

**Participation of the Kingdom of Morocco to the procedure
(written proceedings) before the International Court of Justice in
the case:
Legal consequences of the construction of a wall in the occupied
Palestinian Territory
-Request for an advisory opinion-**

In its procedural ruling on the case of the legal consequences arising out of the construction of a wall in the occupied Palestinian Territory (request for an advisory opinion), rendered on 19 December 2003, the International Court of Justice decided that “in accordance with paragraph 2 of Article 66 of the Statute, the United Nations Organization and its Member States are competent to provide information on all aspects of the question submitted to the Court for an Advisory Opinion”

The question submitted to the Court by the General Assembly in its resolution A/RES/ES-10/14 of 8 December 2003, in accordance with article 65 of the Statute reads as follows:

“What are the legal consequences of the construction of the wall being built by Israel, the occupying Power, in the Palestinian Occupied Territory, including in and around East Jerusalem, as described in the report of the Secretary General, considering the rules and principles of International Law, including the fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”

The Kingdom of Morocco has the honor of taking part in the written proceedings before the Court, by providing information on the overall aspects of the question submitted to it for advisory opinion. Since His Majesty King Mohammed VI chairs the Al Qods (Jerusalem) Committee of the Organization of the Islamic Conference, the Kingdom of Morocco would like to place emphasis on the legal consequences of the construction of the wall “in and around East Jerusalem”.

It should be recalled that the General Assembly requested the Court to review the “legal consequences of the construction of the wall” after having demanded in resolution E-1013 of 21 October 2003 “that Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law” 1.

The Assembly confirms the illegality of the construction of the wall, and requested Israel to assume its international responsibilities by rectifying this illegality act and reversing the situation (restitution in integrum) 2. The Secretary General was requested to report periodically on Israel’s compliance with the resolution. Upon receipt of the first report, new measures should be contemplated, if necessary, by the relevant United Nations bodies.

In his report of 24 November 2003, the Secretary General “concluded that Israel is not in compliance with the Assembly’s demand”. He added that if he recognized “ Israel’s right and duty to protect its people from terrorist attacks, this duty should not be carried out in a way that is in contradiction with international law”. In so doing, the Secretary General confirms the illegality of the act, while setting aside the circumstances evoked by Israel to counter it.

In the face of Israel’s refusal to discharge its international responsibilities by reversing the illegal act, the General Assembly decided to seek the Court’s opinion on the legal consequences of the construction of the wall. The Court’s opinion is designed to provide the General Assembly with a clarification of these consequences so as to enable it to exercise its prerogatives under the Charter with full understanding of the facts 3. The legal opinion of the Court can also help other United Nations bodies, including the Security Council, with respect to any action they might be called upon to take.

1 The Security Council was unable to adopt a resolution on the illegality of the wall due to the negative vote of a Permanent member (S/PV 4841 and S/PV 4842, of 14 October 2003) which prompted the chairman of the Arab Group to request the resumption of the second Special Emergency Session of the General Assembly.

2 Article 35 on “restitution” in the Annex to G.A.Res.56/83 on the ILC’s articles on “State responsibility for internationally wrongful acts”.

3 As stated in the Court’s advisory opinion on the reservations to the Convention for the prevention and punishment of the crime of genocide: “the purpose of the present request is to clarify the action which might be taken by the United Nations” (ICJ, 1951 compendium, pg. 19).

In addition to Israel's non-compliance with the Assembly's demand, the Secretary General's report contains specific and documented information on the wall and its state of advancement.

