *their participation, if any, in the advisory proceedings does not render the Court’s opinion binding upon them*. In general, the States listed are the Member States of the organization requesting the opinion. Any State not consulted by the Court may ask to be.

It is rare, however, for the ICJ to allow international organizations other than the one having requested the opinion to participate in advisory proceedings. With respect to non-governmental international organizations, the only one ever authorized by the ICJ to furnish information did not in the end do so (*International Status of South West Africa*). The Court has rejected all such requests by private parties.

The written proceedings are shorter but as flexible as in contentious proceedings between States. Participants may file written statements, which sometimes form the object of written comments by other participants. The written statements and comments are regarded as confidential, but are generally made available to the public at the beginning of the oral proceedings. States are then usually invited to present oral statements at public sittings.

Advisory proceedings are concluded by the delivery of the advisory opinion at a public sitting.

It is of the essence of such opinions that they are advisory, i.e., that, unlike the Court’s judgments, they have no binding effect. The requesting organ, agency or organization remains free to give effect to the opinion by any means open to it, or not to do so. Certain instruments or regulations can, however, provide beforehand that an advisory opinion by the Court shall have binding force (e.g., conventions on the privileges and immunities of the United Nations).

It remains nevertheless that the authority and prestige of the Court attach to its advisory opinions and that where the organ or agency concerned endorses that opinion, that decision is as it were sanctioned by international law.

#### **Procedure of seeking an advisory opinion from the ICJ**

The UN may seek an advisory opinion from the ICJ under Article 96(1) of the UN Charter either through the Security Council or the General Assembly.

For decisions by the General Assembly, a simple majority vote is usually required, but for decisions on "important questions", a two-thirds majority is required, excluding abstentions.<sup>1</sup> The definition of "important questions" in Art. 18(2) of the UN Charter is not entirely clear, but it is possible that questions regarding the Israel-Palestinian conflict would meet the threshold of "important questions" and therefore require a two-thirds majority of participating voters.

The Court may be properly seized of an advisory opinion if a question presented to it satisfies certain criteria in Art. 65 of the Statute of the International Court of Justice. Art. 65 requires that the question fulfil the following criteria:

1. The question must be a legal question;
2. the question must be requested by duly authorized bodies;
3. the question must be put to the Court by way of a written request;
4. the request must contain an exact statement of the question; and
5. the request must be accompanied by all documents likely to throw light upon the question.

### **Suggested question to be brought to the ICJ**

In his report to the UN Human Rights Council submitted in January 2007, Prof. John Dugard, the UN Special Rapporteur on the human rights situation in the occupied Palestinian territory suggested that "elements of [Israel's military] occupation constitute forms of colonialism and apartheid." Prof. Dugard then posed the question, "What are the legal consequences of a regime of prolonged occupation with features of colonialism and apartheid for the occupied people, the Occupying Power and third States?"

In the same report, Professor Dugard suggested that an advisory opinion on the legal consequences of Israel's conduct should be sought from the ICJ. This advisory opinion would complement the opinion that the ICJ delivered in 2004 on the *Legal consequences of the construction of a wall in the occupied Palestinian territories*.

Following the publication of Prof. Dugard's report, the Human Sciences Research Council of South Africa commissioned a study to scrutinize the hypothesis of Prof Dugard from the perspective of international law. The study set out to examine legally the premises of Professor Dugard's question: is Israel the occupant of the OPT, and, if so, do elements of its occupation of these territories amount to colonialism or apartheid? Colonialism and apartheid both constitute serious violations of fundamental human rights.

The study was completed over 15 months through the work of a team of British, South African, Israeli and Palestinian lawyers, legal scholars and other academics, including members of Al-Haq and Adalah – the Legal Center for Arab Minority Rights in Israel.

### **Colonialism in international law**

Although international law provides no single decisive definition of colonialism, the terms of the Declaration on Colonialism indicate that a situation may be classified as colonial when the acts of a State have the cumulative outcome that it annexes or otherwise unlawfully retains control

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<sup>1</sup> See Art. 18 of the UN Charter and **Rules of Procedure of the Assembly, U.N. Doc. A/520/Rev.15, Rule 86 (1985).**

over territory and thus aims permanently to deny its indigenous population the exercise of its right to self-determination. Colonialism has been consistently condemned by the international community because it prevents, and aims to prevent, a people from exercising freely its right to determine its own future through its own political institutions and in pursuit of its own economic policy.

#### Apartheid under international law

Apartheid is an aggravated form of racial discrimination because it is a State-sanctioned regime of law and institutions that has 'the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them'. This definition is employed in the Apartheid Convention, which builds on the International Convention on the Elimination of All Forms of Racial Discrimination (1965).

#### The Duties of States on Colonialism and Apartheid

The rules of international law prohibiting colonialism and apartheid are peremptory: that is, they are rules 'accepted and recognized by the international community of States as a whole as [rules] from which no derogation is permitted'. Every State owes a legal duty to the international community as a whole not to engage in practices of colonialism or apartheid. Conversely, all States have an interest in ensuring that these rules are respected because they enshrine fundamental values of international public order. Faced with a violation of the prohibitions of colonialism and apartheid, all States have three duties:

- 1) to co-operate to end the violation;
- 2) not to recognize the illegal situation arising from it; and
- 3) not to render aid or assistance to the State committing it.

#### Conclusions of the Study

The main conclusions arrived at by the study are as follows:<sup>2</sup>

- 1) Israel remains the Occupying Power throughout the East Jerusalem, the West Bank, and the Gaza Strip;
- 2) Israel's administration of the OPT systematically breaches the law of armed conflict, both by disregarding the prohibition imposed on an Occupying Power not to alter the laws in force in occupied territory and by enforcing a dual and discriminatory legal regime on Jewish and Palestinian residents of the OPT;
- 3) Five issues, which are unlawful in themselves, taken together make it evident that Israel's rule in the OPT has assumed a colonial character:
  - a. violating the territorial integrity of occupied territory;
  - b. depriving the population of occupied territory of the capacity for self-governance;
  - c. integrating the economy of occupied territory into that of the occupant;
  - d. breaching the principle of permanent sovereignty over natural resources in relation to the occupied territory; and
  - e. denying the population of occupied territory the right freely to express, develop and practice its culture;

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<sup>2</sup> The Executive Summary of the study can be accessed online at: <http://www.hsrc.ac.za/Document-3230.phtml>.

- 4) The implementation of a colonial policy by Israel has not been piecemeal but is systematic and comprehensive, as the exercise of the Palestinian population's right to self-determination has been frustrated in all of its principal modes of expression;
- 5) the State of Israel exercises control in the OPT with the purpose of maintaining a system of domination by Jews over Palestinians;
- 6) By examining Israel's practices in the light of Article 2 of the Apartheid Convention, the study concludes that Israel has introduced a system of apartheid in the OPT.

Accordingly, the study recommends that an ICJ advisory opinion be requested on the following question:

*Do the policies and practices of Israel within the Occupied Palestinian Territories violate the norms prohibiting apartheid and colonialism; and, if so, what are the legal consequences arising from Israel's policies and practices, considering the rules and principles of international law, including the International Convention on the Elimination of all forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN General Assembly Resolution 1514 (1960), the Fourth Geneva Convention of 1949, and other relevant Security Council and General Assembly resolutions?*

If the Palestinian leadership is minded to pursue the possibility of seeking an ICJ advisory opinion, the NSU would be happy to draft alternative questions for consideration.

## **II: INTERNATIONAL DIPLOMACY AT THE UNITED NATIONS**

### **THE SECURITY COUNCIL**

#### **POLITICAL FRAMEWORK**