

**Legal Consequences of the Construction of a Wall  
in the Occupied Palestinian Territory  
(Request for advisory opinion)**

**Summary of the Advisory Opinion of 9 July 2004**

History of the proceedings (paras. 1-12)

The Court first recalls that on 10 December 2003 the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit the question set forth in its resolution ES-10/14, adopted on 8 December 2003 at its Tenth Emergency Special Session, for an advisory opinion. The question is the following:

“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, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”

The Court then gives a short overview of the history of the proceedings.

Questions of jurisdiction (paras. 13-42)

At the outset of its reasoning the Court observes that, when seised of a request for an advisory opinion, it must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why it should decline to exercise any such jurisdiction.

The Court first addresses the question whether it possesses jurisdiction to give the advisory opinion. It notes first that the competence of the Court in this regard is based on Article 65, paragraph 1, of its Statute, according to which 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”, and secondly that the General Assembly, which seeks the advisory opinion, is authorized to do so by Article 96, paragraph 1, of the Charter,

which provides: “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.” As it has done sometimes in the past, the Court then turns to the relationship between the question which is the subject of a request for an advisory opinion and the activities of the Assembly. It observes in this respect that Article 10 of the Charter has conferred upon the General Assembly a competence relating to “any questions or any matters” within the scope of the Charter, and that Article 11, paragraph 2, has specifically provided it with competence on “questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations . . .” and to make recommendations under certain conditions fixed by those Articles. It notes that the question of the construction of the wall in the Occupied Palestinian Territory was brought before the General Assembly by a number of Member States in the context of the Tenth Emergency Special Session of the Assembly, convened to deal with what the Assembly, in its resolution ES-10/2 of 25 April 1997, considered to constitute a threat to international peace and security.

After recalling the sequence of events that led to the adoption of resolution ES-10/14, the Court turns to the first question of jurisdiction raised in the present proceedings. Israel has alleged that, given the active engagement of the Security Council with the situation in the Middle East, including the Palestinian question, the General Assembly acted ultra vires under the Charter, because its request for an advisory opinion was not in accordance with Article 12, paragraph 1, of the Charter, which provides that: “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.” The Court first observes that a request for an advisory opinion is not a “recommendation” by the General Assembly “with regard to [a] dispute or situation”, within the meaning of Article 12, but considers it appropriate to examine the significance of that Article, having regard to the practice of the United Nations. It notes that, under Article 24 of the Charter, the Security Council has “primary responsibility for the maintenance of international peace and security” and that both the Security Council and the General Assembly initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council’s agenda, but that this interpretation of Article 12 has evolved subsequently. The Court takes note of an interpretation of that text given by the United Nations Legal Counsel at the Twenty-third Session of the Assembly, and of an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security. The Court considers that the accepted practice of the Assembly, as it has evolved, is consistent with Article 12, paragraph 1; it is accordingly of the view that the General Assembly, in adopting resolution ES-10/14, seeking an advisory opinion from the Court, did not contravene the provisions of Article 12, paragraph 1, of the Charter. The Court concludes that by submitting that request the General Assembly did not exceed its competence.

The Court recalls that it has however been contended before it that the request did not fulfil the essential conditions set by resolution 377 A (V), under which the Tenth Emergency Special Session was convened and has continued to act.

Resolution 377 A (V) provides that:

“if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures . . .”.

The Court proceeds to ascertain whether the conditions laid down by this resolution were fulfilled as regards the convening of the Tenth Emergency Special Session of the General Assembly, in particular at the time when the Assembly decided to request an advisory opinion from the Court.

In light of the sequence of events as described by it, the Court observes that, at the time when the Tenth Emergency Special Session was convened in 1997, the Council had been unable to take a decision on the case of certain Israeli settlements in the Occupied Palestinian Territory, due to a negative vote of a permanent member; and that, as indicated in resolution ES-10/2, there existed a threat to international peace and security. The Court further notes that, on 20 October 2003, the Tenth Emergency Special Session of the General Assembly was reconvened on the same basis as in 1997, after the rejection by the Security Council, on 14 October 2003, again as a result of the negative vote of a permanent member, of a draft resolution concerning the construction by Israel of the wall in the Occupied Palestinian Territory. The Court considers that the Security Council again failed to act as contemplated in resolution 377 A (V). It does not appear to the Court that the situation in this regard changed between 20 October 2003 and 8 December 2003, since the Council neither discussed the construction of the wall nor adopted any resolution in that connection. Thus, the Court is of the view that, up to 8 December 2003, the Council had not reconsidered the negative vote of 14 October 2003. The Court concludes that, during that period, the Tenth Emergency Special Session was duly reconvened and could properly be seised of the matter now before the Court, under resolution 377 A (V).

The Court also emphasizes that, in the course of this Emergency Special Session, the General Assembly could adopt any resolution falling within the subject-matter for which the Session had been convened, and otherwise within its powers, including a resolution seeking the Court’s opinion. It is irrelevant in that regard that no proposal had been made to the Security Council to request such an opinion.