The planned route of the wall stretching over a distance of 720 kilometres along the West Bank would result in the annexation de facto of 975 square kilometres (i.e. 16.6% of the entire West Bank)

According to Secretary General's report " this area is home to approximately 237,000 Palestinians, 170,000 in the West Bank and 220,000 in East Jerusalem. If the full route is completed, another 160,000 Palestinians will live in enclaves, areas where the Barrier almost completely encircles communities and tracts of land. The planned route incorporates nearly 320,000 settlers, including approximately 178,000 in occupied East Jerusalem". This is an indication of the gravity of the situation of Jerusalem which would not only be cut off from the interior, by a wall encircling the Palestinian population Abu Dis, but would also be separated on the other side from the rest of the West Bank by another wall which would incorporate all the settlements located on the outskirts of Jerusalem. Completed sections include two parts totalling 19.5 kilometres that flank Jerusalem, and a 1.5 kilometre concrete wall in the Eastern Jerusalem community of Abu Dis. When we look at the close links which exist between the villages which flank the Eastern and Southern parts of Jerusalem and the city itself, we can realize the great socio-economic damages caused to thousands of villagers as a result of the construction of the wall. As of the issuance of the report, close to 120 kilometres have already been completed in the West Bank, with the clear purpose of incorporating the largest possible number of settlements into the territory of Israel.

The construction of the wall and its security areas has necessitated requisitioning Palestinian lands on the basis of military orders which become effective on the date they are signed. They have no basis in Israeli law. In emergency cases, land is requisitioned even before the order is issued. The order then becomes effective retroactively following its signature. If the order is appealed, the appeal must be submitted to instances of the Israeli army.

In several places the wall runs deep into areas beyond the Green Line agreed upon in the Armistice of 3 April, 1949, which represents the de facto border between Israel and the Occupied Palestinian Territories.

In the wake of the June 1967 war and the occupation of the West Bank and Jerusalem, the Security Council requested that Israel withdraw its armed forces from occupied territories, on the basis of the principles of the Charter (Article 2), namely the prohibition of the use of force, and its corollary, "the

inadmissibility of acquisition of territory by force” (Security Council resolution 242 of 22 November, 1967). This resolution, related to resolution 338 of 22 October 1973, has binding force as the basis for a peaceful settlement, since it not only reflects the relevant principles of International Law, but has also been accepted as binding by all the warring parties, including Israel. This is the case regarding the Camp David Accords between Egypt and Israel in conflict of 17 September, 1978, the Declaration of Principles on Interim Autonomy Arrangements signed by Israel and the Palestine Liberation Organization (PLO) in Washington D.C. on 13 September 1993, and the Interim Accord on the West Bank and the Gaza Strip signed by Israel and the Palestine Liberation Organization on 28 September, 1995 in Washington.

The PLO was recognized as the sole legitimate interlocutor on the question of the status of the Palestinian Territories in a resolution on Palestine adopted by the 7th Arab Summit held in Rabat on 28 October 1974. This resolution “asserts the right of the Palestinian people to establish an independent National Authority under the auspices of the Palestine Liberation Organization, as the legitimate representative of the Palestinian people, over the entirety of the territory to be liberated”. When the National Council of the PLO proclaimed the State of Palestine, in Algiers, on 15 November 1988, the United Nations replaced the name of PLO with “Palestine” to participate, as an observer, in the United Nations system.

As far as the international community is concerned, Israel’s presence in the Palestinian territories in the West Bank beyond the Green Line in Gaza and East Jerusalem is part of an illegal regime of occupation of territories by force. The first legal consequence of constructing the wall is the further extension of the annexation of Palestinian territory and requires action on the part of the international community. When the Knesset, on 30 July 1980, passed a basic law stating that the “undivided and reunited City of Jerusalem is the eternal capital of Israel”, the reaction of the Security Council was swift. In resolution 478 of 20 August, 1980, it reaffirmed “that Israel’s adoption of the basic law is a violation of International Law and does not affect the application, to the Palestinian territories and other Arab territories occupied since 1967, including Jerusalem, of the Geneva Convention of 12 August 1949 on the protection of Civilians in times of war”.

The second set of consequences involves individual and collective rights of Palestinians variously affected by the construction of the wall.

