

CR 2004/1

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 2004

Public sitting

held on Monday 23 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)

VERBATIM RECORD

ANNÉE 2004

Audience publique

tenue le lundi 23 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)

COMPTE RENDU

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

 Registrar Couvreur

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

M. Couvreur, greffier

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. Peter 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;

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-Hussien, 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, 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. Nigel Ashton, Historical Adviser to the Government of the Hashemite Kingdom of Jordan;

Mr. Mahmoud Al-Hmoud, Legal Adviser;

Mr. Bisher Al Khasawneh, Legal Adviser;

Mr. Samer Naber, Legal Adviser;

Mr. Ashraf Zeitoon, 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. Peter 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;

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-Hussien, 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 du Royaume des Pays-Bas;

Sir Arthur Watts, conseiller juridique principal du Gouvernement du Royaume hachémite de Jordanie;

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

M. Nigel Ashton, conseiller historique du Gouvernement du Royaume hachémite de Jordanie;

M. Mahmoud Al-Hmoud, conseiller juridique;

M. Bisher Al Khasawneh, 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 session is open.

The Court meets today to hear oral statements and comments in accordance with the terms of its Order of 19 December 2003, with regard to the request for advisory opinion submitted to the Court by the General Assembly of the United Nations on the question of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

*

On 8 December 2003, by resolution A/RES/ES-10/14, the General Assembly of the United Nations decided to request an advisory opinion from the Court. On the same date, the text of the resolution was transmitted by a letter from the Secretary-General of the United Nations to the Court and received in the Registry by facsimile on 10 December 2003. I shall ask the Registrar to read from the operative paragraph of that resolution the question on which the Court is asked to “urgently render an advisory opinion”.

Le GREFFIER:

«Quelles sont en droit les conséquences de l'édification du mur qu'Israël, puissance occupante, est en train de construire dans le Territoire palestinien occupé, y compris à l'intérieur et sur le pourtour de Jérusalem-Est, selon ce qui est exposé dans le rapport du Secrétaire général, compte tenu des règles et des principes de droit international, notamment la quatrième convention de Genève de 1949, et les résolutions consacrées à la question par le Conseil de sécurité et l'Assemblée générale ?»

The PRESIDENT: In accordance with Article 66, paragraph 1, of the Statute, all States entitled to appear before the Court were given notice forthwith of the request for advisory opinion. The United Nations and its Member States were also notified, under Article 66, paragraph 2, of the Statute that, by an Order dated 19 December 2003, the Court had determined that they were likely to be able to furnish information on all aspects raised by the question submitted to it and that, by the terms of that Order, it had fixed 30 January 2004 as the time-limit within which written statements might be submitted to the Court. Palestine was also notified that, by its Order, the Court had decided

“that, in light of General Assembly resolution A/RES/ES-10/14 and the report of the Secretary-General transmitted to the Court with the request, and taking into account the fact that the General Assembly has granted Palestine a special status of observer and that the latter is co-sponsor of the draft resolution requesting the advisory opinion, Palestine may also submit to the Court a written statement on the question within the above time-limit”.

By the same Order, the Court decided, “in accordance with Article 66, paragraph 4, of the Statute and Article 105 of the Rules of Court, to hold hearings during which oral statements and comments may be presented to the Court by the United Nations and its Member States, regardless of whether or not they have submitted written statements” and fixed 23 February 2004 as the date for the opening of those hearings. The Court further decided that, for the reasons I mentioned earlier, “Palestine may also take part in the hearings due to open on 23 February 2004”.

It also invited the United Nations and its Member States, as well as Palestine, to inform the Court’s Registry, by 13 February 2004 at the latest, if they intended to take part in the oral proceedings.

The Court subsequently decided, pursuant to Article 66 of its Statute, upon requests submitted by the League of Arab States and the Organization of the Islamic Conference respectively, that those two international organizations were likely to be able to furnish information on the question; and that accordingly they might submit written statements within the same time-limit, fixed by the Court in its Order of 19 December 2003, and participate in the oral proceedings opening on 23 February 2004.