Turning to alleged further procedural irregularities of the Tenth Emergency Special Session, the Court does not consider that the “rolling” character of that Session, namely the fact of it having been convened in April 1997 and reconvened 11 times since then, has any relevance with regard to the validity of the request by the General Assembly. In response to the contention by Israel that it was improper to reconvene the Tenth Emergency Special Session at a time when the regular Session of the General Assembly was in progress, the Court observes that, while it may not have been originally contemplated that it would be appropriate for the General Assembly to hold simultaneous emergency and regular sessions, no rule of the Organization has been identified which would be thereby violated, so as to render invalid the resolution adopting the present request for an advisory opinion. Finally, the Tenth Emergency Special Session appears to have been convened in accordance with Rule 9 (b) of the Rules of Procedure of the General Assembly, and the relevant meetings have been convened in pursuance of the applicable rules.

The Court turns to a further issue related to jurisdiction namely the contention that the request for an advisory opinion by the General Assembly does not raise a “legal

question” within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute of the Court.

As regards the alleged lack of clarity of the terms of the General Assembly’s request and its effect on the “legal nature” of the question referred to the Court, the Court observes that this question is directed to the legal consequences arising from a given factual situation considering the rules and principles of international law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter the “Fourth Geneva Convention”) and relevant Security Council and General Assembly resolutions. In the view of the Court, it is indeed a question of a legal character. The Court further points out that lack of clarity in the drafting of a question does not deprive the Court of jurisdiction. Rather, such uncertainty will require clarification in interpretation, and such necessary clarifications of interpretation have frequently been given by the Court. Therefore, the Court will, as it has done often in the past, “identify the existing principles and rules, interpret them and apply them . . . , thus offering a reply to the question posed based on law” (Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I), p. 234, para. 13). The Court points out that, in the present instance, if the General Assembly requests the Court to state the “legal consequences” arising from the construction of the wall, the use of these terms necessarily encompasses an assessment of whether that construction is or is not in breach of certain rules and principles of international law.

The Court does not consider that what is contended to be the abstract nature of the question posed to it raises an issue of jurisdiction. Even when the matter was raised as an issue of propriety rather than one of jurisdiction, in the case concerning the Legality of the Threat or Use of Nuclear Weapons, the Court took the clear position that to contend that it should not deal with a question couched in abstract terms is “a mere affirmation devoid of any justification” and that “the Court may give an advisory opinion on any legal question, abstract or otherwise” (I.C.J. Reports 1996 (I), p. 236, para. 15).

The Court finds that it furthermore cannot accept the view, which has also been advanced, that it has no jurisdiction because of the “political” character of the question posed. As is clear from its long-standing jurisprudence on this point, the Court considers that the fact that a legal question also has political aspects, “does not suffice to deprive it of its character as a ‘legal question’ and to ‘deprive the Court of a competence expressly conferred on it by its Statute’, and the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task” (Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I), p. 234, para. 13).

The Court accordingly concludes that it has jurisdiction to give the advisory opinion requested by resolution ES-10/14 of the General Assembly.

#### Discretionary power of the Court to exercise its jurisdiction (paras. 43-65)

The Court notes that it has been contended, however, that the Court should decline to exercise its jurisdiction because of the presence of specific aspects of the General Assembly’s request that would render the exercise of the Court’s jurisdiction improper and inconsistent with the Court’s judicial function.

The Court first recalls that Article 65, paragraph 1, of its Statute, which provides that “The Court may give an advisory opinion . . .” (emphasis added), should be interpreted to mean that the Court retains a discretionary power to decline to give an advisory opinion

even if the conditions of jurisdiction are met. It is mindful however of the fact that its answer to a request for an advisory opinion “represents its participation in the activities of the Organization, and, in principle, should not be refused”. From this it follows that, given its responsibilities as the “principal judicial organ of the United Nations” (Article 92 of the Charter), the Court should in principle not decline to give an advisory opinion, and only “compelling reasons” should lead the Court to do so.

The first argument presented to the Court in this regard is to the effect that it should not exercise its jurisdiction in the present case because the request concerns a contentious matter between Israel and Palestine, in respect of which Israel has not consented to the exercise of that jurisdiction. According to this view, the subject-matter of the question posed by the General Assembly “is an integral part of the wider Israeli-Palestinian dispute concerning questions of terrorism, security, borders, settlements, Jerusalem and other related matters”. The Court observes in this respect that the lack of consent to the Court’s contentious jurisdiction by interested States has no bearing on the Court’s jurisdiction to give an advisory opinion, but recalls its jurisprudence to the effect that the lack of consent of an interested State might render the giving of an advisory

opinion incompatible with the Court's judicial character, e.g. if to give a reply would have the effect of circumventing the principle that a State is not obliged to submit its disputes to judicial settlement without its consent.

As regards the request for an advisory opinion now before it, the Court acknowledges that Israel and Palestine have expressed radically divergent views on the legal consequences of Israel's construction of the wall, on which the Court has been asked to pronounce in the context of the opinion it would give. However, as the Court has itself noted before, "Differences of views . . . on legal issues have existed in practically every advisory proceeding." Furthermore, the Court does not consider that the subject-matter of the General Assembly's request can be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court's view that the construction of the wall must be deemed to be directly of concern to the United Nations in general and the General Assembly in particular. The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine. This responsibility has been described by the General Assembly as "a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy" (General Assembly resolution 57/107 of 3 December 2002). The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute. In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground.