In issuing the advisory opinion requested by the General Assembly, the Court will first have to deal with the annexation of the Occupied Palestinian

territories and secondly with violations of the rights of Palestinians in the occupied territory.

I- Annexation of the occupied territories:

Rather than dismantling the rapidly built and developed settlements, as consistently demanded by the international community, Israel, in building the separation wall, has chosen instead to proceed to important deviations from the Green Line, in order to incorporate the settlements within the Israeli side.

The importance of the construction of the wall and the means used for it indicate that this is a definitive barrier designed to determine unilaterally Israel's border, without any attempt to come to an agreement with the approval of United Nations and in conformity with Security Council resolution 242 and the principles of the Charter.

As stated by Professor John Dugard "however, it should be recognized that what we are presently witnessing in the West Bank is a visible and clear act of annexation under the guise of security. There may seem to be no official act of annexation of the Palestinian territory in effect transferred to Israel by the construction of the wall, but everything indicates that it is an act of annexation" 4.

Such annexation is illegal in accordance with the principle of the "inadmissibility of acquisition of territory by war".

Since passage of a general prohibition on the use of force (1928 Briand-Kellog Pact and Charter of the United Nations) 5 conquest is no longer considered a legitimate way of acquiring territory. The Declaration of Principles of International Law on Friendly Relations and Cooperation between States in accordance with the Charter of the United Nations (resolution 2625 XXV of 24 October 1970) provides a clear interpretation of this issue: "no territorial acquisition resulting from the threat of use of force shall be recognized as legitimate" irrespective of "whether the territory is acquired as a result of an act of aggression or in self-defence" 6.

4. Report of the special Rapporteur of the Human Rights Commission, Mr. John Dugard, on the situation of Human Rights in the Palestinian territory occupied by Israel since 1967, E/CN, 4/6 Para. 6, of 8 September, 2003, submitted under Resolution 1993/2 A of the Commission.

5. p. Dailler & A. Pellet: *Droit international public*, L.G.D.I, Paris, pg.531.

6. Dugard, same report, Para.14.

In order to fully fulfil the request of providing an advisory opinion, the Court should rule that there is de facto illegal annexation of the Palestinian territories located between the wall and the Green Line, it will have to clarify for the benefit of the General Assembly the legal consequences resulting from this situation.

First of all, Israel will have to put an end to the illegal act, as unsuccessfully demanded by the General Assembly in resolution ES-10/13 of 21 October, 2003, by stopping the construction of the wall and dismantling the portions already built. Should this illegal situation persist, the other United Nations Member States will have to draw the appropriate legal conclusions by refusing to recognize the annexation or giving Israel any form of assistance in the construction or maintenance of the wall. The Court's jurisprudence regarding the consequences of such illegal situations are well established: "when a competent United Nations body has determined with certainty the presence of an illegal situation, this determination must have consequences. In this situation, the Court would fail in its judicial responsibilities where it not to state that it is an obligation exists for members of the United Nations to put an end to this situation". The ICJ also added that South Africa, which bears responsibility for having created and prolonged a situation rightly deemed unlawful by the Court, is duly bound to put an end to it 7.

Regarding the relations of other Member States with a state which engages in unlawful conduct, it is the responsibility of the political bodies of the United Nations to define them and determine their scope 8 in accordance with principle of non recognition and non assistance.

The Assembly decided to request the Court's advisory opinion on the question of Israel's construction of the wall precisely in order to be duly informed on any possible future action.

7. Advisory opinion of the ICJ of 21 June, 1971, on the legal consequences for states of the continuing presence of South Africa in Namibia (South West Africa) in particular Security Council Res.276 (1970) 1971 Compendium, parkas-117& 118.

8. Ibid. Para.120.

On 30 July, 1980 the Security Council arrived at a conclusion regarding the legal consequences of Israel's law on the annexation of Jerusalem "in violation of international law", when it requested all Member States to consider it null and void (resolution 478 of 30 August, 1980). The Court should now consider extending this obligation of non-recognition to the part of the Palestinian territory which flanks East Jerusalem, specifically in connection with the construction of the wall.

