

CR 2004/3

International Court  
of Justice

THE HAGUE

Cour internationale  
de Justice

LA HAYE

YEAR 2004

*Public sitting*

*held on Tuesday 24 February 2004, at 10 a.m., at the Peace Palace,*

*President Shi presiding,*

***on the Legal Consequences of the Construction of a Wall  
in the Occupied Palestinian Territory***

**(Request for advisory opinion submitted by the General Assembly of the United Nations)**

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VERBATIM RECORD

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ANNÉE 2004

*Audience publique*

*tenue le mardi 24 février 2004, à 10 heures, au Palais de la Paix,*

*sous la présidence de M. Shi, président,*

***sur les Conséquences juridiques de l'édification d'un mur  
dans le Territoire palestinien occupé***

**(Demande d'avis consultatif soumise par l'Assemblée générale des Nations Unies)**

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COMPTE RENDU

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*Present:*      President Shi  
                 Vice-President Ranjeva  
                 Judges Guillaume  
                                 Koroma  
                                 Vereshchetin  
                                 Higgins  
                                 Parra-Aranguren  
                                 Kooijmans  
                                 Rezek  
                                 Al-Khasawneh  
                                 Buergenthal  
                                 Elaraby  
                                 Owada  
                                 Simma  
                                 Tomka  
  
                 Registrar Couvreur

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*Présents* : M. Shi, président  
M. Ranjeva, vice-président  
MM. Guillaume  
Koroma  
Vereshchetin  
Mme Higgins  
MM. Parra-Aranguren  
Kooijmans  
Rezek  
Al-Khasawneh  
Buerghenthal  
Elaraby  
Owada  
Simma  
Tomka, juges  
  
M. Couvreur, greffier

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***Palestine is represented by:***

- H.E. Mr. Nasser Al-Kidwa, Ambassador, Permanent Observer of Palestine to the United Nations;
- Mr. Georges Abi-Saab, Professor of International Law, Graduate Institute of International Studies, Geneva, Member of the Institute of International Law, Counsel and Advocate;
- Mr. James Crawford, Whewell Professor of International Law, University of Cambridge;
- Mr. Vaughan Lowe, Chichele Professor of International Law, University of Oxford, Counsel and Advocate;
- Mr. Jean Salmon, Professor Emeritus of International Law, Université libre de Bruxelles, Member of the Institute of International Law, Counsel and Advocate;
- Mr. Pieter Bekker, Member of the Bar of New York, Senior Counsel;
- Mr. Anis Kassim, Member of the Bar of the Hashemite Kingdom of Jordan, Senior Counsel;
- Mr. Raja Aziz Shehadeh, Barrister at law, Ramallah, Palestine, Senior Counsel;
- Ms Stephanie Koury, Member, Negotiations Support Unit, Counsel;
- Mr. Jarat Chopra, Member, Negotiations Support Unit, Professor of International Law, Brown University, Counsel;
- Mr. Rami Shehadeh, Member, Negotiations Support Unit, Counsel;
- H.E. Mr. Yousef Habbab, Ambassador, General Delegate of Palestine to the Netherlands, Adviser;
- Mr. Muin Shreim, Counsellor, Permanent Observer Mission of Palestine to the United Nations, Adviser;
- Ms Feda Abdelhady Nasser, Counsellor, Permanent Observer Mission of Palestine to the United Nations, Adviser;
- Mr. Michael Tarazi, Member, Negotiations Support Unit, Adviser/Media Co-ordinator;
- Ms Kylie Evans, Lauterpacht Research Centre for International Law, University of Cambridge;
- Mr. François Dubuisson, Centre de droit international de l'Université libre de Bruxelles;
- Mr. Markus W. Gehring, Yale University;
- Mr. Jafer Shadid, delegation of Palestine in the Netherlands.

***The Republic of South Africa is represented by:***

H.E. Mr. Aziz Pahad, Deputy Minister for Foreign Affairs and Leader of the Delegation;

H.E. Ms P. Jana, Ambassador of the Republic of South Africa to the Kingdom of the Netherlands and diplomatic representative to the International Court of Justice;

H.E. Mr. D. S. Kumalo, Permanent Representative of the Republic of South Africa to the United Nations;

Mr. M. R. W. Madlanga, S.C.;

Ms J. G. S. de Wet, Acting Chief State Law Adviser (International Law), Department of Foreign Affairs;

Mr. A. Stemmet, Senior State Law Adviser (International Law) Department of Foreign Affairs;

Ms T. Lujiza, State Law Adviser (International Law) Department of Foreign Affairs;

Mr. I. Mogotsi, Director, Middle East Department of Foreign Affairs.

***The People's Democratic Republic of Algeria is represented by:***

H.E. Mr. Noureddine Djoudi, Ambassador of Algeria to the Kingdom of the Netherlands;

Mr. Ahmed Laraba, Professor of International Law;

Mr. Mohamed Habchi, Member of the Constitutional Council;

Mr. Abdelkader Cherbal, Member of the Constitutional Council;

Mr. Merzak Bedjaoui, Director of Legal Affairs, Ministry of Foreign Affairs.

***The Kingdom of Saudi Arabia is represented by:***

H.E. Mr. Fawzi A. Shubokshi, Ambassador and Permanent Representative of the Kingdom of Saudi Arabia to the United Nations in New York, Head of Delegation;

Mr. Hazim Karakotly, Minister plenipotentiary, Ministry of Foreign Affairs in Riyadh;

Mr. Sameer Aggad, First Secretary in the Ministry of Foreign Affairs in Riyadh;

Mr. Saud Alshawaf, Legal Counsellor;

Mr. Ziyad Alsudairi, Legal Counsellor;

Mr. Muhammed Omar Al-Madani, Professor Emeritus of International Law, Legal Counsellor;

Mr. Khaled Althubaiti, Legal Counsellor;

Mr. David Colson, Legal Counsellor;

Mr. Brian Vohrer, Assistant Legal Counsellor.

***The People's Republic of Bangladesh is represented by:***

H.E. Mr. Liaquat Ali Choudhury, Ambassador of Bangladesh to the Netherlands;

Ms Naureen Ahsan, First Secretary at the Embassy of Bangladesh in The Hague.

***Belize is represented by:***

H.E. Mr. Bassam Freiha, Permanent Representative of Belize to Unesco;

Mr. Jean-Marc Sorel, Professor at the Université de Paris 1 (Panthéon-Sorbonne);

Ms Mireille Cailbault.

***The Republic of Cuba is represented by:***

H.E. Mr. Abelardo Moreno Fernández, Deputy Minister for Foreign Affairs;

H.E. Mr. Elio Rodríguez Perdomo, Ambassador Extraordinary and Plenipotentiary to the Kingdom of the Netherlands;

Mr. Enrique Prieto López, Minister Counsellor at the Embassy of Cuba in the Netherlands;

Mrs. Soraya E. Alvarez Núñez, Official of the Multilateral Affairs Division, Ministry of Foreign Affairs.

***The Republic of Indonesia is represented by:***

H.E. Mr. Mohammad Jusuf, Ambassador the Republic of Indonesia to the Kingdom of the Netherlands, Head of Delegation;

Ms Nuni Turnijati Djoko, Minister, Deputy Chief of Mission, member;

Mr. Mulya Wirana, Counsellor (Political Affairs), member;

Col. A Subandi, Defence Attaché, member;

Mrs. Kusuma N. Lubis, Counsellor (Information Affairs), member;

Mr. Sulaiman Syarif, First Secretary (Political Affairs), member;

Mr. Daniel T. S. Simanjuntak, Third Secretary (Political Affairs), member.

***The Hashemite Kingdom of Jordan is represented by:***

H.R.H. Ambassador Zeid Ra'ad Zeid Al-Hussein, Head of the Delegation and Permanent Representative of the Hashemite Kingdom of Jordan to the United Nations, New York;

H.E. Mr. Mazen Armouti, Ambassador of the Hashemite Kingdom of Jordan to the Kingdom of the Netherlands;

Sir Arthur Watts, K.C.M.G., Q.C., Senior Legal Adviser to the Government of the Hashemite Kingdom of Jordan;

Mr. Guy Goodwin-Gill, Legal Adviser to the Government of the Hashemite Kingdom of Jordan;

Mr. Bisher Al Khasawneh, Legal Adviser;

Mr. Mahmoud Al-Hmoud, Legal Adviser;

Mr. Samer Naber, Legal Adviser;

Mr. Ashraf Zeitoun, Political Adviser;

Ms Diana Madbak, Support Staff.

***The Republic of Madagascar is represented by:***

H.E. Mr. Alfred Rabeloson, Permanent Representative of Madagascar to the Office of the United Nations at Geneva and to the Specialized Agencies, Head of Delegation;

Mr. Odon Prosper Rambatoson, Inspector, Ministry of Foreign Affairs.

***Malaysia is represented by:***

H.E. Datuk Seri Syed Hamid Albar, Foreign Minister of Malaysia, Head of Delegation;

Datin Seri Sharifah Aziah Syed Zainal Abidin, wife of the Minister for Foreign Affairs;

H.E. Tan Sri Ahmad Fuzi Abdul Razak, Secretary-General, Ministry of Foreign Affairs, Malaysia;

H.E. Dato' Rastam Mohd Isa, Permanent Representative of Malaysia to the United Nations;

H.E. Dato' Noor Farida Ariffin, Ambassador of Malaysia to the Kingdom of the Netherlands;

Mr. John Louis O'hara, Head, International Affairs Division, Attorney-General's Chambers;

Professor Nico Schrijver, Professor of International Law, Free University, Amsterdam and Institute of Social Studies, The Hague; Member of the Permanent Court of Arbitration;

Professor Dr. Marcelo G. Kohen, Professor of International Law, The Graduate Institute of International Studies, Geneva;

Mr. Ku Jaafar Ku Shaari, Undersecretary, OIC Division, Ministry of Foreign Affairs;

Mr. Hasnudin Hamzah, Special Officer to the Foreign Minister;

Mr. Zulkifli Adnan, Counsellor, Embassy of Malaysia in the Netherlands;

Mr. Ikram Mohd. Ibrahim, First Secretary, Permanent Mission of Malaysia to the United Nations;

Mr. Mohd. Normusni Mustapa Albakri, Federal Counsel, International Affairs Division, Attorney-General's Chambers.

***The Republic of Senegal is represented by:***

H.E. Mr. Saliou Cissé, Ambassador of the Republic of Senegal to the Kingdom of the Netherlands, Head of Delegation;

Mr. Cheikh Niang, Minister-Counsellor, Permanent Mission of Senegal to the United Nations;

Mr. Cheikh Tidiane Thiam, Director of Legal and Consular Affairs, Ministry of Foreign Affairs.

***The Republic of the Sudan is represented by:***

H.E. Mr. Abuelgasim A. Idris, Ambassador of the Sudan to the Netherlands;

Mr. Ali Al Sadig, Deputy Head of Mission at the Embassy of the Sudan in the Netherlands.

***The League of Arab States is represented by:***

H.E. Mr. Amre Moussa, Secretary General of the League of Arab States;

Mr. Michael Bothe, Professor of Law, Head of the Legal Team;

Ms Vera Gowlland-Debbas, Professor of Law;

Mr. Yehia El Gamal, Legal Adviser;

Mr. Salah Amer, Legal Adviser;

Mr. Mohammed Gomaa, Legal Adviser;

Mr. Mohamed Redouane Benkhadra, Legal Adviser of the Secretary General, Head of the Legal Department, League of Arab States.

***The Organization of the Islamic Conference is represented by:***

H.E. Mr. Abdelouahed Belkeziz, Secretary General of the Organization of the Islamic Conference;

Ms Monique Chemillier-Gendreau, Professor of Public Law, University of Paris VII-Denis Diderot, as Counsel;

Mr. Willy Jackson, *chargé de cours*, University of Paris VII-Denis Diderot, as Assistant to Counsel;

H.E. Mr. Babacar Ba, Ambassador, Permanent Observer of the Organization of the Islamic Conference to the Office of the United Nations at Geneva.



***La Palestine est représentée par :***

- S. Exc. M. Nasser Al-Kidwa, ambassadeur, observateur permanent de la Palestine auprès de l'Organisation des Nations Unies;
- M. Georges Abi-Saab, professeur de droit international à l'Institut de hautes études internationales, Genève, membre de l'Institut de droit international, conseil et avocat;
- M. James Crawford, professeur de droit international à l'Université de Cambridge (chaire Whewell), conseil et avocat;
- M. Vaughan Lowe, professeur de droit international à l'Université d'Oxford (chaire Chichele), conseil et avocat ;
- M. Jean Salmon, professeur émérite de droit international à l'Université libre de Bruxelles, membre de l'Institut de droit international, conseil et avocat;
- M. Pieter Bekker, membre du barreau de New York, conseil principal;
- M. Anis Kassim, membre du barreau du Royaume hachémite de Jordanie, conseil principal;
- M. Raja Aziz Shehadeh, *Barrister at Law* à Ramallah, Palestine, conseil principal;
- Mme Stephanie Koury, membre du groupe d'appui aux négociations, conseil;
- M. Jarat Chopra, membre du groupe d'appui aux négociations, professeur de droit international à la Brown University, conseil;
- M. Rami Shehadeh, membre du groupe d'appui aux négociations, conseil;
- S. Exc. M. Yousef Habbab, ambassadeur, délégué général de la Palestine aux Pays-Bas, conseiller;
- M. Muin Shreim, conseiller à la mission permanente d'observation de la Palestine auprès de l'Organisation des Nations Unies, conseiller;
- Mme Feda Abdelhady Nasser, conseillère à la mission permanente d'observation de la Palestine auprès de l'Organisation des Nations Unies;
- M. Michael Tarazi, membre du groupe d'appui aux négociations, coordonnateur pour les médias;
- Mme Kylie Evans, Lauterpacht Research Centre for International Law, Université de Cambridge;
- M. François Dubuisson, Centre de droit international de l'Université libre de Bruxelles;
- M. Markus W. Gehring, Université de Yale;
- M. Jafer Shadid, délégation de la Palestine aux Pays-Bas.

***La République sud-africaine est représentée par :***

- S. Exc. M. Aziz Pahad, vice-ministre des affaires étrangères, chef de la délégation;
- S. Exc. Mme P. Jana, ambassadeur de la République sud-africaine auprès du Royaume des Pays-Bas;
- S. Exc. M. D. S. Kumalo, représentant permanent de la République sud-africaine auprès de l'Organisation des Nations Unies;
- M. M.R.W. Madlanga, juge;
- Mme J. G.S. de Wet, conseiller juridique en chef *a.i.* (droit international), ministère des affaires étrangères;
- M. A. Stemmet, conseiller juridique principal (droit international), ministère des affaires étrangères;
- Mme T. Lujiza, conseiller juridique (droit international), ministère des affaires étrangères;
- M. I. Mogotsi, directeur, direction du Moyen-Orient, ministère des affaires étrangères.

***La République algérienne démocratique et populaire est représentée par :***

- S. Exc. M. Noureddine Djoudi, ambassadeur d'Algérie auprès du Royaume des Pays-Bas;
- M. Ahmed Laraba, professeur de droit international;
- M. Mohamed Habchi, membre du conseil constitutionnel;
- M. Abdelkader Cherbal, membre du conseil constitutionnel;
- M. Merzak Bedjaoui, directeur des affaires juridiques au ministère des affaires étrangères.

***Le Royaume d'Arabie saoudite est représenté par :***

- S. Exc. M. Fawzi A. Shubokshi, ambassadeur et représentant permanent du Royaume d'Arabie saoudite auprès de l'Organisation des Nations Unies à New York, chef de la délégation;
- M. Hazim Karakotly, ministre plénipotentiaire au ministère des affaires étrangères à Riyad;
- M. Sameer Aggad, premier secrétaire au ministère des affaires étrangères à Riyad;
- M. Saud Alshawaf, conseiller juridique;
- M. Ziyad Alsudairi, conseiller juridique;
- M. Muhammed Omar Al-Madani, professeur émérite de droit international, conseiller juridique;
- M. Khaled Althubaiti, conseiller juridique;
- M. David Colson, conseiller juridique;
- M. Brian Vohrer, conseiller juridique adjoint.

***La République populaire du Bangladesh est représentée par :***

S. Exc. M. Liaquat Ali Choudhury, ambassadeur du Bangladesh auprès du Royaume des Pays-Bas;

Mme Naureen Ahsan, premier secrétaire à l'ambassade du Bangladesh auprès du Royaume des Pays-Bas.

***Le Belize est représenté par :***

S. Exc. M. Bassam Freiha, ambassadeur délégué permanent du Belize auprès de l'Unesco;

M. Jean-Marc Sorel, professeur à l'Université de Paris 1 (Panthéon-Sorbonne) ;

Mme Mireille Cailbault.

***La République de Cuba est représentée par :***

S. Exc. M. Abelardo Moreno Fernández, vice-ministre des affaires étrangères;

S. Exc. M. Elio Rodríguez Perdomo, ambassadeur extraordinaire et plénipotentiaire auprès du Royaume des Pays-Bas;

M. Enrique Prieto López, ministre conseiller à l'ambassade de Cuba aux Pays-Bas;

Mme Soraya E. Alvarez Núñez, fonctionnaire à la direction des affaires multilatérales du ministère des affaires étrangères.