*

Moreover, on 30 January 2004, the Court issued an Order regarding its composition in the case.

*

Within the time-limit fixed by the Court for that purpose, written statements were filed, in the order of receipt, by:

Guinea, Saudi Arabia, the League of Arab States, Egypt, Cameroon, the Russian Federation, Australia, Palestine, the United Nations, Jordan, Kuwait, Lebanon, Canada, Syria, Switzerland, Israel, Yemen, United States of America, Morocco, Indonesia, the Organization of the Islamic

Conference, France, Italy, the Sudan, South Africa, Germany, Japan, Norway, United Kingdom, Pakistan, Czech Republic, Greece, Ireland on its own behalf, Ireland on behalf of the European Union, Cyprus, Brazil, Namibia, Malta, Malaysia, the Netherlands, Cuba, Sweden, Spain, Belgium, Palau, Federated States of Micronesia, Marshall Islands, Senegal and the Democratic People's Republic of Korea.

*

As I indicated a moment ago, the Court is meeting today to hear oral statements and comments relating to the request for advisory opinion in a single series of hearings. In this regard, the Court has been informed that the following participants, set out in speaking order, wish to take the floor during the current oral proceedings:

Palestine, South Africa, Algeria, Saudi Arabia, Bangladesh, Belize, Cuba, Indonesia, Jordan, Madagascar, Malaysia, Senegal, the Sudan, the League of Arab States and the Organization of the Islamic Conference.

The specific arrangements for the hearings have been made known by the Registry to the participants I have just mentioned, by means of various communications. The schedule of the hearings has also been made public by Press Release No. 2004/9 dated 18 February 2004. This morning, the Court will hear Palestine; and this afternoon, South Africa, Algeria, Saudi Arabia and Bangladesh will take the floor. Palestine will speak for a maximum duration of three hours and all the other participants in the oral proceedings will speak for a maximum of 45 minutes each.

Before inviting the delegation of Palestine to address the Court, I would add that, in accordance with Article 106 of the Rules of Court, the Court has decided that the written statements submitted in the current advisory proceedings are to be made accessible to the public with effect from the opening of the present hearings. Further, these written statements will from today be posted on the Court's website, to allow for consultation of both the original language version and the unofficial translation, as submitted to or prepared by the Registry.

I now give the floor to His Excellency Mr. Nasser Al-Kidwa, Ambassador and Permanent Observer of Palestine to the United Nations.

Mr. AL-KIDWA:

INTRODUCTORY STATEMENT

1. Mr. President, Members of the Court, it is my honour to address you on behalf of Palestine. I wish to thank the International Court of Justice for granting Palestine the opportunity to participate in these advisory proceedings on the “*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*”.

2. I stand before you as a representative of the Palestinian people, the indigenous people of the land, who for too long have been denied the right to self-determination and sovereignty over their land and half of whom remain refugees. The Palestinian people have been subject to a military occupation for almost 37 years. They have been dehumanized and demonized, humiliated and demeaned, dispossessed and dispersed, and brutally punished by their occupier. The occupation has systematically denied them their basic rights and freedoms and has controlled almost every single aspect of their lives.

3. This case, however, is not about the whole of the Israeli-Palestinian conflict — it is about the Wall. This Wall is being constructed almost entirely in the Occupied Palestinian Territory. This Wall is not about security: it is about entrenching the occupation and the *de facto* annexation of large areas of Palestinian land. This Wall, if completed, will leave the Palestinian people with only half of the West Bank within isolated, non-contiguous, walled enclaves. It will render the two-State solution to the Israeli-Palestinian conflict practically impossible.