The Court then turns to another argument raised in support of the view that it should decline to exercise its jurisdiction: that an advisory opinion from the Court on the legality of the wall and the legal consequences of its construction could impede a political, negotiated solution to the Israeli-Palestinian conflict. More particularly, it has been contended that such an opinion could undermine the scheme of the "Roadmap", which requires Israel and Palestine to comply with certain obligations in various phases referred to therein. The Court observes that it is conscious that the "Roadmap", which was endorsed by Security Council resolution 1515 (2003), constitutes a negotiating framework for the resolution of the Israeli-Palestinian conflict, but that it is not clear what influence its opinion might have on those negotiations: participants in the present proceedings have expressed differing views in this regard. The Court finds that it cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.

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 wider Israeli-Palestinian conflict which could not be properly addressed in the present proceedings. The Court does not however consider this a reason for it to decline to reply to the question asked: it is aware, and would take into account, that the question of the wall is part of a greater whole. At the same time, the question which the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall, and that the Court would only examine other issues to the extent that they might be necessary to its consideration of the question put to it.

The further argument has been raised that the Court should decline to exercise its jurisdiction because it does not have at its disposal the requisite facts and evidence to enable it to reach its conclusions. According to Israel, if the Court decided to give the requested opinion, it would be forced to speculate about essential facts and make assumptions about arguments of law. The Court points out that in the present instance, it has at its disposal the report of the Secretary-General, as well as a voluminous dossier submitted by him to the Court, comprising not only detailed information on the route of the wall but also on its humanitarian and socio-economic impact on the Palestinian population. The dossier includes several reports based on on-site visits by special rapporteurs and competent organs of the United Nations. Moreover, numerous other participants have submitted to the Court written statements which contain information relevant to a response to the question put by the General Assembly. The Court notes in particular that Israel's Written Statement, although limited to issues of jurisdiction and propriety, contained observations on other matters, including Israel's concerns in terms of security, and was accompanied by corresponding annexes; and that many other documents issued by the Israeli Government on those matters are in the public domain.

The Court therefore finds that it has before it sufficient information and evidence to enable it to give the advisory opinion requested by the General Assembly. Moreover, the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task. There is therefore in the present case no lack of information such as to constitute a compelling reason for the Court to decline to give the requested opinion.

Another argument that has been advanced is that the Court should decline to give the requested opinion on the legal consequences of the construction of the wall because such opinion would lack any useful purpose: the General Assembly would not need an opinion of the Court because it has already declared the construction of the wall to be illegal and has already determined the legal consequences by demanding that Israel stop and reverse its construction and further, because the General Assembly has never made it clear how it intended to use the opinion. The Court observes that, as is clear from its jurisprudence, advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action. It recalls what it stated in its Opinion on the Legality of the Threat or Use of Nuclear Weapons: "it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." It thus follows that the Court cannot decline to answer the question posed based on the ground that its opinion would lack any useful purpose. The Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly. Furthermore, and in any event, the Court considers that the General Assembly has not yet determined all the possible consequences of its own resolution. The Court's task would be to determine in a comprehensive manner the legal consequences of the construction of the wall, while the General Assembly — and the Security Council — may then draw conclusions from the Court's findings.

Lastly, another argument advanced by Israel with regard to the propriety of its giving an advisory opinion in the present proceedings is that Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the Court a remedy for a situation resulting from its own wrongdoing. Therefore, Israel concludes, good faith and the principle of "clean hands" provide a

compelling reason that should lead the Court to refuse the General Assembly's request. The Court does not consider this argument to be pertinent. It emphasizes, as earlier, that it was the General Assembly which requested the advisory opinion, and that the opinion is to be given to the General Assembly, and not to an individual State or entity.

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In the light of the foregoing, the Court concludes that it has jurisdiction to give an opinion on the question put to it by the General Assembly and that there is no compelling reason for it to use its discretionary power not to give that opinion.

#### Scope of the question before the Court (paras. 66-69)

The Court then proceeds to address the question put to it by General Assembly resolution ES-10/14 (see above). The Court explains that it has chosen to use the term "wall" employed by the General Assembly, because the other terms used — "fence" or "barrier" — are no more accurate if understood in the physical sense. It further notes that the request of the General Assembly concerns the legal consequences of the wall being built "in the Occupied Palestinian Territory, including in and around East Jerusalem", and considers that it is not called upon to examine the legal consequences arising from the construction of those parts of the wall which are on the territory of Israel itself.