***La République d'Indonésie est représentée par :***

S. Exc. M. Mohammad Jusuf, ambassadeur de la République d'Indonésie auprès du Royaume des Pays-Bas, chef de la délégation;

Mme Nuni Turnijati Djoko, ministre, chef de mission adjoint, délégué;

M. Mulya Wirana, conseiller (affaires politiques), délégué;

Le colonel A. Subandi, attaché de défense, délégué;

Mme Kusuma N. Lubis, conseiller (affaires de presse), délégué;

M. Sulaiman Syarif, premier secrétaire (affaires politiques), délégué;

M. Daniel T. S. Simanjuntak, troisième secrétaire (affaires politiques), délégué.

***Le Royaume hachémite de Jordanie est représenté par :***

S. A. R. Zeid Ra'ad Zeid Al-Husseini, ambassadeur, chef de la délégation, représentant permanent du Royaume hachémite de Jordanie auprès de l'Organisation des Nations Unies;

S. Exc. M. Mazen Armouti, ambassadeur du Royaume hachémite de Jordanie aux Pays-Bas;

Sir Arthur Watts, K.C.M.G., Q.C., conseiller juridique principal du Gouvernement du Royaume hachémite de Jordanie;

M. Guy Goodwin-Gill, conseiller juridique du Gouvernement du Royaume hachémite de Jordanie;

M. Bisher Al Khasawneh, conseiller juridique;

M. Mahmoud Al-Hmoud, conseiller juridique;

M. Samer Naber, conseiller juridique;

M. Ashraf Zeitoon, conseiller politique;

Mme Diana Madbak, personnel administratif.

***La République de Madagascar est représentée par :***

S. Exc. M. Alfred Rabeloson, représentant permanent de Madagascar auprès de l'Office des Nations Unies et des institutions spécialisées à Genève, chef de délégation;

M. Odon Prosper Rambatoson, inspecteur au ministère des affaires étrangères.

***La Malaisie est représentée par :***

S. Exc. Datuk Seri Syed Hamid Albar, ministre des affaires étrangères de la Malaisie, chef de la délégation;

Mme Datin Seri Sharifah Aziah Syed Zainal Abidin, épouse du ministre des affaires étrangères;

S. Exc. Tan Sri Ahmad Fuzi Abdul Razak, secrétaire général du ministère des affaires étrangères;

S. Exc. Dato' Rastam Mohd. Isa, représentant permanent de la Malaisie auprès de l'Organisation des Nations Unies;

S. Exc. Dato' Noor Farida Ariffin, ambassadeur de la Malaisie auprès du Royaume des Pays-Bas;

M. John Louis O'hara, directeur de la division des affaires internationales, bureau de l'*Attorney-General*;

M. Nico Schrijver, professeur de droit international à l'Université libre d'Amsterdam et à l'Institut d'études sociales de La Haye, membre de la Cour permanente d'arbitrage;

M. Marcelo G. Kohen, professeur de droit international à l'Institut universitaire de hautes études internationales, Genève;

M. Ku Jaafar Ku Shaari, sous-secrétaire à la division de l'Organisation de la Conférence islamique, ministère des affaires étrangères;

M. Hasnudin Hamzah, conseiller spécial auprès du ministre des affaires étrangères;

M. Zulkifli Adnan, conseiller de l'ambassade de la Malaisie aux Pays-Bas;

M. Ikram Mohd. Ibrahim, premier secrétaire de la mission permanente de la Malaisie auprès de l'Organisation des Nations Unies;

M. Mohd. Normusni Mustapa Albakri, conseil (*Federal Counsel*), division des affaires internationales, bureau de l'*Attorney-General*.

***La République du Sénégal est représentée par :***

S. Exc. M. Saliou Cissé, ambassadeur du Sénégal aux Pays-Bas, chef de la délégation ;

M. Cheikh Niang, ministre-conseiller à la mission permanente du Sénégal auprès de l'Organisation des Nations Unies;

M. Cheikh Tidiane Thiam, directeur des affaires juridiques et consulaires au ministère des affaires étrangères.

***La République du Soudan est représentée par :***

S. Exc. M. Abuelgasim A. Idris, ambassadeur du Soudan aux Pays-Bas ;

M. Ali Al Sadig, chef de mission adjoint à l'ambassade du Soudan aux Pays-Bas.

***La Ligue des Etats arabes est représentée par :***

S. Exc. M. Amre Moussa, Secrétaire général de la Ligue des Etats arabes;

M. Michael Bothe, professeur de droit, chef de l'équipe juridique;

Mme Vera Gowlland-Debbas, professeur de droit;

M. Yehia El Gamal, conseiller juridique;

M. Salah Amer, conseiller juridique;

M. Mohammed Gomaa, conseiller juridique;

M. Mohamed Redouane Benkhadra, conseiller juridique du Secrétaire général, chef du département des affaires juridiques de la Ligue des Etats arabes.

***L'Organisation de la Conférence islamique est représentée par :***

S. Exc. M. Abdelouahed Belkeziz, Secrétaire général de l'Organisation de la Conférence islamique;

Mme Monique Chemillier-Gendreau, professeur de droit public à l'Université Paris VII - Denis Diderot, conseil;

M. Willy Jackson, chargé de cours à l'Université Paris VII – Denis Diderot, assistant du conseil;

S. Exc. M. Babacar Ba, ambassadeur, observateur permanent de l'Organisation de la Conférence islamique auprès de l'Office des Nations Unies à Genève.

The PRESIDENT: Please be seated. The sitting is open.

The Court meets this morning to hear the following participants on the question submitted to the Court: Belize, Cuba, Indonesia and Jordan.

Thus, I shall now give the floor to Professor Jean-Marc Sorel who will speak for Belize.

M. SOREL : Monsieur le président, Madame, Messieurs les Membres de la Cour, c'est un grand honneur pour moi de me présenter de nouveau devant votre juridiction. Plus d'une décennie après l'affaire qui avait opposé le Tchad et la Libye et, c'est également un grand honneur pour moi de présenter les observations orales du Belize qui intervient pour la première fois devant votre Cour.

1. Tout d'abord il faut saluer la célérité avec laquelle la Cour a organisé la procédure de manière à permettre que l'avis sur cette question soit rendu effectivement rapidement<sup>1</sup>. Ceci prouve à quel point la haute juridiction peut — et doit — être sollicitée pour répondre aux grandes interrogations juridiques qui apparaissent dans notre monde contemporain. C'est la première fois qu'une juridiction internationale — la plus ancienne et la plus prestigieuse d'entre-elles — peut se prononcer sur les aspects juridiques de ce différend qui dure depuis plus d'un demi-siècle et qui a entraîné, de part et d'autre, d'innombrables souffrances. On mesure ainsi l'importance du moment que nous vivons actuellement.

2. Et c'est la raison pour laquelle le Gouvernement du Belize a souhaité s'exprimer lors de ce débat et remercie la Cour de l'honneur qui lui est fait d'apporter sa modeste contribution à cette importante question. Sa volonté de s'exprimer est motivée à la fois par sa position en faveur d'un règlement pacifique du différend, et également par sa sensibilité multiethnique qui en fait un Etat au carrefour de plusieurs civilisations.

3. Le Belize a voté en faveur de la résolution du 8 décembre 2003 car il est persuadé que la Cour peut apporter et peut contribuer positivement à l'instauration d'un dialogue fructueux entre

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<sup>1</sup> Notamment par l'ordonnance du 19 décembre 2003 qui organise promptement la procédure, ainsi que par ses sages décisions de laisser la Palestine, mais aussi la Ligue des Etats arabes et l'Organisation de la Conférence islamique, présenter des exposés écrits et oraux. Le dossier réunissant les textes pertinents en vertu de l'article 65, paragraphe 2, du Statut de la Cour, disponible dès le 19 janvier 2004, permet également de saluer la précieuse aide aux Etats apportée par la Cour.

les protagonistes de ce conflit par une réponse éclairée et impartiale à la question qui lui est posée.

Et il adhère pleinement à l'affirmation contenue dans le préambule de la résolution selon laquelle :

«Il est nécessaire de mettre fin au conflit sur la base d'une solution permettant aux deux Etats, Israël et la Palestine, de vivre côte à côte dans la paix et la sécurité et dans le respect de la ligne d'armistice de 1949, conformément aux résolutions pertinentes du Conseil de sécurité et de l'Assemblée générale.»

Il lui apparaît, en l'espèce, qu'il faut mettre fin à l'ignoble terrorisme qui sévit en Israël, reconnaît que cet Etat est en droit de prendre des mesures pour sa sécurité<sup>2</sup>, mais que la construction du mur<sup>3</sup> est une mauvaise réponse, aussi bien politique que juridique, dans l'objectif de parvenir à une pacification réelle du conflit.

4. Le Belize n'ayant pas déposé d'exposé écrit sur cette demande d'avis consultatif, il reprendra ici quelques arguments généraux sur la question posée à la lumière de ce qui lui apparaît pertinent puisqu'il s'agit pour lui de la seule occasion de s'exprimer.

5. Au préalable, le Belize souhaite faire remarquer qu'il appartiendra à la Cour d'envisager d'une manière sereine les différents arguments juridiques nécessaires pour répondre à la question posée en dehors de la passion que suscite cette affaire. Et c'est justement parce que la Cour est, par excellence et par sa fonction, l'organe capable d'une telle dissociation que le Belize souhaite présenter les arguments juridiques qui lui semblent pertinents. Pour ce faire, il évoquera essentiellement trois points. Le premier point concerne des questions préalables à la réponse que la Cour devra donner, question qui porte sur des aspects de procédure (compétence et recevabilité) ou sur un aspect substantiel qui est le statut du territoire (I). Ensuite le Belize envisagera le cœur de la question, à savoir les conséquences en droit de la construction du mur (II). Et enfin très brièvement, il s'agira d'envisager les conséquences de la reconnaissance de ce que le Belize pense être une illicéité dans cette construction du mur, conséquences qui se situent en aval de la question posée (III).

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<sup>2</sup> Comme cela a été reconnu par la Palestine dans sa position mentionnée dans l'annexe 2 au rapport du Secrétaire général établi en application de la résolution ES-190/13 de l'Assemblée générale, A/ES-10/248.

<sup>3</sup> Nous utilisons ici le mot «mur» retenu par l'Assemblée générale sans ignorer (cf. *infra*) que des expressions — à forte valeur symbolique — sont utilisées pour qualifier cette construction dénommée «Clôture de défense (ou de sécurité)», puis «Barrière de défense» par Israël.

## I. LES QUESTIONS PRÉALABLES À LA RÉPONSE DE LA COUR

6. Monsieur le président, Madame, Messieurs les Membres de la Cour, voyons tout d'abord les questions préalables à la réponse de la Cour. Et la première question qui se pose, c'est la question de la compétence de la Cour et de la recevabilité de la demande.

### A. Les questions procédurales préalables : la compétence de la Cour et la recevabilité de la question posée

#### 1. La Cour est compétente

7. Pour le Belize, il ne fait pas de doute que la Cour est compétente.

8. Du point de vue procédural, la demande d'avis provient bien de l'Assemblée générale et il ne peut être question de s'appesantir sur le vote de la résolution du 8 décembre 2003, celle-ci ayant bien recueilli la majorité nécessaire. De plus la question posée entre directement dans le champ des préoccupations de l'Assemblée générale telles qu'énoncées à l'article 11 de la Charte des Nations Unies. Au surplus, la restriction de l'article 12 concernant les situations dont le Conseil de sécurité se serait saisi ne peut faire écran puisque si le Conseil s'est bien prononcé sur plusieurs aspects de ce différend, il n'a en revanche pris aucune décision sur la question du mur. Comme chacun le sait, le projet de résolution sur cette question n'ayant pas abouti. Il en résulte que comme pour toute résolution de l'Assemblée générale, il pèse bien une présomption de validité sur celle du 8 décembre 2003.

9. Israël a pourtant dénié cette compétence de la Cour dans son exposé écrit<sup>4</sup>, dont l'essentiel est consacré à cette question, parce que cette requête serait *ultra vires* et parce qu'elle émanerait d'une résolution adoptée lors d'une session extraordinaire d'urgence<sup>5</sup>. Or, ni la Charte des Nations Unies, ni le Statut de la Cour, n'opère de distinction entre les résolutions adoptées dans ce cadre et celles adoptées lors de sessions ordinaires. Il n'y a donc pas lieu de considérer qu'une demande d'avis sur la base d'une recommandation adoptée lors d'une session extraordinaire rendrait la Cour incompétente.

10. D'autre part, l'article 96 de la Charte des Nations Unies indiquant que la Cour peut répondre à «toute question juridique», il revient naturellement à celle-ci de s'interroger sur la nature juridique de la question posée.

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<sup>4</sup> Voir l'exposé écrit déposé par Israël, p. 55 et suiv.

<sup>5</sup> Sessions prévues par l'article 20 de la Charte «lorsque les circonstances l'exigent».



11. Le seul énoncé de la question posée ne laisse guère de doutes sur la nature juridique de celle-ci puisqu'il est demandé à la Cour un avis sur les conséquences «en droit» de l'édification du mur, et ceci «compte tenu des règles et principes du droit international, notamment de la quatrième convention de Genève, et les résolutions consacrées à la question par le Conseil de sécurité et l'Assemblée générale». Non seulement la base de la question est juridique, mais les instruments proposés pour y répondre sont incontestablement juridiques.

12. La Cour sera donc amenée à le constater en la présente espèce, comme elle l'a toujours fait en dégagant les aspects juridiques d'une situation qui apparaît aujourd'hui comme globalement politique. Elle a eu l'occasion de le rappeler d'ailleurs avec force dans son avis de 1996 où elle citait sa propre jurisprudence : «En fait, lorsque des considérations politiques jouent un rôle marquant il peut être particulièrement nécessaire à une organisation internationale d'obtenir un avis consultatif de la Cour sur les principes juridiques applicables à la matière en discussion...»<sup>6</sup> Nul ne contestera que la présente situation mérite cet éclaircissement.

13. De plus, du point de vue général, imaginer que l'on puisse isoler les aspects juridiques de leurs soubassements politiques est illusoire. Le droit est bien le reflet de la politique et son rôle de régulateur social l'ancre dans une réalité qui est à la fois politique, économique et sociale sans laquelle il ne serait rien. C'est donc en toute logique que la Cour isole et doit isoler en l'espèce les aspects juridiques d'un contexte plus large. Pour Belize, la Cour apparaît totalement compétente.

## **2. La demande d'avis est recevable**

14. Au surplus, cette demande d'avis nous apparaît recevable. En effet, nous savons que l'article 65 du Statut de la Cour permet à celle-ci de conserver sa liberté de répondre ou non à une question même définie comme juridique par elle. Autrement dit, de la juger recevable ou non une fois établie sa compétence. Or, tout dans sa jurisprudence en matière d'avis consultatif demandé par l'Assemblée générale indique qu'elle ne peut rejeter cette demande d'avis que sur une base objective relevant soit d'une demande incorrectement parvenue, soit d'une demande qui ne concernerait pas une question juridique. Une fois de plus, il faut nous fier à l'avis de 1996 qui sur la base d'une abondante jurisprudence précise : «en principe, l'avis ne devrait pas être refusé», et

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<sup>6</sup> Avis de 1980 sur l'*Interprétation de l'accord du 25 mars 1951 entre l'OMS et l'Égypte*, C.I.J. Recueil 1980, p. 87, par. 33, cité dans l'avis de 1996, C.I.J. Recueil 1996, p. 234, par. 13.

qui indique également : «Aucun refus, fondé sur le pouvoir discrétionnaire de la Cour, de donner suite à une demande d'avis consultatif n'a été enregistré dans l'histoire de la présente Cour.»<sup>7</sup> Au surplus, la question aujourd'hui posée est très précise, ce qui renforce l'idée «qu'il n'existe aucune «raison décisive» pour qu'elle use de son pouvoir discrétionnaire de ne pas donner cet avis»<sup>8</sup>. Il apparaît donc que cette demande est recevable et que la Cour est bien compétente.

### **B. La question substantielle préalable : le statut du territoire sur lequel se trouve le mur en construction**

15. En effet, la question posée par l'Assemblée générale semble laisser dans l'ombre celle de la construction du mur lui-même — sa licéité au regard du droit international — puisqu'il s'agit seulement de déterminer les conséquences de sa construction. Mais les conséquences juridiques dépendent de la licéité de sa construction en liaison avec l'emplacement où se trouve ce mur. Il suffit d'imaginer que ce mur est construit entièrement sur le territoire reconnu à Israël. Cette construction serait probablement tout aussi critiquable politiquement, mais ne souffrirait pas de contestations juridiques en vertu de la souveraineté territoriale. Donc, si la construction même du mur est une question d'opportunité, son emplacement et son tracé méritent d'être étudiés. Cette question préliminaire semble au Belize incontournable.