4. The Wall is not just a physical structure; it is a whole régime. It encircles entire communities in walled enclaves and, if completed, will wall-in most of the Palestinian population. It is already causing the displacement of Palestinian civilians and has imprisoned thousands of Palestinians between it and the Armistice Line of 1949, the Green Line. There is, moreover, without a doubt, a correlation between the route of the Wall and the illegal Israeli settlements in the Occupied Palestinian Territory and the water resources in the area.

5. There is also, of course, a correlation between the route of the Wall and Israel’s long-standing illegal policies and practices with regard to Jerusalem. East Jerusalem *is* occupied territory. The international community has never recognized Israel’s illegal annexation of East Jerusalem. The route of the Wall will clearly entrench this annexation. It will compound the

humanitarian hardships being faced by the Palestinian inhabitants of the city. Moreover, it will isolate the city from the rest of the Palestinian population, obstructing their access to the city and its Holy Places.

6. We are here because the United Nations has a permanent responsibility — legally, politically and morally — for the question of Palestine until the question is resolved in all its aspects. The General Assembly has reaffirmed this in at least 25 resolutions. It is, after all, the General Assembly that, in accordance with the Charter of the United Nations, dealt with mandated Palestine, deciding on 29 November 1947, in resolution 181 (II), to partition Palestine into two States, one Jewish and one Arab. The Arab State has, of course, not yet been realized; and thus the Palestinian people have been unable to exercise their right to self-determination. Indeed, Palestine is still not a Member State of the United Nations, but remains an observer. Since 1947, however, the General Assembly has never ceased dealing with the question of Palestine or its aspects.

7. The Security Council has also continuously dealt with the question of Palestine. It first placed the “Situation in Palestine” on its agenda in 1948. The Council’s attention to the matter increased after the Israeli occupation in 1967. Since then, the Council has adopted 38 resolutions addressing the situation in the Occupied Palestinian Territory, 26 of which recall the Fourth Geneva Convention, including its applicability to the territories occupied by Israel since 1967, including Jerusalem.

8. These resolutions, of course, remain valid. Israel has complied with almost none of them. The Council has, historically, failed in its responsibility for the maintenance of international peace and security in the case of Palestine. It has failed to follow up the implementation of its own resolutions and take the necessary measures to ensure compliance, and has failed to prevent the continuous and, at times, *massive* violations of international law and of the Charter itself. The basic reason has been the use, or the threat of use, of veto by one of the Council’s Permanent Members. In the 30 years between 1973 and 2003, 27 vetoes have been cast on the Palestinian issue. The most recent was cast on 14 October 2003, when the issue of the construction of the Wall in the Occupied Palestinian Territory was brought before the Council and it failed to act.

9. Over the years, in light of the Council’s inaction, the General Assembly has tried to discharge its own responsibilities in line with General Assembly resolution 377 (V) of 1950. Four

of its ten emergency special sessions have been on Palestine and the Middle East situation. In reaction to the last veto, the tenth emergency special session was resumed to consider the situation. Like the Security Council, the Assembly conducted a serious debate on the issue and two draft resolutions were submitted. One requested the International Court of Justice to issue an advisory opinion on the Wall. After intensive consultation and negotiations, however, the Members of the European Union introduced a draft resolution, with the understanding that the co-sponsors of the original two drafts would not insist on a vote on those drafts. The European Union co-sponsored draft resolution was adopted by an overwhelming majority, on 21 October 2003, as resolution ES-10/13.

10. Three specific elements of that resolution should be highlighted: First, it demanded *“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”*. Second, it requested the Secretary-General to report on compliance. And, third, it expressly stated that upon receipt of the first report *“further actions should be considered, if necessary, within the United Nations system”*. The wording of that third element reflected a compromise on the means of following up the issue, including the possibility of a request for an advisory opinion from this Court on the legal consequences in case of non-compliance. The phrase could not have meant anything other than a reference to the Court, and, regardless of the claim made in one Written Statement¹ of a different understanding, it is indisputable that the idea for requesting an advisory opinion was widely discussed and debated.