#### Historical background (paras. 70-78)

In order to indicate the legal consequences of the construction of the wall in the Occupied Palestinian Territory, the Court has first to determine whether or not the construction of that wall breaches international law. To this end, it first makes a brief historical analysis of the status of the territory concerned since the time that Palestine, having been part of the Ottoman Empire, was, at the end of the First World War, the subject of a class "A" mandate entrusted by the League of Nations to Great Britain. In the course of this analysis, the Court mentions the hostilities of 1948-1949, and the armistice demarcation line between Israeli and Arab forces fixed by a general armistice agreement of 3 April 1949 between Israel and Jordan, referred to as the "Green Line". At the close of its analysis, the Court notes that the territories situated between the Green Line and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, the Court observes, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories have done nothing to alter this situation. The Court concludes that all these territories (including East Jerusalem) remain occupied territories and that Israel has continued to have the status of occupying Power.

#### Description of the wall (paras. 79-85)

The Court goes on to describe, on the basis of the information available to it in a report by the United Nations Secretary-General and the Written Statement presented to the Court by the Secretary-General, the works already constructed or in course of construction in that territory.

#### Relevant rules and principles of international law (paras. 86-113)

It then turns to the determination of the rules and principles of international law which are relevant in assessing the legality of the measures taken by Israel. It observes that such rules and principles can be found in the United Nations Charter and certain other treaties, in customary international law and in the relevant resolutions adopted pursuant to the Charter by the General Assembly and the Security Council. It is aware, however, that doubts have been expressed by Israel as to the applicability in the Occupied Palestinian Territory of certain rules of international humanitarian law and human rights instruments.

United Nations Charter and General Assembly resolution 2625 (XXV) (paras. 87-88)

The Court first recalls Article 2, paragraph 4, of the United Nations Charter, which provides that:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,”

and General Assembly resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States” (hereinafter “resolution 2625 (XXV)”), in which the Assembly emphasized that “No territorial acquisition resulting from the threat or use of force shall be recognized as legal.” As stated in the Court’s Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), the principles as to the use of force incorporated in the Charter reflect customary international law (see I.C.J. Reports 1986, pp. 98-101, paras. 187-190); the same is true, it observes, of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.

As to the principle of self-determination of peoples, the Court points out that it has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant to which “Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] . . . of their right to self-determination.” Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter. The Court recalls its previous case law, which emphasized that current developments in “international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]”, and that the right of peoples to self-determination is today a right erga omnes.

International humanitarian law (paras. 89-101)

As regards international humanitarian law, the Court first recalls that Israel is not a party to the Fourth Hague Convention of 1907, to which the Hague Regulations are annexed. It considers, however, that the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court. The Court also observes that, pursuant to Article 154 of the Fourth Geneva Convention, that Convention is supplementary to Sections II and III of the Hague Regulations. Section III of those Regulations, which concerns “Military authority over the territory of the hostile State”, is particularly pertinent in the present case.

Secondly, with regard to the Fourth Geneva Convention, the Court takes note that differing views have been expressed by the participants in these proceedings. Israel, contrary to the great majority of the participants, disputes the applicability de jure of the Convention to the Occupied Palestinian Territory. The Court recalls that the Fourth Geneva Convention was ratified by Israel on 6 July 1951 and that Israel is a party to that Convention; that Jordan has also been a party thereto since 29 May 1951; and that neither of the two States has made any reservation that would be pertinent to the present proceedings. The Court observes that the Israeli authorities have indicated on a number of occasions that in fact they generally apply the humanitarian provisions of the Fourth Geneva Convention within the occupied territories. However, according to Israel's position, that Convention is not applicable de jure within those territories because, under Article 2, paragraph 2, it applies only in the case of occupation of territories falling under the sovereignty of a High Contracting Party involved in an armed conflict. Israel explains that the territories occupied by Israel subsequent to the 1967 conflict had not previously fallen under Jordanian sovereignty.

The Court notes that, according to the first paragraph of Article 2 of the Fourth Geneva Convention, when two conditions are fulfilled, namely that there exists an armed conflict (whether or not a state of war has been recognized), and that the conflict has arisen between two contracting parties, then the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties. The object of the second paragraph of Article 2, which refers to "occupation of the territory of a High Contracting Party", is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties, but simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.

This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power, regardless of the status of the occupied territories, and is confirmed by the Convention's travaux préparatoires. The States parties to the Fourth Geneva Convention, at their Conference on 15 July 1999, approved that interpretation, which has also been adopted by the ICRC, the General Assembly and the Security Council. The Court finally makes mention of a judgment of the Supreme Court of Israel dated 30 May 2004, to a similar effect.

In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in the Palestinian territories which before the 1967 conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.

#### Human rights law (paras. 102-113)

The participants in the proceedings before the Court also disagree whether the international human rights conventions to which Israel is party apply within the Occupied Palestinian Territory. Annex I to the report of the Secretary-General states:

"4. Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza

Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.”

On 3 October 1991 Israel ratified both the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 and the International Covenant on Civil and Political Rights of the same date, as well as the United Nations Convention on the Rights of the Child of 20 November 1989.

On the question of the relationship between international humanitarian law and human rights law, the Court first recalls its finding, in a previous case, that the protection of the International Covenant on Civil and Political Rights does not cease in time of war (I.C.J. Reports 1996 (I), p. 240, para. 25). More generally, it considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. It notes that there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

It remains to be determined whether the two international Covenants and the Convention on the Rights of the Child are applicable only on the territories of the States parties thereto or whether they are also applicable outside those territories and, if so, in what circumstances. After examination of the provision of the two international Covenants, in the light of the relevant *travaux préparatoires* and of the position of Israel in communications to the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, the Court concludes that those instruments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory. In the case of the International Covenant on Economic, Social and Cultural Rights, Israel is also under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities. The Court further concludes that the Convention on the Rights of the Child is also applicable within the Occupied Palestinian Territory.