16. Or, la construction de ce mur se situe presque entièrement sur le Territoire palestinien dit «occupé», c'est-à-dire à l'intérieur de la ligne définie *de facto* par les armistices du 3 avril 1949 (autrement dit ce qui est qualifié de «Ligne verte»)<sup>9</sup>. Il n'appartient pas à la Cour de définir la nature de cette «Ligne verte», autrement dit d'en définir le caractère frontalier ou non, puisque cette question ne lui est pas posée. En revanche, il lui appartient de constater que de larges portions de ce mur se trouvent à l'intérieur d'un territoire dit «occupé», ce qui implique un régime juridique spécifique d'occupation et surtout l'affirmation, à rebours, que ce mur ne peut constituer une frontière.

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<sup>7</sup> Avis de 1996, *C.I.J. Recueil 1996*, p. 235, par. 14.

<sup>8</sup> *Ibid*, p. 238, par. 19.

<sup>9</sup> Sur la tracé précis du mur, voir le rapport du Secrétaire général annexé à la résolution ES-10/14 précité, ou les explications détaillées données dans l'exposé écrit de la Palestine (app. 2 et 3), et dans celui de la Jordanie (notamment la carte à la suite de la page 25).

17. Quelle que soit la teneur juridique de ce statut, nul ne conteste désormais que le territoire palestinien fait l'objet d'une occupation militaire au sens du droit de la guerre et du droit humanitaire.

18. Israël, après avoir pendant longtemps tenté d'échapper à cette qualification, ne semble plus nier qu'une telle qualification lui soit opposable. Néanmoins, de l'avis du Belize, une telle qualification d'une manière préalable mérite d'être confirmée par la Cour. Et si le statut d'occupation militaire implique des droits et obligations spécifiques, Israël paraît filtrer ces droits et ces obligations applicables au territoire palestinien en décalage avec le droit général — de la guerre ou humanitaire — qui est applicable en la matière. De plus, d'une manière qui n'est pas précisée, Israël, dans le même résumé de sa position estime : «Le statut légal du Territoire palestinien occupé demeure contesté.»<sup>10</sup> Cette affirmation est ambiguë mais se réfère probablement à la situation légale du territoire *en dehors* de son occupation supposée *temporaire*, autrement dit lorsque ce statut d'occupation aura pris fin.

19. Il n'empêche que la Cour serait avisée de définir précisément le statut du territoire sur lequel ce mur se construit, de manière à pouvoir pleinement répondre à la question exacte qui lui est posée à savoir les conséquences en droit de la construction de ce mur au regard du statut du territoire sur lequel il se trouve. C'est le deuxième point que je souhaiterais aborder. Nous sommes là donc au cœur de la question.

## **II. LES CONSÉQUENCES EN DROIT DE LA CONSTRUCTION D'UN MUR AU REGARD DU STATUT DU TERRITOIRE SUR LEQUEL IL SE TROUVE**

20. Ce mur, dont la construction a été décidée, Monsieur le président, Madame et Messieurs de la Cour, en avril 2002, a débuté en juin et qui devrait, nous ne l'espérons pas, s'achever en 2005, s'étendrait sur une longueur qui varie selon les estimations de 720 à 788 kilomètres<sup>11</sup>. Peu importe les détails de ce mur, dont vous trouverez bien sûr tous les éléments dans les nombreux écrits, mais il provoque ce que l'on peut qualifier comme un processus de *ghettoïsation* par l'enfermement

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<sup>10</sup> *Ibid.* Voir aussi l'exposé écrit d'Israël, p. 11, par. 2.9.

<sup>11</sup> Voir néanmoins l'estimation très précise de l'exposé écrit de la Palestine (p. 107-109) pour les secteurs prévus. Voir également les appendices 2 et 3 avec des exemples précis de conséquences de cette construction dans certaines zones, ainsi que le détail, jour par jour, de sa construction.

d'une population à l'intérieur d'un périmètre défini dont les conditions de sortie sont draconiennes. Au sens général, il s'agit d'une forme de «recul de l'histoire» vers ses heures les plus sombres.

21. L'expression même de «mur» est contestée par Israël qui le qualifie de «clôture» ou de «barrière»<sup>12</sup>. De l'avis du Belize, cette distinction ne semble pas pertinente. Qu'il s'agisse d'une construction en béton prenant la forme d'un véritable mur, ou de rangées de barbelés, tels que ceux qui ont été récemment déplacés, les effets restent similaires quelles que soient les appellations utilisées.

22. A partir de ce préalable, il nous semble que la Cour pourrait établir trois constats successifs concernant les conséquences en droit de la construction de ce mur. Tout d'abord, il existe un statut d'occupation militaire qui est détourné et bafoué. Ensuite il existe clairement une violation du droit humanitaire et des normes fondamentales en matière de protection des droits de l'homme. Et enfin, il nous semble qu'aucune circonstance ne peut justifier l'illicéité de cette situation, donc on ne peut exclure cette illicéité.

#### **A. Un statut d'occupation militaire détourné et bafoué**

23. A titre préliminaire, il n'est peut-être pas inutile de rappeler que le statut d'occupation militaire d'un territoire fut envisagé lors de son établissement comme *temporaire*. Or, l'occupation du territoire palestinien dure depuis 1967, soit une période qui dépasse largement tous les «délais raisonnables» envisageables, mais qui surtout permet de lire différemment les textes qui s'y rapportent.

24. La question posée à la Cour lui laisse toute latitude dans son raisonnement pour inclure toutes les normes ou les instruments généraux du droit international, ainsi que les accords particuliers<sup>13</sup>. Les conséquences de l'édification du mur nous convient donc à une relecture des bases du droit international.

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<sup>12</sup> Voir l'exposé écrit d'Israël qui distingue au sein de cette «barrière», les portions qualifiées de «wall» et d'autres de «fence», p. 11, par. 2.8.

<sup>13</sup> Comme l'accord de Taba du 28 septembre 1995 ou la «feuille de route» établie par le Quatuor constitué par des représentants de l'ONU, de l'Union européenne, de la Fédération de Russie et des Etats-Unis, présentée en avril 2003 et approuvée par la résolution du Conseil de sécurité 1515 du 19 novembre 2003 qui impose la «normalisation» de la vie des Palestiniens, le respect des normes humanitaires ou le gel des implantations de colonies. La liste des accords depuis 1993 entre Israël et l'OLP ou la Palestine peut être consultée dans l'exposé écrit de la Palestine, p. 169-170.

25. Or, les conséquences de l'édification de ce mur en rapport avec le statut d'occupation militaire nous imposent de constater que la spoliation des terres ainsi que d'autres actions qui se situent donc à la suite de la construction de ce mur sont contraires au principe de l'interdiction de l'acquisition de territoires par la force au droit à l'autodétermination des Palestiniens, dont la souveraineté permanente sur les ressources naturelles est reniée, que ce mur au surplus induit une opération *de facto* d'annexion, quand ce n'est pas une opération juridiquement reconnue d'annexion et bafoue la souveraineté territoriale d'un peuple qui est appelé à devenir un Etat. Autant de conséquences contraires au statut d'occupation militaire. Et comme le rappelait le rapporteur spécial de la Commission des droits de l'homme, M. John Dugard : «L'affirmation du Gouvernement israélien selon laquelle le mur représente uniquement une mesure de sécurité ne visant aucunement à modifier les frontières politiques n'est tout simplement pas étayée par les faits.»<sup>14</sup>

26. Alors que le Gouvernement israélien soutient, contre toute évidence, que le mur n'est pas une frontière et qu'il s'agit d'une situation temporaire et «amovible»<sup>15</sup>, il serait pour le moins nécessaire que la Cour objecte pour l'avenir que ces déclarations — pour le moment sans fondements — constituent autant d'engagements unilatéraux au regard desquels Israël ne pourra se dédire. La Cour a parfaitement su opposer à la France ses propres engagements, et leur donner une force juridique, dans les affaires des *Essais nucléaires* qui l'opposait à la Nouvelle-Zélande et à l'Australie en 1973-1974<sup>16</sup>. Rien n'empêche la Cour d'adopter une attitude comparable.

27. Néanmoins, les affirmations du Gouvernement israélien concernant l'absence de frontières ne règlent pas la question de l'annexion — cette fois-ci juridiquement confirmée dans le droit interne israélien<sup>17</sup> — de Jérusalem-Est, ou celle de la colonisation qui s'avère inadmissible, y compris dans le cadre de l'annexion. La question posée à la Cour isole d'ailleurs les conséquences du mur à Jérusalem-Est, ce qui permet de pointer une sorte de contradiction dans l'argumentaire du

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<sup>14</sup> E/CN.4/2004/6, p. 6-9.

<sup>15</sup> Voir le rapport du Secrétaire général annexé à la résolution ES-10/14, par. 29.

<sup>16</sup> *C.I.J. Recueil 1974*, p. 253 et 457.

<sup>17</sup> C'est la loi israélienne du 30 juillet 1980 qui fait de Jérusalem la capitale de l'Etat d'Israël, loi contre laquelle a réagi la résolution 478 (1980) du 20 août 1980 du Conseil de sécurité qui reconnaît une violation du droit international et affirme que cette annexion n'entrave pas l'application de la quatrième convention de Genève, ainsi que dans le reste des territoires occupés.

Gouvernement israélien. En effet, le mur, même s'il ne constitue pas une «frontière», est conforme à la vision par Israël de sa future limite avec la Palestine, et particulièrement à Jérusalem-Est où coïncide l'acte d'annexion et ce que l'on peut qualifier, pour la circonstance, de «mur-frontière». Cette situation crée une présomption qu'il est difficile d'ignorer pour le reste de la délimitation, tout en sachant qu'Israël ne pourrait selon ses propres affirmations revendiquer une «frontière» constituée par le mur à Jérusalem-Est, tout en confirmant également son acte d'annexion dont la limite passe par ce mur. Voilà une équation bien difficile à résoudre.

28. Il faut ajouter que ces actes se doublent de l'inadmissible colonisation des territoires occupés contraire aux conventions de Genève et désormais sanctionnée comme crime de guerre par le statut de la Cour pénale internationale<sup>18</sup>. Pour reprendre l'article 49 de la quatrième convention de Genève : «La puissance occupante ne pourra procéder à la déportation ou au transfert d'une partie de sa propre population civile dans le territoire occupé par elle.» Or, la construction du mur isole clairement certaines colonies à l'extérieur de ce mur, de manière à les protéger.

29. De même, même si nous ne pouvons guère nous y appesantir longuement, la construction du mur entraîne l'impossibilité pour le peuple palestinien d'exercer correctement son droit à l'autodétermination. Soumis à une modification de sa population, privé de sa souveraineté sur ses ressources naturelles, amputé d'une partie de son territoire, cette construction très clairement, renforce l'isolement et les amputations diverses qui créent autant d'entraves à l'expression du peuple palestinien à sa libre détermination.

30. Voilà donc autant de violations de normes juridiques que la construction du mur renforce ou révèle, et qui peuvent être qualifiées de violations de normes particulièrement obligatoires pour la communauté internationale, autrement dit de normes *impératives* au sens de la convention de Vienne de 1969 sur le droit des traités. Pour le moins, il est indéniable, comme la Cour l'a reconnu pour le droit des peuples à disposer d'eux-mêmes dans l'affaire du *Timor oriental*, qu'il s'agit de la violation de droits opposables *erga omnes*.

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<sup>18</sup> Qui vise à son article 8, viii) : «Le transfert, direct ou indirect, par une puissance occupante d'une partie de sa population civile, dans le territoire qu'elle occupe, ou la déportation ou le transfert à l'intérieur ou hors du territoire occupé de la totalité ou d'une partie de la population de ce territoire.» C'est sans doute de cette manière qu'il faut comprendre l'affirmation de la Palestine dans le résumé de ses positions selon laquelle les actions consécutives à la construction du mur «engagent la responsabilité pénale du Gouvernement israélien» (annexe 2 du rapport du Secrétaire général, A/ES-10/248) puisqu'il ne peut être question de responsabilité de l'Etat lui-même mais simplement de ses dirigeants.

31. Très clairement, Israël, par la construction de ce mur, renforce la confusion maintes fois constatée entre «l'occupation militaire» qui impose le respect de droits stricts en faveur des populations, et les «actions militaires» qui constituent autant de justifications à des actions qui sont théoriquement ponctuelles et exceptionnelles et qui permettraient des dérogations au droit commun de l'occupation militaire. Israël se prévaut expressément de l'article 23 g) du règlement de La Haye de 1907 qui interdit de détruire ou de saisir des propriétés ennemies, «*sauf*» — et c'est cette partie qui semble intéresser le Gouvernement israélien — «*sauf dans le cas où ces saisies seraient impérieusement commandées par les nécessités de la guerre*». Simplement l'exceptionnel — les nécessités de la guerre — devient la norme et la construction du mur en est une illustration. Ce statut d'occupation militaire est donc très largement bafoué.

#### **B. La violation du droit humanitaire et des normes de protection en matière de droits de l'homme consécutive à la construction du mur**

32. L'absence d'application du droit humanitaire et des normes fondamentales en matière de protection des droits de l'homme n'est pas apparue avec la construction de ce mur. Cette situation préjudiciable au peuple palestinien est une constante depuis l'occupation des territoires en 1967. Néanmoins, la construction du mur a clairement amplifié ce constat au point que les violations sont devenues flagrantes et généralisées.

33. Concernant l'applicabilité du droit humanitaire et des droits de l'homme, il faut rappeler que, dans son argumentaire, le Gouvernement israélien estime que la quatrième convention de Genève de 1949 n'est pas applicable en raison de sa non-incorporation dans son droit interne<sup>19</sup>. Cet argument n'est pas recevable pour plusieurs raisons. D'une part, la législation interne israélienne ne constitue qu'un simple fait au regard du droit international qui n'empêche pas, comme chacun le sait, la qualification d'une situation comme internationalement illicite<sup>20</sup>. D'autre part, le droit humanitaire tel que consigné dans les conventions de Genève a acquis un caractère largement coutumier comme la Cour l'a elle-même affirmé à la fois dans ses arrêts et dans ses avis consultatifs, et notamment une fois de plus dans celui de 1996 où elle considère que ce droit

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<sup>19</sup> Voir le résumé de la position du Gouvernement israélien annexé au rapport du Secrétaire général (A-ES/10/248). Argument également avancé pour le règlement de la convention de La Haye dont Israël utilise, non sans un certain cynisme, l'article 23 g) qu'il estime applicable pour justifier la saisie de propriétés.

<sup>20</sup> Position admise depuis longtemps par la jurisprudence et qui trouve un écho dans l'article 3 du projet d'articles de la CDI sur la responsabilité des Etats annexé à la résolution 56/83 de l'Assemblée générale du 12 décembre 2001.

s'impose à tous les Etats, qu'ils aient ratifié ou non les instruments, parce qu'il reflète «des principes intransgressibles du droit international coutumier»<sup>21</sup>. Il n'est guère douteux que la Cour soit ici amenée à réitérer cette affirmation. Il en résulte que ce droit est applicable, qu'il ait été incorporé ou non dans le droit interne israélien, et indépendamment du caractère pour le moment non étatique de l'entité palestinienne. Peu importe donc que la Palestine ne puisse arguer du caractère étatique puisqu'il s'agit d'un droit où le principe de réciprocité est inopérant et dont l'applicabilité est universelle indépendamment du statut du territoire.

34. Cet aspect permet d'ailleurs de balayer la suite de l'objection israélienne concernant l'absence de souveraineté de la Palestine avant son annexion par l'Egypte et la Jordanie, qui empêcherait cette entité d'être partie aux conventions de Genève. Ajoutons au surplus que la Cour suprême israélienne, dans une jurisprudence récente, reconnaît elle-même l'applicabilité du droit humanitaire, et notamment de la quatrième convention de Genève<sup>22</sup>.

35. Israël est donc bien lié par les instruments généraux du droit humanitaire, et notamment par la quatrième convention de Genève dont on rappellera l'article 53 :

«Il est interdit à la puissance occupante de détruire des biens mobiliers ou immobiliers, appartenant individuellement ou collectivement à des personnes privées, à l'Etat ou à des collectivités publiques, à des organisations sociales ou coopératives, sauf dans les cas où ces destructions seraient rendues absolument nécessaires par les opérations militaires.»

On constate que cet article 53 fait le pendant de l'article 23 du règlement de La Haye. Si ce droit est applicable, il est néanmoins constamment violé. La construction du mur — sans qu'il soit nécessaire de rappeler de nombreux détails que la Cour a par ailleurs déjà connus — entraîne des conséquences humanitaires et en matière des droits de l'homme très importantes : implications économiques (spoliation des terres, séparation du lieu de travail et du lieu d'habitation), conséquences sociales (séparation des familles, contrôle pour l'accès au mur<sup>23</sup>), conséquences pour l'accès à l'eau, conséquences en matière d'éducation (école située de l'autre côté du mur),

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<sup>21</sup> Avis du 8 juillet 1996 : *Licéité de la menace ou de l'emploi d'armes nucléaires*, C.I.J. Recueil 1996, p. 257, par. 79. Voir aussi dans ce sens l'arrêt du 27 juin 1986 : *Activités militaires et paramilitaires au Nicaragua et contre celui-ci*, C.I.J. Recueil 1986, p. 113, par. 218.