11. Following the resolution’s adoption, Israel not only continued but accelerated its construction of the Wall on Palestinian territory. The Secretary-General, pursuant to the resolution, presented a report containing a clear factual presentation about the Wall. It concluded that *“Israel is not in compliance with the Assembly’s demand that it stop and reverse the construction of the wall in the Occupied Palestinian Territory”*². Accordingly, the emergency special session resumed again on 8 December 2003, and adopted by a large majority resolution ES-10/14 requesting this

¹Written Statement of the United Kingdom of Great Britain and Northern Ireland.

²A/ES-10/248.

Court to urgently render an advisory opinion on the legal consequences arising from Israel's construction of the Wall.

12. Mr. President, Members of the Court, Israel's Written Statement to the Court claims that it does not deal with the merits of the case. We beg to differ. The Israeli statement is rife with attempts to justify the construction of the Wall through the presentation of a detailed case on terror attacks and through political arguments, including on the Road Map. Israel repeatedly refers to the Road Map and to Security Council resolution 1515 (2003). This is ironic. The Government of Israel has never wanted this Road Map, it has never wanted the Security Council's endorsement of it and has repeatedly caused the delay of both. After the Road Map was formally presented in April 2003, the Israeli Government would not say that it accepted the Road Map itself but only what it called "*the steps set out in the Roadmap*". Even then, in accordance with the Israeli Cabinet Statement of 25 May 2003, 14 reservations were attached to it.

13. Israel later vehemently objected to the Russian Federation initiative to bring the Road Map to the Security Council for endorsement. When Security Council resolution 1515 (2003) was finally adopted on 19 November 2003, the Council held no debate. This was due to Israel's opposition. Then, on 17 December 2003, Israel undermined the traditional consensus on a General Assembly resolution on "Assistance to the Palestinian People" specifically because the European Union, co-sponsoring the resolution, added a paragraph welcoming the endorsement by the Council of the Road Map in resolution 1515. Israel made its adherence to consensus on that resolution conditional upon the removal of the reference to resolution 1515, which did not occur.

14. Mr. President, Members of the Court, there has been no shortage of peace initiatives on the Middle East and the Israeli-Palestinian conflict. Yet, since the adoption of Security Council resolution 242 (1967), and throughout every one of the subsequent initiatives, Israel has simultaneously been engaged in the intensive colonization of our land. It has transferred 400,000 illegal settlers to the Occupied Palestinian Territory, including East Jerusalem. It is continuously attempting to change the status, physical character, nature and demographic composition of that territory, most recently through its construction of the Wall. Actually, since the signing in 1993 of the Declaration of Principles between the Government of Israel and the Palestine Liberation Organization, Israel not only continued its illegal settlement activities and expansion but actually

doubled the number of its settlers in the Occupied Palestinian Territory, including East Jerusalem. Doubled. How can it be expected that the Palestinian people would continue to believe that peace was imminent under such circumstances?

15. The Road Map could be different; and we hope that it will be. It is rooted in the principles of resolution 242 (1967) and in the vision affirmed by the Security Council in resolution 1397 (2002) of “*a region where two States, Israel and Palestine, live side by side within secure and recognized borders*”. This initiative deserves a chance — we want it to succeed. But Israel cannot once again be permitted to continue its ceaseless taking of Palestinian property and rights, under the cover of the peace process or the semblance of a peace initiative. The legal rights of the Palestinian people cannot simply be ignored or suspended whenever there is a peace process under way. That plays into the hands of extremists on both sides. One of our chief hopes is that the Court will make it clear that the Palestinian people have rights and that international law is not irrelevant to the situation in the Occupied Palestinian Territory.