#### Violation of relevant rules (paras. 114-142)

The Court next proceeds to ascertain whether the construction of the wall has violated the rules and principles of international law found relevant to reply to the question posed by the General Assembly.

#### Impact on right of Palestinian people to self-determination (paras. 115-122)

It notes in this regard the contentions of Palestine and other participants that the construction of the wall is “an attempt to annex the territory contrary to international law” and “a violation of the legal principle prohibiting the acquisition of territory by the use of force” and that “the de facto annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination”. It notes also that Israel, for its part, has argued that the wall’s sole purpose is to enable it effectively to combat terrorist attacks launched from the West Bank, and that Israel has repeatedly stated that the Barrier is a temporary measure.

The Court recalls that both the General Assembly and the Security Council have referred, with regard to Palestine, to the customary rule of “the inadmissibility of the acquisition of territory by war”. As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a “Palestinian people” is no longer in issue, and has been recognized by Israel, along with that people’s “legitimate rights”. The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions.

The Court notes that the route of the wall as fixed by the Israeli Government includes within the “Closed Area” (i.e. the part of the West Bank lying between the Green Line and the wall) some 80 per cent of the settlers living in the Occupied Palestinian Territory, and has been traced in such a way as to include within that area the great majority of the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem). The information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, of the Fourth Geneva Convention which provides: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” The Security Council has taken the view that such policy and practices “have no legal validity” and constitute a “flagrant violation” of the Convention. The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.

Whilst taking note of the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature, the Court nevertheless considers that the construction of the wall and its associated régime create a “fait accompli” on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to de facto annexation.

The Court considers moreover that the route chosen for the wall gives expression in loco to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council. There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing to the departure of Palestinian populations from certain areas. That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right.

Relevant international humanitarian law and human rights instruments (paras. 123-137)

The construction of the wall also raises a number of issues in relation to the relevant provisions of international humanitarian law and of human rights instruments.

The Court first enumerates and quotes a number of such provisions applicable in the Occupied Palestinian Territory, including articles of the 1907 Hague Regulations, the Fourth Geneva Convention, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the United Nations Convention on the Rights of the Child. In this connection it also refers to obligations relating to guarantees of access to the Christian, Jewish and Islamic Holy Places.

From the information submitted to the Court, particularly the report of the Secretary-General, it appears that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention.

That construction, the establishment of a closed area between the Green Line and the wall itself, and the creation of enclaves, have moreover imposed substantial restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto). There have also been serious repercussions for agricultural production, and increasing difficulties for the population concerned regarding access to health services, educational establishments and primary sources of water.

In the view of the Court, the construction of the wall would also deprive a significant number of Palestinians of the "freedom to choose [their] residence". In addition, since a significant number of Palestinians have already been compelled by the construction of the wall and its associated régime to depart from certain areas, a process that will continue as more of the wall is built, that construction, coupled with the establishment of the Israeli settlements mentioned above, is tending to alter the demographic composition of the Occupied Palestinian Territory.

In sum, the Court is of the opinion that the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated régime, by contributing to the demographic changes mentioned, contravene Article 49,

paragraph 6, of the Fourth Geneva Convention and the pertinent Security Council resolutions cited earlier.

The Court then examines certain provisions of the applicable international humanitarian law enabling account to be taken in certain circumstances of military exigencies, which may in its view be invoked in occupied territories even after the general close of the military operations that led to their occupation; it points out, however, that only Article 53 of the Fourth Geneva Convention

contains a relevant provision of this kind, and finds that, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in that Article were “rendered absolutely necessary by military operations” so as to fall within the exception.

Similarly, the Court examines provisions in some human rights conventions permitting derogation from, or qualifying, the rights guaranteed by those conventions, but finds, on the basis of the information available to it, that the conditions laid down by such provisions are not met in the present instance.

In sum, the Court finds that, from the material available to it, it is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.

#### Self-defence and state of necessity (paras. 138-141)

The Court recalls that Annex I to the report of the Secretary-General states, however, that, according to Israel: “the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and Security Council resolutions 1368 (2001) and 1373 (2001)”.

Article 51 of the Charter, the Court notes, recognizes the existence of an inherent right of self-defence 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. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

The Court considers further whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard, citing its decision in the case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), it observes that the state of necessity is a ground recognized by customary international law that “can only be invoked under certain strictly defined conditions which must be cumulatively satisfied” (I.C.J. Reports 1997, p. 40, para. 51), one of those conditions being that the act at issue be the only way for the State to guard an essential interest against a grave and imminent peril. In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction. While Israel has the right, and indeed the duty to respond to the numerous and deadly acts of violence directed against its civilian population, in order to protect the life of its citizens, the measures taken are bound to remain in conformity with applicable international law. Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall. The Court accordingly

finds that the construction of the wall, and its associated régime, are contrary to international law.