<sup>22</sup> Jugement du 3 septembre 2002 : H CJ 7015/02 et 7019/02, *Ajuri v. IDF Commander*, 2002 – IsLR.

<sup>23</sup> Le dernier paragraphe de la position du Gouvernement israélien annexée au rapport du Secrétaire général (A/ES-10/248) est à cet égard éloquent puisqu'il explique la manière dont les permis de passage seront octroyés en fonction des professions (par exemple, un cultivateur d'olives verra son permis limité aux «besoins saisonniers»), le tout sous réserve de la «situation sécuritaire» dont on sait que l'appréciation tient parfois de l'arbitraire.



conséquences en matière sanitaire (accès aux soins rendu difficile, voire impossible), conséquences culturelles (la destruction de quelques sites archéologiques) ou même environnementales (puisque le mur défigure une région qui est déjà confinée et entraîne la suppression de terres agricoles et de forêts). Ces violations sont autant de violations flagrantes, répétées et inadmissibles de la quatrième convention de Genève qui se situent même au-delà de ce qu'il paraît utile de rappeler à travers les conventions tant il s'agit de considérations élémentaires d'humanité.

36. Néanmoins, Israël semble quelque peu se contredire concernant la question du droit humanitaire. En effet, pour objecter à l'application des normes en matière de protection des droits de l'homme, le Gouvernement israélien a affirmé dans son argumentaire : «le droit humanitaire est le type de protection qui convient dans un conflit tel qu'il existe en Cisjordanie et dans la bande de Gaza, tandis que les instruments relatifs aux droits de l'homme ont pour objet d'assurer la protection des citoyens vis-à-vis de leur propre gouvernement en temps de paix»<sup>24</sup>. Ceci signifie que le droit humanitaire selon le Gouvernement israélien peut s'appliquer puisqu'il objecte que les normes en matière de droits de l'homme ne peuvent pas l'être mais que le droit humanitaire peut l'être.

37. Concernant les normes en matière de droits de l'homme, il faut rappeler qu'Israël a signé et ratifié, le 3 octobre 1991, les deux pactes internationaux relatifs aux droits civils et politiques, et aux droits économiques et sociaux de 1966. Rappelons brièvement que l'article 2 du pacte relatif aux droits civils et politiques impose que l'Etat garantisse les droits à tous les individus «relevant de leur compétence», ce qui apparaît bien être la situation des territoires occupés. Le fait que le Gouvernement israélien ait souhaité bénéficier de la dérogation au titre de l'article 9 sur la question du droit à la liberté et à la sécurité des personnes ne paraît pas de nature à modifier les obligations fondamentales d'Israël, telles que rappelées d'ailleurs par l'article 4, paragraphe 1, du pacte relatif aux droits civils et politiques<sup>25</sup>.

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<sup>24</sup> *Ibid.*, position du Gouvernement israélien annexée au rapport du Secrétaire général, A/ES-10/248.

<sup>25</sup> Rappelons que l'article 12 de ce pacte protège la liberté de circulation des personnes qui paraît tout à fait illusoire en l'espèce, et que cette liberté avait été rappelée par l'Assemblée générale (résolution 56/111 du 14 décembre 2001) alors que les limitations étaient moins préoccupantes que dans la situation créée par la construction du mur. Rappelons également que cette liberté est théoriquement protégée — ou, pour le moins, permise — par les accord particuliers comme celui du 28 septembre 1995.

38. Monsieur le président, Madame et Messieurs de la Cour, il est clair que le droit humanitaire et la protection en matière de droits de l'homme doivent être envisagés comme aboutissant à un même ensemble factuel dans la situation particulière des territoires occupés. La division entre ces deux branches parfois possible me paraît ici inopérante.

### **C. L'impossible acceptation de circonstances qui permettraient d'exclure l'illicéité**

39. En effet, nous l'avons constaté, que ce soit à travers l'article 23 g) du règlement de La Haye de 1907, ou 53 de la quatrième convention de Genève de 1949, le Gouvernement israélien utilise systématiquement les clauses dérogatoires pour justifier de la non-application de la norme générale. Il convient donc de démontrer que les circonstances invoquées par Israël lors de la construction de ce mur ne sont pas recevables, et qu'elles ne peuvent justifier des entraves manifestement disproportionnées aux mesures de défense nécessaires.

40. Rappelons que le mur lui-même est considéré comme une mesure défensive exceptionnelle qui répondrait à une situation «temporaire», autrement dit à une action militaire ou à une nécessité militaire. C'est donc l'ensemble du processus qui s'inscrit dans un cadre dérogatoire qui exclurait l'illicéité des mesures prises et des conséquences qui en découlent en droit.

41. A cet égard, le Gouvernement israélien invoque très clairement la légitime défense qui est expressément citée dans le résumé de sa position. En effet, le point 6 mentionne que la construction du mur serait «conforme à l'article 51 de la Charte des Nations Unies, ainsi qu'à son droit inhérent de légitime défense et aux résolutions 1368 (2001) et 1373 (2001) du Conseil de sécurité».

42. L'article 51 de la Charte des Nations Unies qui est invoqué par Israël impose certaines conditions qu'il est inutile de rappeler mais, notamment : une «agression armée», «jusqu'à ce que le Conseil de sécurité ait pris les mesures nécessaires». La justification même de cette légitime défense paraît donc pour le moins douteuse.

43. Au surplus, la légitime défense ne s'envisage que sous la condition d'un critère de proportionnalité qui doit accompagner la mesure décidée par l'Etat agressé. La Cour a fermement rappelé, à la fois au contentieux et dans ses avis consultatifs, cette exigence, qu'elle a qualifiée

comme une exigence du droit international coutumier<sup>26</sup>. En l'espèce, cette proportionnalité doit être appréciée dans le cadre d'une occupation militaire qui donne naturellement un poids important — plus important — à l'occupant, en précisant que la construction du mur, longuement réfléchi et s'étalant sur une période de temps très longue, peut difficilement entrer dans le cadre de mesures immédiates telles qu'on peut les imaginer en cas de légitime défense<sup>27</sup>. Si les actes terroristes sont hautement condamnables, l'enfermement d'une population dans un mur de plus de 700 kilomètres ne semble ni une réponse adéquate, ni une réponse proportionnelle. D'autant qu'il est alors peu compréhensible que ce mur de «protection» se situe à l'intérieur du territoire occupé. Si Israël souhaite légitimement se protéger, il doit le faire à l'intérieur de son territoire, ou à l'extrême limite sur la «Ligne verte».

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44. Les conséquences en droit de l'édification du mur apparaissent ainsi contraires à la fois à la Charte des Nations Unies, au droit international général, au droit de la guerre, au droit humanitaire, aux normes de protection des droits de l'homme et aux accords particuliers conclus par Israël. S'il ne faut retenir qu'une conclusion à cet ensemble de violations, le Belize souhaite insister sur la modification profonde du statut du territoire opérée par cette construction. Notre point de départ a été de constater que le statut du territoire sur lequel ce mur se construit est celui d'un territoire militairement occupé. Or, le mur implique, comme nous l'avons ensuite constaté, un morcellement de ce statut par le biais de dérogations permanentes, d'annexions en droit ou *de facto*, par le renforcement, voire la protection de la colonisation, ou par l'impossible exercice du droit des peuples à disposer d'eux-mêmes. Ce n'est donc plus un simple territoire occupé dont il s'agit tant les conditions à son occupation imposées par la construction du mur en ont modifié la physionomie mais surtout le régime juridique. Or, ces conséquences risquent de devenir irréversibles si la Cour ne se prononce pas clairement sur cet ensemble de violations.

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<sup>26</sup> Avis consultatif du 8 juillet 1996, *C.I.J. Recueil 1996*, p. 245, par. 41. Ceci se double d'un rappel par la Cour d'une affirmation identique dans l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci*, *C.I.J. Recueil 1986*, p. 94, par. 176 et p. 103, par. 194.

<sup>27</sup> Dans le point 7 du résumé de sa position (annexe 1 du rapport A/ES-10/248), le Gouvernement israélien indique que les «réquisitions des terres pour permettre la construction du mur sont proportionnelles, eu égard au nombre de morts et de blessés dénombrés parmi les citoyens israéliens ...». Il en découle une appréciation très difficile et pour le moins arbitraire.

### III. LES EFFETS DE LA RECONNAISSANCE DE L'ILLICÉITÉ DE LA SITUATION PROVOQUÉE PAR LA CONSTRUCTION DU MUR

45. Le Belize ne souhaite pas s'étendre longuement sur cette question mais, sous réserve bien sûr de la position que la Cour sera amenée à adopter, il lui semble opportun de pointer quelques conséquences qui découleraient de la logique reconnaissance de l'illicéité de la construction de ce mur.

46. D'une part, il faut rappeler que l'avis de la Cour est, par définition, un avis «consultatif» dont la portée n'est à priori pas contraignante comme les médias l'ont d'ailleurs abondamment rappelé ces derniers temps. Mais chacun sait que la Cour rend des avis qui sont très importants et qui dépassent le cadre purement consultatif, ce qui signifie que ni l'organisation, ni l'Etat concerné par l'avis, ne peut l'ignorer. Il ne fait donc pas de doute que les conséquences de cet avis entraîneront des mesures concrètes de la part des organisations internationales, des entités ou des Etats.

47. Comme le Belize l'espère ardemment, si la Cour admet que les conséquences en droit de la construction du mur représentent des violations caractérisées des normes internationales fondamentales, l'arrêt de la construction du mur et, à terme, la destruction des parties déjà en place semblent s'imposer. Cette destruction impose non seulement des actes matériels bien évidemment, mais également juridiques par l'abrogation de tous les actes pris dans le cadre de sa construction. Il ne peut, d'autre part, être question de conditionner cette destruction à des négociations futures puisque les accords qui régissent ce processus (et en particulier l'actuelle «feuille de route»<sup>28</sup>) condamnent par avance les entraves que ce mur implique.

48. En admettant que cette destruction inconditionnelle soit possible, il semble également que des réparations soient nécessaires pour permettre d'effacer l'illicéité de l'acte. A cet égard, le Belize est persuadé que la simple remise en l'état ne peut suffire à titre de réparation et que des indemnités adéquates devront être envisagées, mais ces indemnités ne peuvent, à l'inverse, se substituer à la conservation du mur.

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<sup>28</sup> Qui précise notamment que : «Israël prend toutes les dispositions nécessaires pour aider à normaliser la vie des Palestiniens» ou encore : «gèle toutes les activités d'implantation de colonies». A cela s'ajoutent l'assouplissement de la liberté des restrictions de circulation, l'arrêt de la saisie ou de la destruction de biens ou le respect de la «continuité territoriale» de la Palestine (voir le document joint à la résolution du Conseil de sécurité 1515 (2003) du 19 novembre 2003, S/2003/529).

49. Enfin, pour reprendre les propres termes de l'avis de la Cour de 1971 à propos de la *Namibie*<sup>29</sup>, la reconnaissance de l'illicéité doit s'accompagner, pour tous les Etats, d'une obligation de ne pas reconnaître la situation créée.

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50. En conclusion, Monsieur le président, Madame et Messieurs les Membres de la Cour, le Belize voudrait souligner qu'au-delà de ses aspects juridiques, ce mur représente une illusion. Depuis le mur d'Hadrien, en passant par la muraille de Chine ou, plus près de nous, le mur de Berlin, cette forme de séparation ne crée que l'illusion de la sécurité alors qu'elle secrète un profond traumatisme au sein des populations concernées<sup>30</sup>. Il s'agit du creuset d'une violence qui ne peut que s'accroître, et non l'inverse. La poursuite d'attentats nous conduit malheureusement à constater qu'Israël vit ainsi dans l'illusion que cette séparation pourrait garantir sa sécurité. Aucun mur n'est infranchissable et il est à craindre que celui construit en territoire occupé n'attise les haines plus qu'il ne sécurise les populations de part et d'autre<sup>31</sup>. Pour Israël, la sécurité ne peut venir de la construction du mur, mais de la construction de la paix par le respect des droits légitimes du peuple palestinien, par le respect des normes fondamentales du droit international, des résolutions des Nations Unies et par la fin de l'occupation de la Palestine.

51. Enfin, au terme de cet exposé, le Belize tient à saluer l'œuvre de la Cour dans le règlement pacifique des différends. Il est indéniable que l'avis qu'elle va rendre est d'une importance fondamentale, non seulement pour le cas de l'espèce, mais, plus largement, pour le respect des principes fondamentaux du droit international qui permettent à tous les Etats ou entités, au-delà de leur différence de taille ou de puissance, de bénéficier d'une égalité souveraine que la

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<sup>29</sup> En l'espèce, la Cour demandait de : «s'abstenir de tous actes et en particulier de toutes relations avec le Gouvernement sud-africain ... qui constitueraient une aide ou une assistance à son égard» (*Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971, p. 58, par. 133.*)

<sup>30</sup> Olivier Razac note dans son *Histoire politique du barbelé* que : «Jamais une clôture ni une muraille ne se suffit à elle-même. Il faudrait pour cela un rempart absolument indestructible, ce qui est impossible» ou encore : «Toute utilisation du barbelé représente un coût politique d'autant plus élevé que le symbole est fortement ressenti et que la sensibilité publique à la violence politique ou sociale est aiguë»; Editions La Fabrique, Paris, 2000, p. 81, 95.

<sup>31</sup> Lors d'une récente allocution à l'occasion de la visite en France du président israélien, le président français J. Chirac déclarait à propos du mur : «[il] créera de nouvelles frustrations et davantage de colère et [il] compromettra la solution de deux Etats qui fait l'objet d'un consensus international», *Le Monde*, 14 février 2004.

Charte des Nations Unies garantit. Aujourd'hui, la Palestine souffre sous le joug d'un Etat plus puissant et mieux organisé, mais cette situation n'a malheureusement pas vocation à être unique et la mission de la Cour sera de poser, pour l'avenir, les jalons d'un ordre international qui empêche cette situation de se reproduire partout dans le monde et envers n'importe quel Etat. L'impunité face à un droit international bafoué doit cesser et la Cour a aujourd'hui la mission de le rappeler fermement. Nul ne doute qu'elle sera entendue au-delà du cas d'espèce.

Monsieur le président, Madame et messieurs les Membres de la Cour, je vous remercie pour l'attention que vous avez bien voulu porter à ces quelques observations du Belize.

The PRESIDENT: Thank you, Professor Sorel. I now give the floor to His Excellency Mr. Moreno Fernández of Cuba.

Mr. MORENO FERNÁNDEZ: Distinguished President, honourable judges: the Republic of Cuba presented, on 30 January 2004, its written arguments on the fundamental question placed by the General Assembly of the United Nations before this august Court in compliance with its resolution ES-10/14, of 8 December 2003, for the emission of a consultative opinion. Likewise, a Cuban delegation appears before this solemn audience as an expression of its genuine recognition of the need for international peace and security, multilateralism and the rule of law in international relations and as an expression of its historic and unconditional solidarity with the peoples subjected to colonialism and foreign domination, in particular with the Palestinian people, which continue to be denied its inalienable right to self-determination.

It is an honour to present the oral explanation of the facts and the legal analysis carried out by Cuba arising from the construction of the Wall by Israel, the Occupying Power, in the Occupied Palestinian Territory, in and around East Jerusalem, as described in the report of the Secretary-General of the United Nations, and considering the norms and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions.

Honourable judges, the presentation by the Cuban delegation on this issue is structured as follows:

Part I, as an introduction, examines three essential elements:

1. The jurisdiction of the International Court of Justice to emit a consultative opinion on the legal question presented by the United Nations General Assembly;
2. The importance of the emission of a consultative opinion on the legal question of reference;
3. The position of the Republic of Cuba on the most significant facts related to the construction of the Wall by Israel.

Part II describes the fundamental legal considerations and consequences derived from the construction of the Wall, by examining the following elements:

1. The construction of the Wall by Israel, violates fundamental principles and norms enshrined in the Charter of the United Nations and international law (*jus cogens* norms);
2. The construction of the Wall violates resolutions adopted by the United Nations General Assembly and Security Council;
3. The construction of the Wall violates principles and norms of international humanitarian law, particularly the Fourth Geneva Convention of 12 August 1949, relative to the Protection of Civilian Persons in Time of War.

In the analysis of this last element, the presentation by the Cuban delegation will especially make reference to the following aspects:

- (A) The applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory;
- (B) The disproportionate and excessive use of the concept of the right to legitimate defence by the Occupying Power and the disregard by Israel of the principles of proportionality and distinction derived from the construction of the Wall.

Likewise, the presentation by the Republic of Cuba contains as Part III, its final considerations.

## **PART I**

Honourable judges, regarding the jurisdiction of the International Court of Justice for the emission of a consultative opinion on the legal question presented by the General Assembly, the Republic of Cuba considers that this august body is fully competent to emit the consultative opinion requested.

Article 96 of the United Nations Charter confers the General Assembly and the Security Council, the unconditional — and I must underline unconditional — right to request consultative opinions to the Court on any legal question.