16. There is near unanimity among the States in the world that building this Wall is unacceptable. The overwhelming majority of Member States believe that it is in contradiction to international law. The same overwhelming majority believes, as one group, the European Union, has officially declared, that the Wall renders “*the two-State solution physically impossible*”. Saving the Road Map thus and the prospects for peace requires a cessation of the construction of this Wall, its removal and non-recognition by States of any of its consequences.

17. With regard to the Quartet, it has expressed its concerns about the Wall. Moreover, despite the implication in one Statement to the Court³ that the members of the Quartet are in agreement that an advisory opinion would likely hinder the peace process, it should be clarified that there is no agreement among the Quartet with regard to asking the Court not to render the requested advisory opinion. The Statement of the Russian Federation does not ask the Court to refuse to give an opinion. The Statement of the United Nations does not do so. Nor does the European Union Statement. Ireland’s Minister for Foreign Affairs affirmed this in the Irish Senate on 4 February 2004, stating that “*Contrary to some press reports, the EU has not asked the ICJ to refrain from issuing an Advisory Opinion. There would have been no consensus to adopt such a*

³Written Statement of the United Kingdom of Great Britain and Northern Ireland.

position.”⁴ Indeed, we even doubt whether the Statement of the United States could be characterized as such.

18. Some States have said that an advisory opinion could harm the final status issues that should be left to the parties for negotiation. It is clearly Israeli actions in the Occupied Palestinian Territory, and not any Court opinion, that will constitute illegal facts on the ground in relation to final status issues. Nevertheless, we do agree that the Court is not being asked to advise on solutions for the final status, although it will undoubtedly be necessary to make some reference to final status issues due to the intricate relationship between the Wall and the settlements and the character and route of the Wall in and around East Jerusalem.

19. Mr. President, Members of the Court, I wish now to address the issue of the suicide bombings, the security situation and Israel’s policies and practices in the Occupied Palestinian Territory. Israel claims that the construction of the Wall is a temporary defensive measure to prevent suicide bombings and provide security for Israel. This is not true, and the proof is simple. If this were in fact the case, then Israel would have constructed the Wall on its territory along the Armistice Line of 1949 and not in departure of the Armistice Line and almost entirely in the Occupied Palestinian Territory. If Israel wanted a Wall for security, it could construct it on its territory and raise it to 80 m rather than 8 m if it wished. This would not bode well for mutual coexistence of course, but no one would challenge its legality in principle.

20. The suicide bombings have led to the death of 438 Israelis in Israel. Four hundred and ninety Israelis, mostly soldiers and settlers, have also been killed by other kinds of violence. In contrast, since September 2000 and as of 18 February 2004, the Israeli occupying forces have directly killed, including many by extrajudicial execution, a total of 2,770 Palestinian civilians, including children, women and men. Of those killed, more than 1,200 Palestinians have been killed by the Israeli occupying forces in the Gaza Strip, even though Israel has already built another kind of wall surrounding the Gaza Strip. The question that must be asked is: how then will this Wall being built by Israel solve the security problem? If anything, its route and the illegal measures entailed in its construction ensure that it will actually exacerbate the security situation. It is more than obvious that when you deprive an entire people of their rights, expropriate their land

⁴Statement to Senate of Ireland, 4 February 2004; European Union Presidency (January–June 2004).

and property and wall them into enclaves and ghettos, you are not solving the security problem but creating an untenable situation that will combust.

21. At this time, I wish to make our position vis-à-vis the suicide bombings very clear. We have consistently, repeatedly and unequivocally condemned these bombings. We condemn any violence directed at civilians in this conflict, whether Israeli or Palestinian. We consider the suicide bombings to be unlawful. They are also harmful to the just and honourable cause of the Palestinian people.

22. That said, I draw attention to the fact that the first suicide bombing occurred nearly 27 years after the onset of this oppressive military occupation of the Palestinian people. This phenomenon is the result of Israeli policies and measures, including the relentless colonization of our land. It is not the cause of those policies and measures. It is also imperative that a distinction be made between such unlawful acts of violence against Israeli civilians in Israel and acts of Palestinian resistance to the Israeli occupation and to military attacks by the occupying forces, consistent with international law. Nevertheless, Palestine reaffirms its commitment to a peaceful, negotiated solution to end this occupation and end this conflict.