Legal consequences of the violations (paras. 143-160)

The Court then examines the consequences of the violations by Israel of its international obligations. After recalling the contentions in that respect of various participants in the proceedings, the Court observes that the responsibility of Israel is engaged under international law. It then proceeds to examine the legal consequences by distinguishing between, on the one hand, those arising for Israel and, on the other, those arising for other States and, where appropriate, for the United Nations.

Legal consequences of those violations for Israel (paras. 149-154)

The Court notes that Israel is first obliged to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory. Consequently, Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law. Furthermore, it must ensure freedom of access to the Holy Places that came under its control following the 1967 War.

The Court observes that Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. In the view of the Court, cessation of Israel's violations of its international obligations entails in practice the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem. All legislative and regulatory acts adopted with a view to its construction, and to the establishment of its associated régime, must forthwith be repealed or rendered ineffective, except where of continuing relevance to Israel's obligation of reparation.

The Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. The Court recalls the established jurisprudence that "The essential principle contained in the actual notion of an illegal act . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.

Legal consequences for other States (paras. 154-159)

The Court points out that the obligations violated by Israel include certain obligations erga omnes. As the Court indicated in the Barcelona Traction case, such obligations are by their very nature "the concern of all States" and, "In view of the importance of the rights involved, all States can be held to have a legal interest in their

protection.” (Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970, p. 32, para. 33.) The obligations erga omnes violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law. As regards self-determination, the Court recalls its findings in the East Timor case, and General Assembly resolution 2625 (XXV). It recalls that a great many rules of humanitarian law “constitute intransgressible principles of international customary law” (I.C.J. Reports 1996 (I), p. 257, para. 79), and observes that they incorporate obligations which are essentially of an erga omnes character. It also notes the obligation of States parties to the Fourth Geneva Convention to “ensure respect” for its provisions.

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

The United Nations (para. 160)

Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

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The Court considers that its conclusion that the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law must be placed in a more general context. Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court’s view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The “Roadmap” approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the

establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.

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The full text of the final paragraph (para. 163) reads as follows:

“For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) By fourteen votes to one,

Decides to comply with the request for an advisory opinion;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: Judge Buergenthal;

(3) Replies in the following manner to the question put by the General Assembly:

A. By fourteen votes to one,

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 régime, are contrary to international law;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: Judge Buergenthal;

B. By fourteen votes to one,

Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this Opinion;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: Judge Buergenthal;

C. By fourteen votes to one,

Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: Judge Buergenthal;

D. By thirteen votes to two,

All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: Judges Kooijmans, Buergenthal;

E. By fourteen votes to one,

The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: Judge Buergenthal.”

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### **Separate opinion of Judge Koroma**

In his separate opinion Judge Koroma stated that although he concurred with the Court's ruling 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 régime are contrary to international law, he thought the following points worth stressing.

In his view, the construction of the wall has involved the annexation of parts of the occupied territory and the dispossession of some of the Palestinians of their land, contrary to international law (in particular, the principle of the non-acquisition of territory by force), human rights law and international humanitarian law, according to which the rights of an occupying Power in an occupied territory and over the inhabitants are of a limited nature; such rights do not amount to sovereign rights which would entitle the occupier to bring about changes in the status of that territory such as the construction of the wall. In other words, it is a violation of the existing law for an occupying Power unilaterally by its action to bring about changes in the status of a territory under its military occupation.

On the issue of jurisdiction, Judge Koroma stated that while it is understandable for a diversity of legal views to exist on the question submitted to the Court, he is of the opinion that the objection that the Court lacks jurisdiction to consider the issues raised in the question is not sustainable when seen in the light of the United Nations Charter, the Statute of the Court and its jurisprudence; also not sustainable, in his view, is the objection based on judicial propriety — a matter which the Court considered extensively in terms of the fair administration of justice. In the judge's view, not only is the question presented to the Court an eminently legal one susceptible of a legal response but no compelling evidence was adduced to persuade the Court to deny itself its advisory competence.

Equally worth stressing were the Court's finding regarding the right to self-determination of the Palestinian people including the establishment of a State of their own as envisaged in resolution 181 (II) and the finding that the construction of the wall would be an impediment to the realization of that right.

He also emphasized the authoritative character of the findings of the Court, some of which are based on the principles of jus cogens and are of an erga omnes character.

Also of importance is the call upon the parties to the conflict to respect the principles of humanitarian law, in particular the Fourth Geneva Convention, in the ongoing hostilities.

Finally, the judge stated that, the Court having made its findings, it was now up to the General Assembly to utilize those findings in such a way as to bring about a just and peaceful solution to the Israeli-Palestinian conflict, a conflict which has not only lasted for too long but has been the cause of enormous suffering to those directly involved and has poisoned international relations in general.