Article 65, paragraph 1, of the Statute of the International Court of Justice establishes that the Court will emit consultative opinions regarding any legal question at the request by any organ authorized to do so by the Charter.

In addition, the General Assembly, by resolution ES-10/13, of 21 October 2003, established that the construction of the Wall is an issue that has clear implications for international law. Said resolution, in its paragraph 1, “*Demands* that Israel stop and reverse the construction of the Wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of International Law”.

The General Assembly also clearly established the applicable legal framework for the interpretation and application of the pertinent legal norms in the emission of the consultative opinion on the legal question.

In spite of the so-called “considerations”, or “political elements”, involved in the negotiated solution of the Israeli-Palestinian conflict, and the request by several States that the Court make discretionary use of Article 65, paragraph 1, of its Statute, the Republic of Cuba considers that the Court should not abstain from emitting a consultative opinion on this important question. In Cuba’s view, any debate on the optional nature of Article 65, paragraph 1, of the Statute is eminently theoretical in nature and can only be carried out in the light of the other Articles of said Statute and of the United Nations Charter.

Likewise, although on occasions States have objected to the jurisdiction of the Court based on the political nature of questions that have been placed before it, this has not prevented the Court from emitting consultative opinions on said questions, circumscribing itself to the legal consequences deriving from them, and, thus, adhering to its competence according to the internationally accepted instruments that govern its functioning.

It is Cuba’s contention that the emission of a consultative opinion regarding the question presented by the General Assembly is based not only on Article 96 of the Charter, but also on Article 14, which establishes that the General Assembly is competent to recommend measures for



the peaceful solution of any situation, irrespective of origin, even a situation arising from a violation of the United Nations Charter itself.

Mention has been made in the written statements of the limitations imposed by Article 12 of the Charter to the fulfilment by the General Assembly of the mandate conferred upon it by Article 14. In Cuba's view those limitations are not applicable in the cases involving requests for consultative opinions to the Court. Article 96 of the Charter, giving this faculty to the General Assembly, is not qualified in any manner and, therefore, places no limitations whatsoever.

Furthermore, even if Article 12 were to be theoretically applicable, limitations imposed by it would not be an obstacle for the request of a consultative opinion by the General Assembly on this issue. The fact is that the issue at hand was dealt with by the General Assembly by virtue of the United for Peace resolution resulting from a veto imposed by a Permanent Member of the Security Council to an enabling resolution. Hence, this should be interpreted in the sense that, for all practical purposes, the Security Council is not considering the draft resolution presented to it and the item involved, even if said issue were still on the Council's agenda.

In addition, Cuba considers that the emission of a consultative opinion on the legal question of reference is of significance in the present international context and for the negotiated solution of the Israeli-Palestinian conflict itself and for the most recent efforts carried out in that direction.

A consultative issue should constitute an essential tool in the hands of the United Nations in the fulfilment of its functions, particularly for the General Assembly of the United Nations, according to Article 14 of the Charter. Likewise, it has also the role of contributing to clarify to the international community as a whole the terrible socio-humanitarian consequences for the Palestinian people derived from the construction of the Wall and, particularly, for the exercise of its right to self-determination and for the establishment of a sovereign and independent Palestinian State.

The emission of a consultative opinion on this question should also be a dissuasive element for the Occupying Power geared at having it stop and revert the construction of the Wall in the Occupied Palestinian Territory and it should, at least, be a strong call on the Occupying Power to comply with the wishes of the United Nations General Assembly, as expressed in resolution ES-10/13 of 21 October 2003.

By the same token, the emission of a consultative opinion should also have the function of contributing to avoid that, in the future, the Occupying Power intends to obtain international recognition of the *de facto* situation created in the Occupied Palestinian Territory, including in and around Jerusalem, with the construction of the Wall that alters the Armistice Line of 1949.

Honourable judges, with regard to the Republic of Cuba's position on the most salient facts derived from the construction of the Wall, my delegation wishes to reiterate that the situation in the Occupied Palestinian Territory has always been a source of deep concern for my country. For decades, Israel, the Occupying Power, has been responsible for continuous and flagrant violations of human rights, of international humanitarian law and of international law in said territory and has ignored resolutions of the General Assembly and the Security Council.

The Republic of Cuba accepts and upholds as fundamental reference for its presentation the background and facts described in the report of the United Nations Secretary-General contained in document A/ES-10/248, presented by virtue of resolution ES-10/13 of the same body.

At present, according to available public information, the situation is even more critical. The construction of the Wall supposes in the short-term a humanitarian catastrophe that could be conducive to the extermination and genocide of the Palestinian people, while, at the same time, conditioning, from the physical point of view, the co-existence of two sovereign and independent States in the region, Israel and Palestine.

Through its presentation, the Government of the Republic of Cuba reiterates *inter alia*, its condemnation of acts of annexation, to the excessive use of force without establishing a distinction between civilians and combatants, to the creation of a humanitarian crisis caused by the limitations imposed on the circulation of goods and persons, to the inhuman treatment of children, and to the generalized destruction of goods, all of which are a direct consequence of the territorial expansion of the Occupying Power through the construction of the Wall, and all of which have clear legal consequences.

This situation must cease. Israel, the Occupying Power, has the obligation to stop and to revert the construction of the Wall, while the international community, on the other hand, has also the obligation of not recognizing the control by the Occupying Power of the Palestinian Territory delimited by the Wall.

## PART II

Honourable judges, on the considerations and fundamental legal consequences derived from the construction of the Wall in the Occupied Palestinian Territory, including in and around Jerusalem, this presentation will only examine the most serious legal consequences that, in the view of the Republic of Cuba, would inevitably be considered in the context of the new *de facto* situation intended with the construction of the Wall. In our respectful opinion, the analysis to be carried out by the distinguished judges of this Court on this issue, should take into account the following elements.

The construction of the Wall violates principles and norms of international law enshrined in the Charter of the United Nations and international law.

It is a violation of the prohibition of the threat and use of force. In conformity with Article 2, paragraph 4, of the Charter, the Members of the United Nations shall abstain in international relations to resort to the threat or use of force against the territorial integrity or the political independence of any State, or in any another form incompatible with the purposes of the United Nations.

If the layout of the Wall foreseen by the authorities of the Occupying Power is carried out, it would deviate from the Armistice Line of 1949 (Green Line) up to 22 km in several places, annexing important zones of the West Bank and in and around Jerusalem.

The Occupying Power, with this act, would *de facto* establish a new border by means of unilateral imposition and the use of the force, by means of a separation wall between the Palestinian Territory occupied in the war of aggression carried out by Israel in 1967, and its own State. By virtue of international law, an aggressor State cannot acquire a territory by means of unilateral annexation.

According to international law the prohibition of acquiring territories by force applies independently of any other consideration. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, that is resolution 2625 of the Twenty-Fifth Session of the General Assembly (24 October 1970), establishes that “the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal”.

This non-recognition has been confirmed in a number of resolutions and international agreements. Resolution 242 (1967) of the Security Council and the Oslo Agreements, are paradigmatic instruments accepted by the overwhelming majority of the international community. The Oslo Agreement, for example, establishes that “the status of the West Bank and the Gaza Strip will not be changed pending the outcome of the permanent status negotiations”.

The construction of the Wall in the Occupied Palestinian Territory also qualifies as an illicit act of annexation in accordance with the provisions of resolutions 478 (1980) and 497 (1981) of the United Nations Security Council, which declare that the acts of Israel geared at the annexation of East Jerusalem and the Golan are null and void, and should not be recognized by States.

The construction of the Wall also ignores the principle of the equality of rights and self-determination of peoples. The right to self-determination is founded on Article 1, paragraph 2, and on Article 55 of the United Nations Charter. It was sanctioned also in Article 1 of the Covenants on Civil and Political Rights and on Cultural, Social, and Economic Rights.

Likewise, the United Nations General Assembly has ratified this principle in numerous resolutions. Among the most noteworthy, it is found in resolution 1514 (XV) of the fifteenth session of the General Assembly, on the Declaration on the concession of independence to the colonial countries and peoples, and in the aforementioned resolution 2625 (XXV) of the twenty-fifth session.

The right to self-determination is closely linked with the concept of territorial sovereignty. A people can only exercise the right to self-determination within a territory. The amputation of the Palestinian territory by means of the construction of a wall is a serious breach of the inalienable right to self-determination of the Palestinian people, since it considerably reduces the size of the already small self-determination unit within which such right should be exercised.

The right to self-determination of the Palestinian people cannot be alienated and it should be realized on the basis of territorial integrity within the borders of an independent Palestinian State. This right of the Palestinian people has been confirmed by the United Nations General Assembly in numerous resolutions, and also recognized in the different phases of the peace process in the Middle East.

The construction of the Wall goes against the principle of peaceful solution of disputes. Article 2, paragraph 3, of the United Nations Charter establishes that States should resolve their disputes by peaceful means. Thus, any delimitation of borders should be negotiated between the two parties concerned on the basis of equality and equity for both which clearly derives from this principle. The parties should be placed on equal terms and each one of them should respect the rights of the other in accordance with international law. The unilateral construction of the Wall by the Occupying Power, in the Occupied Palestinian Territory, is in no way conducive to a climate propitious to the peaceful and negotiated solution of the Israeli-Palestinian conflict on equal terms.

Honourable judges, it is crystal clear that the construction of the Wall goes against the provisions contained in a number of resolutions of the General Assembly and the Security Council.

The consideration of these resolutions also demonstrates that the systematic refusal by the Occupying Power to comply with the provisions contained therein regarding the acts committed in the Occupied Palestinian Territory, entails legal consequences for the Occupying Power.

In addition, the non-compliance by the Occupying Power of United Nations resolutions is in conflict with the principle of good faith, one of the fundamental principles of international law.

The construction of the Wall in the Occupied Palestinian Territory is also in violation of resolutions adopted by the United Nations bodies in the context of the Israeli settlements in the Occupied Palestinian Territory.

Furthermore, the construction of the Wall by the Occupying Power violates principles and norms of international humanitarian law.

First and foremost, Cuba sustains that the Geneva Convention of 12 August 1949 regarding the protection of civilian persons in times of war, the Fourth Geneva Convention, is fully applicable to the Occupied Palestinian Territory, including in and around East Jerusalem. Reference should be made to the violations by Israel, the Occupying Power, of said Convention.

Though Israel has contended that the Fourth Geneva Convention is not applicable to the Occupied Palestinian Territory as it is “not a territory of a High Contracting Party as required by the Convention”, the applicability of this instrument to the Occupied Palestinian Territory enjoys extensive international recognition. The written presentation delivered by the Republic of Cuba on 30 January 2004 to this Court, contains legal and factual elements confirming this assertion. At the

same time, Israel, as Occupying Power, is also legally bound by other consuetudinary norms relating to occupation, according to the stipulations of the Rules annexed to the Hague Convention on Laws and Customs of Land Wars of 18 October 1907.

Not to accept the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem, would be tantamount to placing the Palestinian population residing in that territory in a situation of defencelessness against the actions of the Occupying Power. Therefore, those persons should be considered as “protected persons”, according to the definition of this condition in Article 4 of said Convention.

In the view of the Republic of Cuba, as a result of the construction of the Wall and of the severe humanitarian and socio-economic conditions that this has entailed and will continue to entail for the population of the Occupied Palestinian Territory, the Occupying Power incurs in a large number of very serious violations of the Fourth Geneva Convention.

It violates the obligation emanating from Article 1, common to the four Geneva Conventions, according to which the “High Contracting Parties undertake to respect and to ensure respect of said Convention in all circumstances”.

It must be recalled that, because of their special nature, the norms of international humanitarian law establish obligations applicable to the international community as a whole. Therefore, every member of the international community is entitled to demand that said norms be respected.

The Occupying Power is up to now preventing 22 Palestinian locations from access to schools by impeding the free circulation of Palestinians on both sides of the Wall, with which it is violating the provisions of Article 50, paragraph 1, according to which “the occupying Power shall . . . facilitate the proper working of all institutions devoted to the care and education of children”.

On the other hand, the Occupying Power is up to now preventing 30 Palestinian locations from access to health services and eight from access to the primary sources of water provision by impeding the free circulation of Palestinians on both sides of the Wall. With these actions, Israel is violating the provisions of Article 56, according to which, *inter alia*, “the occupying Power has the

duty of ensuring and maintaining . . . the medical and hospital establishments and services, public health and hygiene in the occupied territory . . .”.

With the destruction of dwellings, stores, cultivated lands and other goods belonging to the Palestinian population by the construction of the Wall, the Occupying Power is violating Article 53 of the Fourth Geneva Convention according to which

“any destruction by the occupying Power of real estate or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations”.

In Cuba’s view, the exception foreseen in this Article is not applicable to this case.

As a result of the construction of the Wall and of the establishment of arbitrary restrictions to the movement of Palestinian persons and goods from one side of the Wall to the other, access by the Palestinian population to their lands, jobs, markets and other sources of subsistence has been severely limited, with which the Palestinian economy has been severely affected and its population subjected to unsustainable conditions. This situation clearly demonstrates that the Occupying Power has not fulfilled its obligation to provide these persons with the opportunity to find paid employment, according to provisions included in Article 39, paragraph 1, of the Fourth Geneva Convention.

Likewise, the Occupying Power has not fulfilled the provisions of paragraph 2 of said Article 39, according to which

“where a Party to the conflict applies to a protected person methods of control which result in his being unable to support himself, and especially if such a person is prevented for reasons of security from finding paid employment on reasonable conditions, the said Party shall ensure his support and that of his dependents”.

In this context, the Occupying Power has not fulfilled the provisions of Article 55, paragraph 1, of the Fourth Geneva Convention, according to which “the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the Occupied Territory are inadequate”.

Keeping in mind the previously mentioned violations of the rights of the “protected population”, in this case the Palestinian population resided in the Occupied Palestinian Territory, the Occupying Power is also violating Article 47 of the Fourth Geneva Convention, according to

which “protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention . . .”.

All the violations of the provisions of the Fourth Geneva Convention above described, represent, furthermore, a humiliation to the Palestinian people by virtue of Article 27 of said instrument, according to which

“protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof . . .”

In all evidence, the construction of the Wall, with its concrete structure, its razor wire, its towers of observation and its electronic monitoring means, creates a population of prisoners.

In addition to the above, the disproportionate and excessive use of the concept of the right to legitimate defence by the Occupying Power, and the violation of the principles of proportionality and distinction derived from the construction of the Wall should be also considered.

The Occupying Power intends to justify the construction of a Wall in the occupied Palestinian territory as being a security measure by virtue of the exercise by States of their right to legitimate defence. In accordance with the United Nations Charter and international law, States have the right to exercise said right individually or collectively in the case of an armed attack for the protection of its legitimate security interests, and in cases of strict military necessity. Nevertheless, distinguished Members of the Court, those actions should be compliant with international human rights norms and international humanitarian law.

The actions adopted by Israel, the Occupying Power, of building a wall in the Occupied Palestinian Territory is not justified in any way whatsoever by military necessities.

It violates, furthermore, the principle of proportionality, as it is not proportionate with legitimate security interests, moves away from measures of that character and acquires the nature of punishment, humiliation and conquest.

Though it is accepted that combatants participating in armed conflict be faced by situations of mortal danger, international humanitarian law tries to limit the damages to be suffered by civilians, by requiring that all parties in the conflict respect the principle of distinction. This principle, enunciated in Article 48 of the Additional Protocol I to the Geneva Conventions,



establishes that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”.

In addition, Article 51, paragraph 2, clearly states that “the acts or threats of violence whose main purpose is to terrify the civilian population are forbidden”.

### **PART III**

Honourable Members of the Court, finally, it is an honour for my delegation to present to the consideration of this high judicial instance the conclusions derived from the analysis carried out by the Republic of Cuba on the legal consequences of the construction of the Wall by Israel:

1. The Government of the Republic of Cuba considers without any shadow of doubt whatsoever, that the International Court of Justice is competent to emit a consultative opinion on the legal question presented to it by the United Nations General Assembly. Articles 14 and 96 of the United Nations Charter and Article 65, paragraph 1, of the Statute of the Court uphold said competence. It is also our firm view that the emission of a consultative opinion on this important issue is pertinent and timely.

2. The Government of the Republic of Cuba also considers that the emission of a consultative opinion on this important issue will not constitute an obstacle to the peace process but, on the contrary, would be an important tool in the hands of the United Nations General Assembly and the United Nations as a whole for the fulfilment of its functions with regard to this conflict. Likewise, it can contribute to clarify to the international community the terrible socio-economic consequences for the Palestinian people derived from the construction of the Wall, particularly for the exercise of its inalienable right to self-determination.

3. The emission of a consultative opinion on this question should also encourage the Occupying Power to comply with the wishes of the international community and should also play a decisive role in preventing any future intention of the Occupying Power to obtain international recognition of the *de facto* situation created in the Occupied Palestinian Territory as a result of the construction of the Wall.

4. The Government of the Republic of Cuba cannot accept that the following elements may be considered an answer proportionate to the perception of security of the Occupying Power: the

excessive use of force, the lack of distinction between combatants and civilians, the creation of a humanitarian crisis as a consequence of the limitations imposed on the circulation of goods and persons, the death and the inhuman treatment of children, the generalized destruction of goods and, ultimately, the territorial expansion by means of the construction of the Wall.