23. There is a humanitarian crisis in the Occupied Palestinian Territory. Serious violations and grave breaches of international humanitarian and human rights law are being committed. The Wall, part and parcel of these violations and breaches, is severely exacerbating this situation. How can the Road Map truly succeed under such circumstances? It cannot. How can Israel expect the Palestinian side to be able to act effectively when it has destroyed Palestinian security capabilities and has confined the leader of the Palestinian people and elected President of the Palestinian Authority, Yasser Arafat, for more than two years, undermining the leadership's ability to properly function? It cannot. How can Israel's construction of this Wall and its continued confiscation and colonization of the Palestinian land lead to peace and security for both peoples? It cannot.

24. The colonization by Israel of the Palestinian land under its occupation and the attempts to change its legal status are not new phenomena. What is new, however, is the magnitude of Israel's attempt to change the legal status and to effect the *de facto* annexation of large parts of the Occupied Territory by means of the Wall. The Wall will be the culmination of all previous illegal measures and practices carried out by Israel since 1967 towards that end. It will destroy the hopes

of the Palestinian people for the realization of their inalienable rights, including the right to self-determination, and destroy their faith in the rule of international law and the international community's ability to uphold it in the face of such grievous violations. It will destroy the hopes of the international community for implementation of the Road Map and the "two-State" solution of Israel and Palestine, both living side by side within secure and recognized boundaries. Such a lamentable outcome must be avoided at all costs.

25. Mr. President, Members of the Court, on behalf of Palestine, the Palestinian people and their leadership, I respectfully request the Court to give full consideration to the gravity of this situation and to the importance of an advisory opinion at this critical moment. In your most recent address before the General Assembly, Mr. President, you underlined the role of the Court as the "*guardian of international law*" and you assured the Assembly "*that the Court will pursue its efforts to respond to the hopes placed in it*". The Palestinian people have great hopes for this proceeding and have full confidence that the Court will help the General Assembly to carry out its functions by rendering the advisory opinion. This would allow the Assembly to make its own substantial contribution in response to Israel's continued construction of the Wall and the ensuing threats to the prospects for peace between the two peoples. It is our firm belief that such an advisory opinion can lead to positive developments and perhaps even a chain of events similar to that resulting from the Court's Advisory Opinion on Namibia.

26. Mr. President, Members of the Court, our delegation now wishes to make a brief factual presentation of what we believe to be the minimum necessary to help clarify the legal submissions that will follow. It will be made by Ms Stephanie Koury. She will be followed by Professor James Crawford, who will address the question of admissibility of the request. He will be followed by Professor Georges Abi-Saab, addressing the question of the application of international humanitarian law and international human rights law in the Occupied Palestinian Territory, and then by Professor Vaughan Lowe, who will speak on the violations of those laws. Our submissions will be closed by Professor Jean Salmon, who will speak on the relation between the Road Map and the right of self-determination and on the legal consequences of the Wall.

Thank you, Mr. President. Thank you, Members of the Court.

The PRESIDENT: Thank you, Mr. Al-Kidwa. I now give the floor to Ms Stephanie Koury.

Ms KOURY:

FACTUAL PRESENTATION

1. Mr. President, Members of the Court, this factual presentation is in two parts. I will describe the nature and route of the Wall. Then, I will outline its effects at the local, regional and national levels. This presentation is based on reports included in the United Nations dossier before you. I am joined by Professor Jarat Chopra of Brown University.