### **Separate opinion of Judge Higgins**

Judge Higgins, who voted with the Court on each of the paragraphs in the dispositif, expounds in her separate opinion on some of the problems faced by the Court in deciding whether it should exercise its discretion to decline to respond to the question put to it. In her view, a condition elaborated by the Court in the Western Sahara Advisory Opinion is not met — namely, that where two States are in dispute, an opinion should not be requested by the General Assembly “in order that it may later, on the basis of the Court’s opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy” (I.C.J. Reports 1975, p. 26, para. 39). Participants in this case made clear that the intention was precisely to use any opinion to bring pressure to bear.

Judge Higgins further opines that it is in principle undesirable for a question to be put to the Court, while precluding it from looking at the context in which the problem has arisen. She specifies what the Court should have done, both to ensure that the Opinion was balanced and evenhanded, and to make use of the possibilities afforded by an advisory opinion to remind both Palestine and Israel of their responsibilities under international law.

Judge Higgins further explains that, while she agrees that Articles 46 and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention have been violated by the building of the wall within the Occupied Territory, she does not fully share all the reasoning of the Court in arriving at this conclusion. In particular, she doubts the wall constitutes a “serious impediment” to the exercise of Palestinian right to self-determination, seeing the real impediment as lying elsewhere. While she agrees that Israel may not exclude wrongfulness by invoking the right of self-defence, her reasons are different from those of the Court, whose views on self-defence as expressed in paragraph 139 of this Opinion she does not share.

As to the legal consequences of the Court’s findings, Judge Higgins notes that while she has voted in favour, inter alia, of subparagraph (3) (D), she does not believe that the obligations incumbent on United Nations Members stem from or rely on the legal concept of obligations erga omnes.

### **Separate opinion of Judge Kooijmans**

Judge Kooijmans starts by summarily explaining why he voted against operative subparagraph (3) (D).

He then sketches the background and context of the General Assembly’s request. He feels that the Court should have described more in detail this context; the Opinion would then have reflected in a more satisfactory way the legitimate interests and responsibilities of all groups and persons involved.

Judge Kooijmans then makes some comments on jurisdictional issues and the question of judicial propriety. He is of the view that the request, which is premised on the illegality of the construction of the wall, is drafted in a rather infelicitous way; it is, however, the Court’s judicial responsibility to analyse the request and, if necessary, to restate its object.

With regard to the merits Judge Kooijmans dissociates himself from the Court's finding that the construction of the wall constitutes a breach of Israel's obligation to respect the Palestinian people's right to self-determination. The realization of that right is part of the much wider political process, although he agrees with the Court that the wall impedes its realization.

Judge Kooijmans further regrets that the measures taken by Israel have not been put to the proportionality test but merely to that of military exigencies and requirements of national security; in international humanitarian law the criteria of military necessity and proportionality are closely linked.

With regard to Israel's claim to have acted in self-defence Judge Kooijmans observes that the Court has failed to note that Security Council resolutions 1368 (2001) and 1373 (2001) on which Israel relies do not refer to an armed attack by another State but that it correctly points out that these resolutions refer to acts of international terrorism. In the present case the terrorist acts have their origin in territory which is under Israeli control.

Finally Judge Kooijmans explains why he supports the Court's findings on the legal consequences for the United Nations and for Israel but why he dissociates himself from the findings vis-à-vis other States with the exception of the duty not to render aid or assistance in maintaining the situation created by the construction of the wall.

With regard to the duty of non-recognition and the duty to ensure respect for compliance by Israel with international humanitarian law Judge Kooijmans is of the view that the Court's findings are not well founded in positive international law and that, moreover, these duties are without real substance.

### **Separate opinion of Judge Al-Khasawneh**

Judge Al-Khasawneh, appending a separate opinion, expressed his agreement with the Court's findings and its reasoning but wished to elucidate three points:

Firstly, that the characterization of Israel's presence in the West Bank including East Jerusalem and Gaza as one of military occupation, rests on solid opinio juris and is supported by many resolutions, some of a binding nature, as well as the position of governments individually or in groups. The Court, while taking cognizance of that constant opinio juris, arrived at similar conclusions independently of those resolutions and other findings. The Court was wise, Judge Al-Khasawneh said, in not enquiring into the precise prior status of the occupied territories before 1967, because a finding that these territories are occupied and that the international legal régime of occupation applies in them can be arrived at without reference to their prior status. Moreover, except on the impossible thesis that the territories were terra nullius would their previous status matter. No one can seriously argue that those territories were terra nullius for that is a discredited concept that does not have relevance in the contemporary world. Moreover, the territories were part of mandatory territory and the right to self-determination of their inhabitants was not extinguished and would not be until the Palestinians achieved that right.

Secondly, Judge Al-Khasawneh advanced the question of the Green Line recalling that before 1967 prominent Israeli jurists sought to prove it was more than a mere armistice line, at the present it is the point from which Israeli occupation is measured. Denigrating the importance of that Line works both ways and opens the door for questioning Israel's title and its territory expanse beyond what was envisioned in the partition plan of Palestine in 1947.

Thirdly, Judge Al-Khasawneh recalled that referring to negotiations is possible but they are a means to an end and not an end to themselves. If they are not going to produce non-principled solutions they should be grounded in law. They should be conducted in good faith that should be concretized by not creating *faits accomplis*.