5. Israel, the Occupying Power, persists in serious violations of the provisions of the Fourth Geneva Convention of 1949. It still refuses to accept the *de jure* applicability and even the application of the Convention to the Occupied Palestinian Territory, including Jerusalem, thus demonstrating its refusal to respect the wish of the international community, that for more than 30 years has confirmed the applicability of this Convention to the Occupied Palestinian Territory.

6. Israel, as a State party to the Fourth Geneva Convention and, at the same time, as Occupying Power, should comply with the obligation emanating from Article 1, common to the four Geneva Conventions, according to which the High Contracting Parties undertake to respect and to ensure respect of said Convention in all circumstances.

7. The extreme humanitarian crisis imposed by the Occupying Power on the Palestinian population since the construction of the Wall, as described in the report of the Secretary-General and in other public sources, may be classified as a crime of extermination, as it constitutes the intentional infliction of conditions of life, calculated to bring about the destruction of part of a population, in this case the Palestinian population.

8. The Government of the Republic of Cuba respectfully hopes that the International Court of Justice, while emitting the consultative opinion requested by the General Assembly, recognizes that the construction of the Wall by Israel is illegal and in violation of norms and principles of international law, including the Fourth Geneva Convention of 1949 and the relevant resolutions of the Security Council and the General Assembly.

9. The Government of the Republic of Cuba equally expects that the International Court of Justice recognize the international responsibility derived for the Occupying Power by the illicit acts previously expressed. Likewise, the Government of the Republic of Cuba considers that the stopping of the process of construction of the Wall in the Occupied Palestinian Territory cannot be postponed, and respectfully requests the Court to demand that the Wall be totally demolished and

that the Occupying Power unrestrictedly fulfil its obligations under international law and international humanitarian law.

10. Lastly, Cuba hopes that the International Court of Justice acts in a decisive and unanimous manner in favour of peace and justice. The Wall of separation continues to accentuate the illegal Israeli occupation, and perpetuates the system of “apartheid” established by Israel in the Occupied Palestinian Territory. Furthermore, with these actions, Israel moves the possibility of reaching a negotiated, just and lasting solution to the Palestinian-Israeli conflict further along into the future.

Honourable judges, thank you very much for your patience and attention.

The PRESIDENT: Thank you, Your Excellency. This is now the time for a break of ten minutes. The Court will resume the hearing at 11.30 a.m.

*The Court adjourned from 11.20 to 11.30 a.m.*

The PRESIDENT: Please be seated. I give the floor to His Excellency Mr. Mohammad Jusuf of Indonesia.

Mr. JUSUF:

1. Mr. President, honourable Members of the Court, it is an honour and privilege for me to represent my Government before the Court in these proceedings. Let me also commence my statement by underlining that the request for advisory opinion on the legal consequences of the construction of the Wall in the Occupied Palestinian Territory, including in and around East Jerusalem, would raise issues of profound significance for the international community. As the principal judicial organ of the United Nations, the Court’s response to the advisory opinion request would reassert its considerable credibility among nations. Its independent consideration of this request would also be a true testimony to the validity of this trust.

2. In these oral proceedings, Indonesia would only focus on the issue of jurisdiction of the Court and its judicial propriety to render its advisory opinion. Furthermore, Indonesia would like to seize this opportunity to reassert its Written Statement’s argument by giving further detailed information on the applicability of international humanitarian and human rights law in Occupied

Palestinian Territory, including East Jerusalem. In the last part of this statement, Indonesia will reiterate the salient points of its written submission.

3. With regard to the competence of the General Assembly in requesting the Court to render its opinion, as in the case of *Legality of the Threat or Use of Nuclear Weapons*, Indonesia is of the view that the General Assembly has competence in any event to seise the Court. As stipulated in Article 10 of the Charter, the General Assembly has competence relating to “any questions or any matters within the scope of the present Charter”. Furthermore, the General Assembly has acted in accordance with the recommendation of its “Agenda for Peace” that “United Nations organs turn to the Court more frequently for advisory opinions”<sup>32</sup>. And consecutive Presidents of the Court appeal before the General Assembly for greater recourse to the advisory function of the Court<sup>33</sup>.

4. The competence of the Court to issue its advisory opinion derives from Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Court’s Statute, which require that the question on the subject-matter of the request should be a “legal question”. Indonesia believes that the advisory opinion requested by the General Assembly indeed relates to a “legal question” within the meaning of its Statute and the United Nations Charter. The Court has indicated on many occasions — *inter alia*, the *Western Sahara* case — that legal questions “framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law . . . [and] appear . . . to be questions of a legal character”<sup>34</sup>. The present question is a legal one since the Court is asked to rule on the compatibility of the question with the relevant principles and rules of international law. In doing so, as the Court decided in the case of *Legality of the Threat or Use of Nuclear Weapons*, the Court will identify the existing principles and rules, interpret them and apply them to the construction of a wall in the Occupied Palestinian Territory, therefore offering a reply to the question posed on law<sup>35</sup>. As stated in the case of the *Legality of the Threat or Use of Nuclear Weapons*, the Court considered that even though there may be political

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<sup>32</sup>Agenda for Peace, 1992, p. 22.

<sup>33</sup>See *I.C.J. Yearbook 1997-1998*, p. 292.

<sup>34</sup>*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15.

<sup>35</sup>See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, para. 13.

considerations in the request “the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion”<sup>36</sup>.

5. Furthermore, Indonesia finds no “compelling reasons” preventing the Court from giving the advisory opinion requested by the United Nations General Assembly<sup>37</sup>. Even though a State or group of States might reject this advisory opinion or have stated their lack of consent to the competence of the Court, however it cannot be a “compelling reason” for the Court not to give its opinion. In the case of *Legality of the Threat or Use of Nuclear Weapons*, the Court confirmed that “the Court’s Opinion is given not to the States, but to the organ which is entitled to request it”<sup>38</sup>. Moreover the Court conferred great respect for the process within the United Nations General Assembly. The Court stated that “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.”<sup>39</sup> The Court disregarded the origins or the political history of the question in determining whether there are any “compelling reasons” for it to refuse. The Court stated: “the Court . . . will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution”<sup>40</sup>.

6. With regard to Article 12 of the Charter, let me refer to the opinion made by the honourable Judge Bruno Simma in his publication *The Charter of the United Nations: A Commentary* that this Article has been gradually eroded. It is not uncommon that the General Assembly has made recommendations even when the Security Council was dealing actively with an issue. If the Security Council was not actually exercising its function at that moment, or if a resolution was blocked by a veto, the General Assembly has assumed that it is free to make recommendations, provided that these did not directly contradict a Security Council resolution<sup>41</sup>.

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<sup>36</sup>*Ibid.*

<sup>37</sup>Written Statement by the Government of the Republic Indonesia on the request for advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 29 January 2004, para. 3.

<sup>38</sup>*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 234, para. 14.

<sup>39</sup>*Ibid.*, p. 237, para. 16.

<sup>40</sup>*Ibid.*

<sup>41</sup>Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, Oxford University Press, 2nd edition, 2002, p. 254.

This view is traditionally legitimized by the Uniting for Peace Resolution Mechanism<sup>42</sup> which acknowledges that the failure of the Security Council to discharge its responsibilities does not deprive the General Assembly of its rights or relieve it of its responsibilities under the Charter. Having said that, Indonesia is of the view that the advisory opinion request falls, without any doubt, within the scope of “functions” and “powers” of the General Assembly. The argument that the advisory opinion request was *ultra vires* the competence of the General Assembly is therefore unfounded.

7. Mr. President, distinguished Members of the Court, a State or group of States might oppose the rendering of an opinion by the Court on the ground that the Court’s opinion on this question will jeopardize the negotiating process. On the contrary, the impartial legal views of the Court will give a solid international legal ground to speed up the negotiating process. The negotiating process cannot be a “compelling reason” for the Court not to give its opinion. There is no precedent that the impartial legal opinion of the World Court would hamper the peace process or create additional barriers for the negotiating process or make the “two-State” solution impossible. Indonesia shares the view that the establishment of a Palestinian State, living side by side with Israel must be realized through political dialogue. It consistently maintains that the interest of the very fundamental principle of international law shall not be compromised. As mentioned by the distinguished Palestinian representative yesterday, the implementation of the peace process should not be at the expense of the legal rights of the Palestinian people. In this regard, the Indonesian Government believes that the advisory opinion of the Court could contribute positively to the peace process.

8. The positive contribution of the Court to the peace process has been expressed by a Member of the Court, the former Judge and President, Mohamed Bedjaoui, before the Sixth Committee on 16 October 1995. In this case, Indonesia also endorses the preventive nature of advisory opinions. Since an advisory opinion could provide an authoritative and important guide, advisory procedure appears to be an instrument of “preventive diplomacy”, as envisaged in “Agenda for Peace”, which is a particularly suitable means for the Court to defuse tension and ward off conflicts by the determination of law. In this connection, I would like to recall the

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<sup>42</sup>United Nations General Assembly resolution 377 (V).

positive contribution of the Court's Opinion on Namibia to the establishment of the rule of international law in south-western Africa. Within this context, Indonesia expects that an advisory opinion on this particular issue would be a legal building block for the peace process in the Middle East. The impartial legal opinion of the Court on this question would provide a solid international legal ground ensuring that the negotiation process be fairly conducted in good faith.

9. The parties are therefore under an obligation to conduct themselves in order to have meaningful negotiations as stated in the case of the *Gabčíkovo-Nagymaros Project*<sup>43</sup>. The construction of the Wall hampers a meaningful negotiation. According to General Assembly resolution A/ES-10/248 of 24 November 2003 on the report of the Secretary-General "the barrier's construction in the West Bank cannot, in this regard, be seen as anything but a deeply counterproductive act. The placing of most of the security structure on occupied Palestinian land could impair future negotiations." The negotiation is a matter of trust between two parties and the construction of the Wall "undermines Palestinians' trust in the road map process, as it appears to prejudge final borders of a future of a Palestinian State" as stated in the Quartet Statement of 26 September 2003.

10. Mr. President, honourable judges, on the issue of legality, Indonesia strongly believes that there is no legal justification for Israel to construct the Wall<sup>44</sup>. The Wall is illegal because it is meant to ensure control of the Palestinian Territories through various measures. By building the Wall, the Israeli Government has ordered vast expropriations of land and has destroyed homes, shops, schools, water networks and agricultural land. On the applicability of international humanitarian law in the Occupied Palestinian Territory, the construction of the Wall and related access arrangements fail to meet the requirements of international human rights and humanitarian law.

11. Israel is a party to the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War and two international covenants which are the International

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<sup>43</sup>See *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, para. 141.

<sup>44</sup>The construction also is against the relevant General Assembly and Security Council resolutions, particularly General Assembly resolution A/RES/ES-10/13 on illegal actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory (OPT) of 21 October 2003; A/RES/58/21 on Peaceful Settlement of the Question of Palestine of 3 December 2003; A/RES/58/98 on Israeli Settlements in the OPT, including East Jerusalem, the Occupied Syrian Golan of 9 December 2003; A/RES/58/99 on Israeli Practices affecting the Human Rights of the Palestinian People in the OPT, including East Jerusalem; and Security Council resolutions S/RES/1073 of 28 September 1996 and S/RES/465 of 1 March 1980.

Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Social, Economical and Cultural Rights (ICSECR). However, time and again, Israel refuses to apply the Fourth Geneva Convention to the Occupied Palestinian Territory even though the international community called upon the Israeli Government to accept *de jure* application of the Fourth Geneva Convention in Palestine<sup>45</sup>. Also according to Article 2 of the ICCPR Israel, as a party, must undertake “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”. Since Palestinian Territories are not part of Israel, it should strictly follow these principles, not only towards its nationals but also in protecting the rights of Palestinians. Israel should accept the applicability of international human rights and humanitarian law. Israel should also incur international responsibilities arising from a continuing violation of international obligations<sup>46</sup>.

12. Honourable judges, Article 47 of the Fourth Geneva Convention ensures that the occupied population is entitled to certain rights that

“protected persons . . . shall not be deprived, in any case or in any manner whatsoever, of the benefits the present convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power”.

International humanitarian law guarantees in Article 27 that

“Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.”<sup>47</sup>

The Wall is a combined product of the settlements and closure policies. The Wall adds a permanent barrier to the barriers already put in place through checkpoints. In addition, it is a permanent expropriation of private property.

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<sup>45</sup>See the United Nations Security Council resolution 681 (United Nations, 1990). Also see United Nations General Assembly resolution 56/60 that United Nations reaffirmed that this Geneva Convention is applicable to Palestine Territories.

<sup>46</sup>See *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, para. 118.

<sup>47</sup>Article 27, “Provisions common to the territories of the parties to the conflict and to occupied territories”, the Fourth Geneva Convention, relative to the Protection of Civilian Persons in Time of War (1949).



13. The “Bertini Report”<sup>48</sup> has elaborated on the humanitarian situation in Palestine and shown how closures, sieges, curfews and checkpoints are strategies that have affected the right to the freedom of movement and property. The report states:

“Palestinians are subject to a variety of closures, curfews, roadblocks and restrictions that have caused a near-collapse of the Palestine economy . . . and rising dependency on humanitarian assistance. The restrictions affect almost all activities, rendering most Palestinians unable to carry out any semblance of a normal life and subject to daily hardships, deprivations and affronts to human dignity.”<sup>49</sup>

The report also states “There is a consensus among all parties, and this report confirms, that the current regime of closures and curfews is having a devastating impact on the Palestinian population, both on their economy and the humanitarian situation.”<sup>50</sup>

14. The International Committee of the Red Cross in its press release of 18 February 2004, stated *inter alia* its concern about the humanitarian impact of the West Bank barrier on many Palestinians living in the Occupied Territory. The ICRC’s opinion is that the West Bank barrier, in as far as its route deviated from the “Green Line” into Occupied Territory, is contrary to international humanitarian law. The problems affecting the Palestinian population in their daily lives clearly demonstrate that it runs counter to Israel’s obligation under international humanitarian law to ensure the humane treatment and well-being of the civilian population living under its occupation. The measures taken by the Israeli authorities linked to the construction of the barrier in the Occupied Territory go far beyond what is permissible for an occupying power under international humanitarian law. These findings are based on the ICRC’s monitoring of the living conditions of the Palestinian population and on its analysis of the applicable international humanitarian law provisions. The Israeli authorities have been regularly informed about the ICRC’s humanitarian and legal concerns. And the ICRC therefore calls on Israel not to plan, construct, or maintain this barrier within the Occupied Territory.

Mr. President, honourable judges, I would now like to mention some provisions violated as a consequence of the construction of the Wall by Israel.

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<sup>48</sup>Catherine Bertini, *Personal Humanitarian Envoy of the Secretary-General Mission Report 11–19 August 2002*, see at <http://www.caabu.org/press/documents/bertini-report.html>.

<sup>49</sup>*Ibid.*, Overview, para. 4.

<sup>50</sup>*Ibid.*, Observations, para. 12.

15. The Wall violates Article 2 of the Universal Declaration of Human Rights. Article 2 of the Universal Declaration of Human Rights also makes it clear that “no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty”. This approach is also confirmed by United Nations General Assembly resolution 48/121 (1993) endorsing the “Vienna Declaration and Action Plan from the World Conference on Human Rights”. It explicitly ensures that effective international measures, to guarantee and monitor the implementation of a human rights standard, should be taken in respect of people under foreign occupation.

16. Although Article 12 of the ICCPR stated that freedom of movement can be restricted for security reasons — but the restrictions should be limited to what is necessary and proportionate as mentioned in General Comments No. 27 adopted by the Human Rights Committee<sup>51</sup>. The Wall creates walled-in enclaves confining tens of thousands of people. It sharply limits freedom of movement except to a handful of permit-holders, and endangers Palestinians’ access to basic services such as education and medical care and other access to work and water. The Israeli Government cannot use security concerns for Israelis living in illegal settlements to justify further illegal changes to the Occupied Territory by constructing illegal barriers. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Convention<sup>52</sup>. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected<sup>53</sup>. The construction of a wall does not fulfil the obligation under Article 12 of the ICCPR.

17. The Wall also infringes on other Palestinian rights such as right to property as enshrined in Article 17 of the Universal Declaration on Human Rights, Article 1 of the ICESCR, and Article 1 of the ICCPR; the right to health as stated in Article 12 of the ICESCR and Article 56 of

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<sup>51</sup>See General Comments No. 27 (67) on Article 12 “Freedom of Movement” adopted by the Human Rights Committee under Article 40, paragraph 4, of the ICCPR.

<sup>52</sup>*Ibid.*, para. 11.

<sup>53</sup>*Ibid.*, para. 14.

the Fourth Geneva Convention; the right to education as stated in Article 3 of the ICESCR, Article 50 of the Fourth Geneva Convention; the right to work as enshrined in Article 23 of the Universal Declaration of Human Rights and Article 6 of the ICESCR; the right to food and water as stated in Article 11 of the ICESCR; and lastly, the right to freedom of religion as stated in Article 18 of the ICCPR, and Article 58 of the Fourth Geneva Convention.