Resolution 478 considers the law as "an obstacle to the establishment of a comprehensive, just and lasting peace in the Middle East".

There is a clear legal consequence in connection with the change of the status of Jerusalem, especially since the "result-based Roadmap for the permanent settlement of the Israeli-Palestinian conflict by the two States," established by the Quartet (S-2003/529 of 7 May, 2003) and approved by the Security Council (SC Res. 1515 of 19 November, 2003) stipulates that there will ultimately be "a negotiated settlement on the question of the status of Jerusalem, taking into account the political and religious concerns of the two parties, which will protect the religious interests of the Jewish, Christian and Muslim populations of the whole world and which conforms to the principle of two States: Israel, and a sovereign, independent, democratic and viable Palestine, living side-by-side in peace and security".

The annexation of Jerusalem, compounded by the construction of the wall, adversely affects not only the Israeli-Palestinian peace process, as each State will have links to this capital, but also its spiritual dimension for the three religions. The most salient of these interests are the protection of the Holy Sites and freedom of access for all faithful.

The organization of the Islamic Conference and its AL Qods Committee under the Chairmanship of His Majesty the late King Hassan II were established following the fire ignited in 1969 in the Al Aqsa Mosque, the third holiest site of Islam.

The annexation of the occupied Palestinian's territories will have consequences on the settlement of the Israeli-Palestinian conflict as well as the maintenance of international peace and security.

In fact, the Israeli-Palestinian Interim Accords on the West Bank and the Gaza Strip (Washington D.C. 28 September 1995) 9, as well as the Declaration of Principles on Provisional Autonomy Arrangements (Washington D.C. 13 September 1993) and the Roadmap are based on Israel's withdrawal from the territories occupied in 1967. By taking unilateral action and annexing part of the territories, Israel is in breach of its commitment to negotiate on the basis of land for peace.

This is an important legal consequence of the construction of the wall which will have to be considered by United Nations bodies in their efforts to bring about a peaceful settlement of the Israeli-Palestinian dispute.

The extension of Jerusalem and its total annexation go beyond the settlement of the Israeli-Palestinian conflict, as well as infringing the fundamental rights of millions of Muslim and Christian faithful to enjoy protection of and unhindered access to Holy Sites.

But, the construction of the wall also runs counter to some of the most fundamental rights of the Palestinians, a legal consequence which, if so determined by the Court, should prompt international bodies to take action to help the individuals concerned.

II- Violations of Palestinian Rights in the occupied territories:

For the purpose of including within Israeli territory the largest number of settlements from the occupied Palestinian territory, the wall, "in some places creates a barrier that completely encircles Palestinian villages while at many points it separates Palestinian villages from the rest of the West Bank and converts them into isolated enclaves. Qalqilia, a city with a population of 40,000, is completely surrounded by the wall and its residents can only enter or leave through a single military checkpoint open from 7 a.m. to 7 p.m." 10. Palestinians living between the wall and the Green Line are by and large effectively cut off from their land and work places. The various constraints and restrictions imposed by the construction of the wall seriously undermine the fundamental rights of the Palestinians, such as their humanitarian and human rights, as guaranteed under international legal instruments.

9. Para. 1 of Art. IX of the Accord states that "both parties consider the West Bank and the Gaza Strip as a single territorial entity whose status and integrity will be preserved during the interim period".

10. J. Dugard, same report, Para.9.

1- Violation of the humanitarian law:

We should begin by recalling that the Fourth Geneva Convention on the Protection of Civilians in Times of War of 12 August 1949 is applicable to the Palestinian territories occupied since 1967, including Jerusalem.

Although the government of Israel signed and ratified the Convention, it considers that it does not apply to the occupied territories since they do not fall under the sovereignty laws of neighbouring countries, namely Jordan and Egypt 11.