### **Declaration of Judge Buergenthal**

In Judge Buergenthal's view the Court should have exercised its discretion and declined to render the requested advisory opinion because it lacked sufficient information and evidence to render the opinion. The absence in this case of the requisite factual basis vitiates the Court's sweeping findings on the merits, which is the reason for his dissenting votes.

Judge Buergenthal is prepared to assume that on a thorough analysis of all relevant facts, a finding could well be made that some or even all segments of the wall being constructed by Israel in the Occupied Palestinian Territory violate international law. But he believes that for the Court to reach such conclusion with regard to the wall as a whole without having before it or seeking to ascertain all relevant facts bearing directly on issues of Israel's legitimate right of self-defence, military necessity and security needs, given the repeated deadly terrorist attacks in and upon Israel proper coming from the Occupied Palestinian Territory to which Israel has been and continues to be subjected, cannot be justified as a matter of law. In this connection, Judge Buergenthal shows that the right of self-defence does not apply only to attacks by State actors and that armed attacks on Israel proper originating from the Occupied Palestinian Territory must be deemed, in the context of this case, to meet the requirements of Article 51 of the United Nations Charter.

Judge Buergenthal also concludes that the Court's overall findings that the wall violates international humanitarian law and human rights instruments are not convincing because they fail to address any facts or evidence specifically rebutting Israel's claim of military exigencies or requirements of national security. Judge Buergenthal recognises, however, that some international humanitarian law provisions the Court cites admit of no exceptions based on military exigencies, namely, Article 46 of the Hague Rules and paragraph 6 of Article 49 of the Fourth Geneva Convention. While Judge Buergenthal believes that the Court's analysis of the relevance to this case of Article 46 is not well founded, he concludes that Article 49, paragraph 6, which provides that "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies", applies to the Israeli settlements in the West Bank, and that they violate Article 49, paragraph 6. Hence, the segments of the wall being built by Israel to protect the settlements are ipso facto in violation of that provision.

Finally, Judge Buergenthal notes that it could be argued that the Court lacked many relevant facts bearing on the legality of Israel's construction of the wall because Israel failed to present them, and that the Court was therefore justified in relying almost exclusively on the United Nations reports submitted to it. This would be true if, instead of dealing with an advisory opinion request, the Court had before it a contentious case where each party has the burden of proving its claims. That is not the rule applicable to advisory opinion proceedings. Israel had no legal obligation to participate in these proceedings or to adduce evidence supporting its claim regarding the legality of the wall. Consequently, the Court may not draw any adverse evidentiary conclusions from Israel's failure to supply it or assume, without itself fully inquiring into the matter, that the information before it is sufficient to support its sweeping legal conclusions.

### **Separate opinion of Judge Elaraby**

Judge Elaraby expressed his complete and unqualified support for the findings and conclusions of the Court. He, however, considered it necessary to append a separate

opinion in order to elaborate on some of the historical and legal aspects in the Advisory Opinion.

He first addressed the nature and scope of the United Nations responsibility towards Palestine, which has its genesis in General Assembly resolution 181 (II) of 29 November 1947. Known as the Partition Resolution, it called for the establishment of two independent States, one Arab and one Jewish, and affirmed that the period prior to the realization of the objective “shall be a transitional period”.

Judge Elaraby then addressed the international legal status of the Occupied Palestinian Territory, and the legal implications of the Mandate over Palestine and its termination by the General Assembly. Judge Elaraby also recalled that the Court has, in the South West Africa and Namibia cases, held that former mandatory territories were “a sacred trust of civilization” and were “not to be annexed”. He also referred to Israel’s various undertakings to withdraw and to respect the territorial integrity of the Occupied Palestinian Territory.

In a third section of his separate opinion, he provided a brief analysis of the effects of the prolonged Israeli occupation, and the limitations in the rules of jus in bello that ensure protection for non-combatants. He considers that the breaches by Israel of international humanitarian law should have been characterized as grave breaches.

Judge Elaraby also commented on the Court’s finding that “the construction of the wall severely impedes the exercise of the Palestinian people of their right to self-determination”. He is of the view that this important finding should have been reflected in the dispositif.

#### **Separate opinion of Judge Owada**

In his separate opinion Judge Owada concurs with the conclusions of the Advisory Opinion of the Court, both on the preliminary issues of jurisdiction and of judicial propriety in exercising jurisdiction, and on most of the points belonging to the merits. He however has some reservations about the way the Court has proceeded in exercising its judicial propriety in the present case.

More specifically, Judge Owada is of the view that the Court should have approached the issue of judicial propriety, not simply in terms of whether it should comply with the request for an advisory opinion, but also in terms of how it should exercise jurisdiction once it has decided to exercise it, with a view to ensuring fairness in the administration of justice in the case which involves an underlying bilateral dispute. In this situation, consideration of fairness in the administration of justice would also require fair treatment of the positions of the parties involved in the subject-matter with regard to the assessment of facts and of law. Finally, Judge Owada would have wished to see in the Opinion of the Court a categorical rejection by the Court of the tragic circle of indiscriminate violence perpetrated by both sides against innocent civilian populations, which forms an important background to the present case.