18. Honourable judges, as widely reported, the construction of the Wall has destroyed schools, commercial buildings, homes, water networks and has made difficulties for teachers reaching their classes when travelling. The shops and enterprises have been closed as a consequence of the Wall. The restriction of movement also affects access to sacred places and mosques. Regarding the right to food and water, the Israeli authority has taken food away from farmers and the Wall has affected communities' access to water. Israel, as Occupying Power, does not fulfil its obligation to ensure the Palestinian right to health. As reported by the Bertini Report there are "access restrictions . . . [which] prevent Palestinians in need of medical treatment from reaching health services"<sup>54</sup>.

19. On the basis of the additional arguments set out above, as well as already stated in Indonesia's Written Statement, Indonesia respectfully, humbly, requests the august body of this Court to respond to the request of the General Assembly:

1. The construction of the Wall by Israel in the Occupied Palestinian Territory, including East Jerusalem, departing from the Armistice Line of 1949, is illegal under relevant norms and principles of international law and must be ceased and reversed.
2. Israel is under a legal obligation to restore land and private properties forcibly seized for the construction of the Wall, to pay full compensation, to annul all measures enacted regarding the Wall, to cease restriction on freedom of movement in the Occupied Palestinian Territory, including East Jerusalem.
3. Israel is under an obligation to fully and effectively respect the Fourth Geneva Convention, as well as Additional Protocol I to the Geneva Conventions to the Occupied Palestinian Territory, including East Jerusalem.

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<sup>54</sup>Catherine Bertini, *Personal Humanitarian Envoy of the Secretary-General Mission Report 11–19 August 2002*, Health, para. 34.

4. All norms and principles as provided by international human rights conventions shall be respected in the Occupied Palestinian Territory, including East Jerusalem, and therefore Israel is under obligations to stop its grave breaches of international human rights law, and to bring all the perpetrators of human rights atrocities to justice.
5. Last but not least, Israel is under an obligation to co-operate with international humanitarian organizations, including the International Committee of the Red Cross and the Human Rights Committee to respect the dignity of the Palestinian people.

Mr. President, honourable Members of the Court, thank you for your kind attention and indeed for your patience.

The PRESIDENT: Thank you, Excellency. I now give the floor to His Royal Highness Prince Al-Hussein of Jordan.

H.R.H. Prince AL-HUSSEIN: Mr. President and Members of the Court, I should like to begin by reminding the Court of Jordan's very direct historical and current interest in the issues which are now before the Court. Both by virtue of geography and Jordan's past, the Kingdom enjoys a unique relationship with Palestine and the Palestinians, which we believe affords us a special insight into developments there, beyond perhaps that which is possible for other States. Moreover, with the exception of the Palestinians themselves, we feel it is we, Jordanians, who are the ones who could be most affected by Israel's decision to place the Wall where it has, and where it intends to do so in the near future.

Mr. President, in the written statements submitted to the Court, considerable importance has been attached in some quarters to Israel's security concerns. Jordan has no wish to be dismissive of any State's concerns over its security. Jordan has repeatedly condemned the attacks mounted against civilians in Israel, particularly where they have resulted in the loss of innocent life. Those suicide bombings have indeed been nothing less than horrific. But, Mr. President, those events do not stand by themselves. Israel's argument, centred as it is on the sporadic suicide bombings of the last three years in particular, must be weighed against almost four decades of Israel dominating and, by virtue of its occupation, degrading, an entire civilian population; often unleashing practices

which have been no less horrific, resulting in a huge number of innocent Palestinian deaths and casualties.

But, Mr. President, those matters are not what these proceedings are about. The question before the Court concerns a very specific situation. It concerns a wall. And not just “a” wall, but a very specific wall. It is the “Wall being built by Israel . . . in the Occupied Palestinian Territory, including in and around East Jerusalem”, as described in the report of the Secretary-General of 24 November 2003. It is the specific characteristics of that particular Wall which are critical for the issues which now confront the Court.

Two things about it are of crucial importance. First, much of the Wall now being built by Israel is in territory which does not belong to Israel, but which is, rather, occupied territory — territory which, as consistently acknowledged by the international community for over 35 years, is subject to a special régime in international law.

It is the fact that the Wall is being built on Occupied Territory which is at the heart of the present case. If Israel has a security problem, then in principle Israel can protect itself by taking suitable measures *within its own territory*. If the Wall had been constructed wholly within Israel’s sovereign territory, these proceedings would not have come about.

The second crucial factor about the Wall is that it is a wall with the characteristics described in the Secretary-General’s report. On the screen now (and at tab 1 in the judges’ folders) is a succession of photographs taken of the Wall. The Court can see that in physical terms the Wall is not just a simple fence. It dominates its surroundings, separates homes from their lands, people from their places of worship as well as from essential services and sources of water, it divides communities, and cuts a swathe through towns and villages.

Those physical characteristics are supplemented by an extensive system of administrative controls. The Wall cannot be looked at on its own, but only in conjunction with the controls which are an integral part of the whole system.

It is when one looks at the overall picture presented by the Wall and its accompanying controls that one fears for the future of the Palestinian inhabitants of the Occupied Territories. It is consistent with what is known already of the Wall to see in its construction steps aimed at the further assimilation of the Occupied Territories into Israel.

The construction of the Wall has, apart from its legal consequences, major practical consequences, particularly for Jordan. My country already hosts a huge number of refugees and displaced persons; and Jordan is now faced with the threat of a new wave of refugees as a result of the Wall's construction.

A second major consideration referred to in a number of written statements is the impact which the Court's advisory opinion might have on ongoing international negotiations. This is said to be a reason for the Court to abstain from giving an opinion. While this argument will be addressed in greater detail by counsel for Jordan, there is, Mr. President and Members of the Court, a general point I should like to make.

In its Written Statement Israel has emphasized how many attempts it has made to reach a peaceful settlement of the Palestinian question since the Israeli-Palestinian talks in Oslo in 1993. Mr. President, Israel has no monopoly of such attempts. We *all* want a peaceful settlement. My country, together with the Palestinians, has been every bit as assiduous in its peace efforts.

The latest negotiations to hold centre stage revolve around the Quartet's "Road Map" which, in recognition of Jordan's central contribution to it, was launched in Aqaba last year. But one must be realistic, Mr. President. Although in principle ongoing, in practice those negotiations have unfortunately made little or no progress in recent months, and there seems little prospect that they will make much progress in the near future — in large measure, precisely because of Israel's construction of the Wall.

Even in the best of circumstances the impact of an advisory opinion on ongoing negotiations can only be speculative. But in circumstances when negotiations are at best quiescent, speculation descends into mere guesswork. That cannot be a proper basis on which the Court should decline to give an advisory opinion.

The request for an advisory opinion has come from the General Assembly of the United Nations. The Assembly has had long-standing responsibilities for the status of Palestine, ever since the British Mandate for Palestine came to an end in 1948. It is still exercising that responsibility today. And it is in exercising that responsibility that the Assembly, in order to fulfil its functions, needs the advisory opinion of the United Nations principal judicial organ as to the legal consequences which flow from the construction of the Wall.

The Assembly knew what it was doing when it decided to seek the Court's opinion on a specific legal question, and it took that course for reasons of which *it* was the best — and only — judge.

Mr. President and Members of the Court, I should be grateful if you would now invite Sir Arthur Watts, QC, counsel for Jordan, to address the Court on certain more specifically legal issues.

Thank you, Mr. President.

The PRESIDENT: Thank you, Your Royal Highness. I now give the floor to Sir Arthur Watts.

Sir Arthur WATTS:

1. Mr. President and Members of the Court, it is an honour for me to appear before the Court today and to do so on behalf of the Hashemite Kingdom of Jordan. Let me begin by reminding the Court of some aspects of the Wall which these proceedings are all about. The representative of Jordan has, just a moment ago, said something about the physical nature of the Wall. I should like to add a few words about the route which the Wall takes.

2. The starting point has to be the line resulting from the 1949 Jordan-Israel Armistice Agreement, the "Green Line". That line is shown on the sketch-map on the screen now and it is at tab 2 in the judges' folders. Two things about it are not in the slightest doubt. First, the land lying generally to the east of the Green Line is *not* part of Israel; second, ever since the 1967 war, those lands have been overwhelmingly regarded as "occupied territories" in which Israel has only had the limited authority of an "Occupying Power". It is in those Occupied Territories that the Wall is being built.

3. Certain parts of the Wall have already been completed or are currently under construction. The sketch-map now on the screen (and it is at tab 3 in the folders) shows these sections. Although in limited parts the Wall more or less follows the Green Line, for most of its length it runs well within the Occupied Territories.

4. In addition, approval has already been given for further sections of the Wall. The sketch-map now on the screen (and at tab 4 in the folders) shows these planned stretches of the

Wall, together with the stretches already constructed. Again, the planned stretches run for the most part well within the Occupied Territories.

5. But there is still more. Further sections of the Wall are officially contemplated<sup>55</sup>. The sketch-map now on the screen (and it is at tab 5) shows these further stretches of the projected Wall, together with the stretches already completed and planned.

6. Mr. President, recent press reports of small changes to the Wall have no effect upon the essentials of the Wall's route as I have described it. Even if such changes are implemented (and that is by no means certain), they affect only 8 km of the Wall's eventual 720 km; and that small section of the Wall is being dismantled only because a back-up wall is already in place behind it. The great bulk of the Wall and its associated system of controls will remain precisely as they are at present.

7. Returning, then, to the different sections of the Wall, they all come together to produce the complete Wall project, as shown on the sketch-map now on the screen (and at tab 6 in the folders). One thing immediately stands out. This Wall carves up the Occupied Territories, and cuts off Palestinian communities from each other and even from their own neighbouring lands.

8. And more than that, Mr. President, it obstructs the "permanent, free and unhindered access to the Holy Places by all the people of all religions and nationalities". That has been a major element in United Nations policy on Palestine since resolutions 191 (III) and 194 (III) in 1948. And it was reiterated by the General Assembly in resolution 57/111 of 2002.

9. The map, Mr. President, also shows something else. It shows that, despite arguments to the contrary, this Wall is *not* primarily about the defence of Israel's territory. One glance at the route taken by the Wall gives the lie to that argument. If the Wall is no more than a security barrier to protect the territory of Israel, why does it follow the path it does? How, for example, does a Wall encircling Qalqilya help to defend nearby Israeli territory? What does the long finger of Wall extending far into the West Bank in the region of Salfit have to do with the defence of Israel's territory? How can the projected eastern stretch of the Wall, from Jenin in the north to Hebron in the south, be justified as a security barrier for the protection of Israel's territory, when there is already the whole stretch of the Wall over to the west to serve for that alleged purpose? If the Wall

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<sup>55</sup>See Jordan, Written Statement, para. 3.7.



defends anything, it is — as we shall see in a moment — the position of Israeli settlements in the Occupied Territories: but no exceptional right of self-defence can be invoked, Mr. President, to defend that which is itself unlawful. Had Israel built a wall wholly within its own territory, we would not all be here today. And I would just observe that the Court has been given no cogent reasons why it was *necessary* to build this Wall in Occupied Territory, and why a wall built within Israel's own territory would not have met the security concerns which are alleged to have provoked it.

10. Now let me show one more sketch-map. Still on the screen is the complete route of the Wall — constructed, planned and projected. Now on the screen (and at tab 7 in the folders) is that same map, but superimposed on it are the locations of Israeli settlements in the Occupied Territories. Although settlements are spread throughout the Occupied Territories, 80 per cent of the settler population is concentrated in the western areas, now being pointed out. It is readily apparent that the Wall brings the main groups of the settlements into effective contiguity with Israel's own territory; it strengthens, develops and consolidates Israel's settlements.

11. Those settlements have long been regarded by the international community as illegal<sup>56</sup>. And ever since the Wall began to be constructed, the international community has also regarded the Wall as illegal<sup>57</sup>. Mr. President and Members of the Court, that is the Wall about the legal consequences of which the General Assembly has requested your opinion.

12. In relation to substantive issues raised by that question the various Written Statements reveal no significant disagreement. Jordan feels no need to comment on these issues, and stands by what it said in its Written Statement<sup>58</sup>. But the Court's jurisdiction and its discretionary powers in relation to advisory opinions have proved more contentious. Jordan has set out in its Written Statement arguments to show that the Court has jurisdiction to give the requested advisory opinion, and that there are no compelling reasons for the Court to decline to exercise that jurisdiction. While maintaining those arguments, I should just like to add some comments in response to arguments to the contrary which have been put forward.

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<sup>56</sup>See Jordan, Written Statement, para. 5.140.

<sup>57</sup>General Assembly resolution ES-10/13 (21 October 2003) (adopted 144-4-12); ten Members of the Security Council, including three of the Permanent Members, also voted in that sense in October 2003.

<sup>58</sup>Especially at paras. 5.37-5.300.

13. The starting point, Mr. President, has to be that (and here I quote from the relevant General Assembly resolution)<sup>59</sup> “the United Nations has 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”. The General Assembly, as one of the principal organs of the United Nations, shares (as does the Court, also one of the principal organs) that “permanent responsibility” for the question of Palestine. In exercising that responsibility the Assembly is faced with a fact — the construction of the Wall. It has to know what this implies for its future actions. It has therefore asked the Court, as the Organization’s principal judicial organ, to give an advisory opinion on the legal consequences of that fact. Nothing could be more natural.

14. Yet it has been urged that the Court, notwithstanding its responsibilities as the United Nations principal judicial organ, should leave the General Assembly without the advice it needs. In Jordan’s submission, Mr. President and Members of the Court, for the reasons set out in Jordan’s Written Statement<sup>60</sup> that cannot be the right course for this Court to take. The Court has never before exercised its discretion so as to decline to give an advisory opinion properly requested by an authorized organ; and there is no cause for it to do so now.

15. One argument, Mr. President, recalls that the General Assembly’s resolution requesting an advisory opinion was adopted within the framework of the “Uniting for Peace” resolution<sup>61</sup>. It is said that there had been no failure by the Security Council to act — a prerequisite for action under the resolution — since, shortly before the Assembly’s request was made, the Council had adopted resolution 1515 endorsing the “Road Map”.

16. But Mr. President, the special conditions laid down in the “Uniting for Peace” resolution — including the failure of the Security Council to act because of a lack of unanimity of the Permanent Members — govern the *convening* of Emergency Special Sessions, not the extent of the powers exercisable by the Assembly once the Session has been properly convened.

17. Moreover, although Security Council resolution 1515 dealt with general outlines for a possible Middle East settlement — which had nothing to say about the Wall — it is more to the

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<sup>59</sup>General Assembly resolution 57/107 (3 December 2002).

<sup>60</sup>At paras. 5.1-5.36.

<sup>61</sup>General Assembly resolution 377 (V) (3 November 1950).

point that the Council, only one month earlier, also considered the specific issue of the Wall — and failed to act, precisely because of a veto by one Permanent Member<sup>62</sup>.

18. Mr. President, the Assembly needs the opinion it has requested. In the language of the Court in the *Reservations* case “the object of this request for an Opinion is to guide the United Nations in respect of its own action”<sup>63</sup>. It is precisely the Assembly’s own future decisions which require that it should know the legal consequences of the building of the Wall: only then can it properly decide what action to take.

19. The Court’s view of the matter has been remarkably consistent since its pronouncements in that case. In the *Namibia* case the Court referred to a request being “put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions”<sup>64</sup>; in the *Western Sahara* case the Court said that “an opinion given by the Court in the present proceedings will furnish the General Assembly with elements of a legal character relevant to its further treatment of the decolonization of Western Sahara”<sup>65</sup>. *Mutatis mutandis*, Mr. President, that is exactly the situation in the present case.

20. The argument has also been made that since under the Charter the Security Council has the primary responsibility for the maintenance of international peace and security, therefore the General Assembly may not take action which interferes with the Council’s exercise of its primary responsibilities — upon which, in the present context, it has been actively engaged for many years and is indeed currently engaged.

21. Mr. President, seeking an advisory opinion in no way interferes with the Council’s primary responsibilities — especially when on the matter in hand the Council was unable to act because of the negative vote of a Permanent Member. But in any event, the argument cannot stand. It is startling in its implications, and without foundation in the Charter. If accepted it would cast serious doubt on the legality of much that the General Assembly has done over the past 37 years in relation to the Occupied Territories. The Council and the Assembly have overlapping competences, within the limits of Article 12 of the Charter. But that Article only precludes the

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<sup>62</sup>Jordan, Written Statement, para. 5.88.

<sup>63</sup>*I.C.J. Reports 1951*, p. 19.

<sup>64</sup>*I.C.J. Reports 1971*, p. 24, para. 32.

<sup>65</sup>*I.C.J. Reports 1975*, p. 37, para. 72.

Assembly from making a recommendation with regard to a dispute or situation while the Council is exercising its functions in respect of a dispute or situation: and in this case the Assembly made no recommendation, only a *request* to another organ of the United Nations for an advisory opinion in the exercise of its specific powers under Article 96 of the Charter.