However, as stated by the International Committee of the Red Cross (ICRC) and the Conference of the High Contracting Parties, the Convention applies to territories occupied as a consequence of armed conflict, irrespective of their prior status 12.

The Security Council and General Assembly of the United Nations reaffirmed this conclusion 13.

While Israel's Supreme Court agrees with the acceptance by Israel Court of the Hague Regulation as an integral part of international custom, it refused to apply the Fourth Geneva Convention since the later has not been incorporated into the Israeli legal system 14.

11. Report of the Secretary General (24 Nov, 2003) pursuant to General Assembly resolution ES-10/13, Annex 1 "Summary legal position of the Government of Israel".

12. See 1975 Annual Report of the ICRC p.g. 22 and the Declaration adopted by the High Contracting Parties to the Fourth Geneva Convention on 15 July, 1999 pursuant to GA Res. ES-10/6.

13. see inter alia Security Council Res.904 of 18 March, 1994 and GA Res. 58/97 of 9 Dec., 2003.

14. HCI 606/78 Suleiman Tawfiq Ayyub et al vs-Minister of Defense et al, et 6: (1978) 33 (2) P.D. 113; 9 Isr YHR(1979) 337.

Nevertheless, the Israeli Supreme Court could well have used the same argument for the Convention as it did when it recognized the customary nature of the Hague Regulations, inter alia, by referring to the jurisprudence of the International Court of Justice. In its ruling on the matter of Nicaragua's military and paramilitary activities, the International Court of Justice, determined, on the basis of Article 1 of the four Geneva Conventions, that "the United States has an obligation "to respect" and "ensure respect" for these Conventions "in all circumstances", since the obligation stems not only from the Conventions themselves, but from the general principles of international laws which are simply reflected in the Conventions" 15. Since such a large number of States have ratified the Geneva Conventions (191 at present), "this universality (which) allows them to be considered as the authoritative formulation of Customary Law" has turned them into doctrine 16.

The customary nature of the regulations contained in the Fourth Geneva Convention places certain obligations upon Israel even though the text has not been ratified, or incorporated into national law through the adoption of special legislation. As it will be revealed, these are "self-executing" obligations which place upon a State certain prohibitions or limitations regarding its prerogatives as an occupying power and they apply even when there is no corresponding national law.

It is clear that the construction of a wall is a violation of the following provisions of the Fourth Geneva Convention:

Article 49 states that "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."

The annexation of the Palestinian territory through the construction of the wall and its enclosure of entire populations can be equated with mass forcible transfers.

Article 52 states that "All measures aimed at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited". This is clearly the case of what is referred to as the "Bantustanization" of the occupied Palestinian territory.

15. Military & paramilitary activities in Nicaragua (Nicaragua vs. United States of America) See Inter alia the advisory opinion of 8 July 1996 in the case of the illegality of the threat or use of nuclear weapons.

16. p. Daillier & A. Pellet, same doc., pg. 927.

Article 53 states that “ Any destruction by the Occupying Power of real 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.”

Construction of the wall has resulted in the destruction of Palestinian property, in violation of the Convention.

This is not a case of an absolute requirement of military operations. Such operations are usually targeted, for purposes of defending against attacks, while the wall is a construction designed to be a lasting “ fait accompli”. Nor can it be justified on the grounds of guaranteeing the safety and security of Israeli citizens who live on the occupied territories, since the establishment of settlements is itself illegal.

Finally it is important to emphasise that “the Occupying Power has the duty of ensuring the food and medical supplies of the population” (Art. 55 of the Convention) and yet the wall has separated thousands of Palestinians from their agricultural lands and their places of work.

Under International Law, the serious violations of Humanitarian Law perpetrated in the Palestinian territory should give rise to Israel’s criminal liability, which is an issue that the Court should assess in its review of the legal implications of the building of the wall.