I. The nature and route of the wall

[Slide 1: Cross section of the Wall complex⁵]

2. Now, let me turn to the nature and route of the Wall. The Wall complex varies in width between 30 m and 100 m, with closed military zones on either side. As the slide indicates, the Wall complex includes a number of components: stacks of coils of barbed and razor wire, trenches, an electrified fence with automatic sensors, a paved road for Israeli patrols, a sand trace path to detect footprints, a dirt area, and surveillance cameras.

[Slide 2: Section of the Wall complex⁶]

3. This photograph shows these components of the Wall complex.

[Slide 3: Concrete sections of the Wall⁷]

4. In some places, the Wall is made of concrete and is 8 m high, including around Occupied East Jerusalem. In Qalqilya, the concrete Wall is lined with watch towers approximately 300 m apart.

[Slide 4: Gate installed along the Wall⁸]

5. Gates are also one of the features of the Wall. According to the United Nations, there are 37 gates built into the Wall. Approximately half of these gates are not operating. Some gates open for short 15-minute intervals only two or three times a day. However, the opening times change unpredictably and Palestinians have to wait for soldiers to open the locks. A number of gates have never been opened, like the one shown on this slide.

⁵Cross section of the Wall complex, document 1, Palestine's Written Statement, Volume 1, maps and graphics.

⁶Photograph 1, Palestine's Written Statement.

⁷Photographs 15 and 4, Palestine's Written Statement.

⁸Photograph 14, Palestine's Written Statement.

[Slide 5: Phases of the Wall in the Occupied Palestinian Territory]

6. The United Nations Secretary-General's reports divide construction of the Wall into four phases. A fifth phase of construction is projected, as noted by the United Nations Special Rapporteur and the Commission on Human Rights. On this map, the blue represents Israeli settlements. Phase A of the Wall is completed and is illustrated by the solid red line. This phase extends from Salem to the Israeli settlement of "Elkana". Phase A also includes two sections of the Wall north and south of Jerusalem. Phase B extends from the Jordan River and south to Tayasir. This latter portion is the beginning of an Eastern Wall. A majority of Phase B has been completed, and the broken red lines indicate areas either approved or under construction. Phase C of the Wall extends from the settlement of "Elkana" to Jerusalem. Much of the current construction is occurring in this phase. Phase D has been approved and will extend from the Israeli settlement of "Gilo" to the south-east of Hebron. A fifth phase in the east is projected to extend along the entire Jordan Valley.

7. If completed, the total length of the Wall will be between 700 km and 800 km, and it will enclose some 56.5 per cent of the West Bank inside the Wall.

[Slide 6: The Wall in Occupied East Jerusalem]

8. This slide illustrates how the Wall significantly deviates from the Green Line in Occupied East Jerusalem. It weaves in and around the Palestinian population, residing in areas indicated in grey, separating Palestinian from Palestinian. It also creates enclaves of Palestinian populated areas and isolates East Jerusalem from the remainder of the West Bank. The Wall denies worshippers access to holy sites in Jerusalem's Old City. You can also see how the Wall extends around Israeli settlements, which are shown in blue on the map.

[Slide 7: The Wall and settlement expansion around Qalqilya]

9. The relationship between the route of the Wall and settlement expansion is clearly illustrated in the Qalqilya area. The Wall has been routed around the planned expansion areas of the "Zufin" and "Alfe Menashe" settlements, as shown by the light blue. The Wall is also routed around the roads that link the settlements with each other and to Israel, as shown by the light blue lines. The result of this pattern is the enclosure of Qalqilya.

[Slide 8: The Wall and Israeli settlements expansion]

10. Not only in Qalqilya, but throughout the West Bank, the route of the Wall corresponds to Israeli settlements. The dark blue represents existing settlements. The light blue represents planned settlement expansion areas. The grey represents the jurisdictional areas of settlements, which are reserved for future settlement expansion and other settlement activities. The route of the Wall, in red, corresponds to these Israeli settlement areas.

II. The effects of the Wall

11. Mr. President, Members of the Court, I would now like to draw your attention to the effects of the Wall at the local, regional, and national levels.