22. The Assembly's role in relation to the maintenance of peace and security may be secondary, but it is not non-existent. It retains its normal competences under the Charter, and its request for an advisory opinion falls fairly and squarely within them.

23. It is further argued that the construction of the Wall is part of an ongoing dispute between Israel and Palestine, and that as such the Court should not consider it without the consent of both parties — which consent Israel, for its part, does not give.

24. First, Mr. President, there is no specific, independent, actually pending, bilateral dispute between Israel and Palestine about the Wall: none of the usual indicia of the actual existence of a “dispute aris[ing] independently in bilateral relations”<sup>66</sup> are on record in this case. And as the Court said in the *Namibia* case<sup>67</sup>, the existence of legal issues on which there are radically divergent views between two parties and on which the Court may have to pronounce does not mean that there exists a dispute.

25. In any event, Mr. President, in the *Western Sahara* case, in circumstances which are strikingly similar to those of the present case<sup>68</sup>, the Court rejected just such an argument about an ongoing dispute and the consequent alleged need for consent. It is an argument which harks back to the decision of the Permanent Court in 1923 in the case concerning the *Status of Eastern Carelia*<sup>69</sup>. But the circumstances of the present case are entirely different from those of the *Eastern Carelia* case<sup>70</sup>.

26. In the present case the non-consenting State — Israel — is a Member of the United Nations, and a party to the Statute of the Court, and has thus agreed to the Court's advisory

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<sup>66</sup>*Western Sahara, I.C.J. Reports 1975*, pp. 28-29, para. 46.

<sup>67</sup>*I.C.J. Reports 1971*, para. 34.

<sup>68</sup>See Jordan, Written Statement, para. 5.29.

<sup>69</sup>1923, *P.C.I.J., Series B, No. 5*.

<sup>70</sup>Jordan, Written Statement, para. 5.25.

procedures. Moreover, Israel has actively participated in these proceedings, both as regards the composition of the Court and by submitting a written statement.

27. As regards the availability of facts, any facts which Israel might be able to provide but which, by its substantive non-participation, it has chosen not to provide do not greatly affect the issue; indeed, Israel's conduct in declining to assist the Court estops it from complaining about alleged lack of facts. The relevant facts are limited — they concern only the construction of the Wall and do not cover any other aspects of Arab-Israeli problems in the Middle East. The route to be taken by the Wall is known; as are the regulatory controls which supplement the physical effects of the Wall. All this has been spelled out in several recent independent and authoritative reports<sup>71</sup>. And they have also identified the impact which the Wall has on the local population, and on local social and economic structures. More facts about the Wall have been set out in the Written Statements submitted to the Court. And there is a voluminous public record of a kind which the Court, in the *Hostages*<sup>72</sup> and *Nicaragua*<sup>73</sup> cases, has already accepted as evidence of matters before it. The Court has more than enough information on which to base its advisory opinion. In the *Western Sahara* case the Court set out the test to be met:

“The issue is whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character.”<sup>74</sup>.

That test is amply met in the present case.

28. Moreover, Mr. President, the specific question put to the Court does not directly address a legal question actually pending between two States. The Court's advisory opinion will not settle any existing bilateral dispute, since it will not deal with such a dispute: the Court's opinion will deal only with a particular request relating to certain legal consequences flowing from a given situation; it will only be “advisory”, and it will only be addressed to the General Assembly.

29. The fact that the question put to the Court by the Assembly may have political aspects or motivation, or that the Court's opinion may when given to the Assembly have implications in the

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<sup>71</sup>Report of the Special Rapporteur of the Commission on Human Rights (8 September 2003); Report of the Secretary-General (24 November 2003 and 29 January 2004); and the ICRC Report (19 February 2004).

<sup>72</sup>*I.C.J. Reports 1980*, pp. 9-10, paras. 12-13.

<sup>73</sup>*I.C.J. Reports 1986*, pp. 40-41, paras. 62-63.

<sup>74</sup>*I.C.J. Reports 1975*, pp. 28-29, para. 46.

wider political arena, is, as the Court has often indicated, a separate matter which does not affect the Court's ability to give its advisory opinion on what is clearly a *legal* question<sup>75</sup>. It is significant that, on *every* occasion when such an argument has been raised, the Court has rejected it. In the *Nicaragua* case, in 1986, the Court noted that it "has never shied away from a case brought before it merely because it had political implications . . ."<sup>76</sup>. It has not done so subsequently, Mr. President, and Jordan submits that it should not start doing so now.

30. Nor can the Court be regarded as being in some way politicized just because it fulfils its judicial function by giving an advisory opinion on a matter with political implications: the Court, Mr. President and Members of the Court, is a more robust institution than that suggestion would imply. The issue is not the politicization of the Court, but rather emphasizing that the questions for decision are purely legal.

31. It is particularly wrong, Mr. President, to treat the subject-matter of the Court's advisory opinion as essentially a bilateral dispute between Israel and Palestine, when that subject-matter directly concerns the international community as a whole, the United Nations in general, and the General Assembly in particular. The legal issues before the Court touch not just on some bilateral issue but on Israel's obligations *erga omnes*<sup>77</sup>. As for the United Nations, it has a "permanent responsibility" for the question of Palestine until that question "is resolved . . . in accordance with international legitimacy"<sup>78</sup>. The problem to which the Wall has given rise is a problem between one State — Israel — and the United Nations, two principal organs of which have consistently and frequently, over 37 years, determined that that State has only the limited authority of an Occupying Power within areas characterized as Occupied Territories. It is because the Wall is being constructed almost entirely in the Occupied Territories that the General Assembly has felt the need for the Court's opinion as to the legal consequences. The General Assembly has had a regular and long-standing concern with Israel's conduct in the Occupied Territories. The issue before the

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<sup>75</sup>Jordan, Written Statement, paras. 5.8-5.14, 5.34.

<sup>76</sup>*I.C.J. Reports 1986*, p. 435, para. 96.

<sup>77</sup>See Switzerland, Written Statement, para. 17.

<sup>78</sup>General Assembly resolution 57/107 (3 December 2002); above, para. 13.

Court is manifestly one “which arose during the proceedings of the General Assembly and in relation to matters with which it was dealing”<sup>79</sup>.

32. It is suggested, Mr. President, that since the General Assembly has already determined that the building of the Wall is illegal, there is consequently no value in the Court giving its advisory opinion on the same matter. But, Mr. President, a determination by the General Assembly that a particular state of affairs is illegal is, while indicative of an *opinio juris* on the part of the international community<sup>80</sup>, it is nevertheless a determination by a political organ of the United Nations: the confirmation, if so it be, of that determination by the United Nations principal judicial organ *does* add something of legal value to what the General Assembly has already said. The argument in any event misrepresents the question on which the General Assembly has asked the Court for its opinion. The General Assembly’s question is not whether the Wall is illegal, but asks about the legal consequences of constructing the Wall. Those consequences go much wider than any finding of illegality. It is the wider consequences, not yet addressed by the General Assembly, upon which the General Assembly seeks the Court’s guidance. *Finally* — and this is perhaps the overriding consideration — the General Assembly has asked for an advisory opinion on a matter on which it believes it will be assisted by having the Court’s views before it: the Court is, indeed, well placed to make a constructive contribution to a difficult situation at the heart of which lie issues of international law. As the Court has already indicated, it is for the General Assembly, and not for the Court, to determine whether the General Assembly needs the advisory opinion which it has sought and what use to make of it<sup>81</sup>.

33. The General Assembly has also been said, Mr. President, to have wrongfully prejudged the Court’s conclusions by formulating the question put to the Court in the way it has, by using terms such as “occupied territories” and “Occupying Power”. These terms, it is suggested, inherently and implicitly give to the Green Line the character of a “presumptive and immutable border of a putative Palestinian State”<sup>82</sup>, thereby prejudicing, so it is said, the outcome of whatever final territorial settlement might be reached.

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<sup>79</sup>*Western Sahara, I.C.J. Reports 1975*, pp. 28-29, para. 46.

<sup>80</sup>See Jordan, Written Statement, para. 5.89 ff.

<sup>81</sup>*Nuclear Weapons, I.C.J. Reports 1996*, p. 237, para. 16; and see Jordan, Written Statement, para. 5.33.

<sup>82</sup>Israel, Written Statement, para. 2.9.

34. That argument has no merit. *First*, ever since Israel began its occupation of the Palestinian Arab West Bank territories and East Jerusalem as a result of the June 1967 war, the Security Council and General Assembly, often unanimously or by overwhelming majorities, and including binding decisions of the Council, have never faltered in their characterization of Israel's status as being that of an occupying power, and of the territories in question as being occupied territories to which a special international legal régime applies, including in particular that of the Fourth Geneva Convention. Even the Road Map refers to "the occupation that began in 1967"<sup>83</sup>. That consistent record of the international community's *opinio juris* cannot just be swept aside and ignored.

35. *Second*, the argument misunderstands the significance of the Green Line. It is, in origin, the Armistice Demarcation Line, laid down in Article V of the Jordan-Israel General Armistice Agreement of 3 April 1949<sup>84</sup>. But it was given additional significance by Security Council resolution 242 of 1967, which affirmed, unanimously, the principle of Israel's withdrawal of its armed forces "from territories occupied in the recent conflict" — and that meant, and could only mean, territories on the non-Israeli side of the Green Line. Thus the Green Line is the starting line from which is measured the extent of Israel's occupation of non-Israeli territory; originating in 1949 as an armistice line, it became in 1967 the line to the *Israeli* side of which Israel had to withdraw its forces, and on the *non-Israeli* side of which territory was "occupied" by Israel. The terms of the General Assembly's request for an advisory opinion reflect that consistent United Nations position and involves no implication that the Green Line is to be a permanent frontier. It is not the General Assembly's implicit reference to the Green Line which is prejudicial, but rather, as many States have recognized<sup>85</sup>, the departure of the Wall from the Green Line which prejudices future negotiations because it pre-empts the boundaries of the envisaged two-State solution.

36. It is also suggested that for the Court to respond to the question put by the General Assembly would prejudice progress in the current negotiations for a Middle East peace settlement,

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<sup>83</sup>Third paragraph.

<sup>84</sup>United Nations doc. S/1302/Rev.1 (3 April 1949).

<sup>85</sup>E.g. statement by Italy on behalf of the EU and accession States, General Assembly, 8 December 2003.



which are taking place on the basis of the “Road Map”, including certain issues known as “permanent status” issues.

37. The arguments about the possible impact of the Court’s advisory opinion on the overall peace process need disentangling.

38. At the outset one must not overlook two things. The *first* is that the General Assembly, when requesting the Court’s opinion, was well aware of the Road Map negotiations; it took them into account and referred to them, directly or by reference, in resolutions ES-10/13 and ES-10/14. The *second* is that one of the “Quartet” co-sponsoring the Road Map is the United Nations itself; the General Assembly — the Organization’s principal deliberative organ — in putting the request for an advisory opinion to the Court will not have ignored the possible effect of its actions upon negotiations of which the United Nations itself was a co-sponsor.

39. Turning to the particular arguments, the first I would refer to is to the effect that the Israeli-Palestinian dispute over the Wall should be dealt with by negotiation within the framework of the Road Map rather than by way of an advisory opinion.

40. But this argument elides the very particular question on which an opinion is being sought with what is presented as a distinct Israeli-Palestinian dispute. But as we have just seen, the request for an opinion did *not* focus on some already-pending bilateral dispute; it focused on a quite different question, about legal consequences, which is directly related to the General Assembly’s future course of action.

41. Moreover, even if the question did relate to a bilateral dispute, which it does not, the suggestion that it should be resolved within the framework of the Road Map misunderstands the nature of the “Road Map process”. It is a diplomatic plan to resolve the Israeli-Palestinian conflict by negotiations<sup>86</sup>. In legal terms it expresses little more than aspirations; at most it is a *pactum de contrahendo*.

42. In particular it has no institutional content which enables it to function as a dispute settlement mechanism. It is not a vehicle for resolving specific legal issues — particularly disputes about matters which do not in any event feature in the Road Map. Nowhere does the Road Map

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<sup>86</sup>One of the principal proponents of the Road Map has said that its “essence . . . is a negotiating process”, and that it involves “a phased diplomatic framework for achieving a final and comprehensive settlement of the Israeli-Palestinian conflict”, and “a mechanism . . . for realizing a vision” (US, Written Statement, paras. 2.6, 2.4 and 5.1); another has said that it “involves a delicate process of mutual concessions” (UK, Written Statement, para. 3.25).

use a term like “dispute”; and in the list of the various fields in which reciprocal steps by the parties are to be taken — “political, security, economic, humanitarian, and institution-building fields”<sup>87</sup> — there is no mention of “legal” matters.

43. Even if the Road Map did envisage settlement of a particular dispute through negotiation (which it does not), such a process would, in any event, not be an exclusive vehicle for settling disputes about particular matters such as the Wall. It in no way excludes concurrent action on general or particular aspects of the Middle East problem by the General Assembly: indeed, since the Road Map was promulgated the Assembly has considered a host of matters directly arising out of the Israeli-Palestinian problem, with no suggestion that it was thereby doing something improper. It is, Mr. President and Members of the Court, the building of the Wall which is inconsistent with the principles underlying the Road Map and the Security Council resolution, not the Assembly’s legitimate request for an advisory opinion. As the United Nations Secretary-General said in his report last November, “In the midst of the Road Map peace process . . . the Barrier’s construction in the West Bank cannot . . . be seen as anything but a deeply counterproductive act.”<sup>88</sup>

44. The next line of argument to be considered is that the giving of an advisory opinion would be unhelpful to the broader peace process within the diplomatic framework of the Road Map because, it is said, it would make the overall negotiating process more difficult.

45. But that is a matter about which one can only speculate. It must not be forgotten that the Court is called upon in these proceedings to consider only a very specific factual situation, on the *legal* consequences of which the Assembly stands in need of the Court’s opinion. Speculation about the *political* consequences which might follow for the peace process is a political matter into which the Court should not allow itself to be drawn.

46. Moreover, the Court has already rejected the argument that because the giving of an advisory opinion might have an impact on some current negotiating process therefore the Court ought to refrain from giving an opinion properly requested of it. In the *Nuclear Weapons* case that

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<sup>87</sup>Para. 1 of the Introduction.

<sup>88</sup>A/ES-10/248, 24 November 2003, para. 29.

argument was advanced, and the Court's response was clear: "the Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction"<sup>89</sup>.

47. The alleged impact on the Road Map negotiations of the Court's future advisory opinion is not only wholly speculative, it is also wholly imprecise: all we have had is generalizations. The Road Map is set out in some six-and-a-half pages of single-spaced print. The Court has seen hundreds of pages of written statements. Yet not once has any State pointed to a single provision in the Road Map, or the "permanent status" agenda, which would be directly affected by or need changing as a result of the Court's advisory opinion.

48. It may be that much of the concern felt about the possible impact of the Court's opinion is based on a fear that the Court might range far and wide over a myriad legal issues which might be thought to be raised by the question put to the Court. But this is not so, Mr. President. The Court, in answering the question put to it, will no doubt keep strictly to the issues raised directly by that question. And being an advisory opinion, the Court has the possibility of saying only as much about any particular aspect of the question put to it as it considers appropriate.

49. The further argument has been advanced that the question put to the Court is so complex and uncertain that it is not a legal question at all, and raises such complex issues of fact and law as to be unsuitable for determination by an advisory opinion.

50. This argument has no substance. The relevant facts are no more complex than the Court has been faced with in other advisory opinions, and in fact they are very limited in scope, as I have already noted<sup>90</sup>.

51. The focus for the Court's opinion is also limited. It is also clear. The Court is asked to give its opinion on "the legal consequences" of the construction of that Wall. There is nothing uncertain about a question so phrased. There can be nothing inappropriate in asking a judicial organ to give an opinion on the legal consequences flowing from a specific situation about which the facts are well known: indeed questions about the legal consequences of an act are quintessentially legal questions since, in the words of the Court in the *Western Sahara* case, they are "framed in terms of law and raise problems of international law . . . [and] are by their very

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<sup>89</sup>*I.C.J. Reports 1996 (I)*, p. 237, para. 17.

<sup>90</sup>See above, para. 27.

nature susceptible of a reply based on law; indeed, they are scarcely susceptible of a reply otherwise than on the basis of law”<sup>91</sup>.

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52. Mr. President, Members of the Court, in the light of Jordan’s careful study of the Written Statements submitted in these proceedings, Jordan confirms the submissions which it made at the conclusion of its own Written Statement.

53. Mr. President and Members of the Court, that concludes my statement. I should like to thank the Court for the courtesy with which it has heard my submissions on behalf of the Hashemite Kingdom of Jordan. Thank you, Mr. President.

The PRESIDENT: Thank you, Sir Arthur. This concludes the oral statements and comments of Jordan.

The oral proceedings will resume this afternoon at 3 o’clock in order for Madagascar, Malaysia and Senegal to be heard on the question submitted to the Court.

The sitting is closed.

*The Court rose at 1.05 p.m.*

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<sup>91</sup>*I.C.J. Reports 1975*, p. 18, para. 15.