2- Violations of fundamental rights of the human person:

Here again Israel challenged the application to the occupied Palestinian territories of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights while having ratified both.

Despite opposing the application of the Fourth Geneva Convention, Israel “asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and the Gaza Strip, whereas human rights instruments were intended for the protection of citizens from their own Government in times of peace” 17.

17. Report of the Secretary General (24 Nov., 2003) pursuant to General Assembly resolution ES-10/13, Annex 1 “ Summary legal position of the Government of Israel”.

International law is no longer limited to this restrictive view of the protection of human rights conceived as an area reserved to States in their relations with their own nationals. This protection is now incumbent upon States in their relations with all persons placed under their effective authority regardless of their nationality or legal status. Such obligations cannot be waved on the basis of their non-respect by another State, nor be the subject of the adoption of measures against the latter 18.

The fundamental rights of the human person, which are a guarantee of dignity and integrity, are not related to a person's nationality or a state's competence towards its nationals; they go beyond this relationship and involve the international community as a whole, which provides such guarantees through various legal and institutional mechanisms.

Thus, in the Barcelona Traction case, the Court was unequivocal in stating that “ a clear distinction must be drawn between states responsibility to the international community as a whole and the responsibility arising towards another state in the context of diplomatic protection. By virtue of its nature, the former concerns all states. In view of the importance of the rights in question, every state may be deemed to have a legal interest in the protection of these rights; these responsibilities are ‘erga omnes’ obligations. The Court added that such responsibilities stem from the wrongfulness of acts of aggression and genocide, as well as the rules and principles governing the fundamental rights of the human person, including the practice of slavery and racial discrimination”¹⁹.

These fundamental rights, such as respect for the physical and moral integrity of the individual without regard to the means available in a particular social context are binding on all states and are parts of jus cogens. Therefore it is the role of relevant international organizations to enforce these laws, and States cannot hide behind their sovereign rights. This is the case regarding the right to life, as well as the right to free choice of one's residence (Art. 12 of the International Covenant of Civil and Political Rights). The Committee on Human Rights (made up of experts chosen by the States Parties) having noted obstacles to “ the rights to liberty of movement as set forth in Art. 12” ²⁰, urged Israel to abide by these rights.

18. Art. 60 Para. 5 of the Vienna Convention on the Law of Treaties (1969), & Para. 50 of Res. A/56/83 of 28 Jan, 2002 on States Responsibility for Internationally Wrongful Acts.

19. Barcelona Traction Light & Power, Ltd., ruling rendered on 5 Feb., 1978, 1978 compendium paras. 32 and 33.

20. CC PR/c/79 add. 93 Para. 22.

Israel must therefore respect the fundamental rights of the human person not solely under the covenants, but also, and specially, under general international law. In this context, the construction of the wall has the legal consequence of depriving thousands of Palestinians of their fundamental rights, inter alia, the right to freedom of movement and the establishment of their residence in all areas of the occupied territories.

It follows that the encirclement of Palestinians between the wall and the Green Line or in enclaves is a violation of Israel's international obligations to abide by the fundamental rights of the human person, obligations which are binding in Jus Cogens. This violation is even more flagrant in the case of East Jerusalem which is cut off from its immediate environment, where the wall flanking Abu Dis bars many Palestinians from access to their homes in the Old City, from going to see their relatives and friends, from visiting holy sites or just engaging in their normal activities.

In conclusion, in the context of the Court's decision of 19 December 2003, the Kingdom of Morocco makes this statement to provide some information on the legal implications of the wall which is being built by Israel. This information relates to the right to land and the rights of individual persons as well as to our common spiritual values.

We should assist the Court to provide the Advisory opinion requested by the General Assembly, thus contributing to the international peace and security for the benefit of all the population of the Middle East region.

THE AMBASSADOR OF HIS MAJESTY THE KING

Ali EL MHAMDI