[Slide 9: Local impacts of the Wall: Focus Jayyus]

12. At the local level, Palestinians are being separated from their land and deprived of their water resources. On this map, the Green Line is indicated. The yellow line represents Palestinian village boundaries. The brown areas are agricultural areas. The blue circles are water wells. And the red line is the Wall weaving its way through the West Bank. The blue areas are Israeli settlements and the dotted blue lines again represent planned settlement expansion.

13. Jayyus is a village of approximately 3,000 people, the majority of whom depend on farming. Approximately two thirds of the village land is now situated to the west of the Wall, separating villagers from their land and water wells. Consequently, these farmers of Jayyus are no longer investing in their land. The picture on the right is a view from Jayyus of its land on the other side of the Wall.

[Slide 10: Regional impacts of the Wall: Focus Qalqilya area]

14. At the regional level, the Wall has also had a serious impact. For instance, due to the complete enclosure of Qalqilya by the Wall and a gate, some one third of the shops have closed and unemployment rates have increased. The impact on the villages dependent upon Qalqilya has also been severe. People's access to basic services has declined dramatically. For example, a United Nations hospital in Qalqilya has experienced a 40 per cent decrease in caseloads since the enclosure of Qalqilya and the surrounding areas. Both Qalqilya and the neighbouring villages are separated from almost all of their agricultural land in what is considered to be part of the "Bread basket" of the West Bank. Because of these conditions, Palestinians are leaving the area.

[Slide 11: The Wall and gate closures⁹]

15. The Wall is also disrupting access to education. These photographs illustrate students at gates waiting for Israeli soldiers to open the locks and allow them through.

[Slide 12: National impacts of the Wall]

16. At the national level, a significant portion of the water fields will be situated outside of the Wall, as shown by the shaded areas on the left map. Consequently, Palestinian capacity to develop the national economy and agricultural base will be significantly curtailed.

17. As shown by the map on the right, main urban centres throughout the West Bank are being isolated by the construction of the Wall. As in the case of Qalqilya, the capacity of these main centres to provide regional services and to drive economic development is being extensively eroded by the Wall. The Wall is also rerouteing the movement of goods and people, significantly increasing travel times.

[Slide 13: The closed zone and permit system]

18. Exacerbating the existing effects caused by the Wall, Israel has issued military orders declaring the area between the Wall and the Green Line a "Closed Zone". According to these military orders, Palestinian residents over the age of 12 within the Closed Zone must apply for a permit to live in their own homes and remain on their land. In addition, Palestinians living inside the Wall wishing to access their land, to work or visit relatives in the Closed Zone must obtain access permits. Israeli citizens are exempt from this permit system. Significantly, obtaining a permit to enter the Closed Zone does not guarantee access because of gate closures. Altogether these procedures are causing Palestinians to leave their homes.

Thank you, Mr. President, Members of the Court. I would now like you to call on Professor Crawford.

The PRESIDENT: Thank you, Ms Koury. I now give the floor to Professor Crawford.

⁹Photographs 21 and 22, Palestine's Written Statement.

Mr. CRAWFORD:

CONSIDERATIONS OF JURISDICTION AND ADMISSIBILITY

1. Mr. President, Members of the Court, it is both an honour and a grave responsibility to appear before you today to address the issues of jurisdiction and admissibility of the request. The responsibility is the more grave in that a number of States have objected to the request, even though they, along with the vast majority of the international community, consider the Wall to be unlawful.

2. However it is possible to respond to these objections just by using the language the Court has used repeatedly in its earlier opinions. Repeatedly it has been objected that requests raised political issues, were politically motivated, were inopportune, affected United Nations Member States who are parties to the dispute, involved controversial questions of fact or would prejudice negotiations. Repeatedly the Court has rejected these arguments. While you maintain your *jurisprudence constante* you cannot, I respectfully suggest, decline to answer the question now put to you.

3. This presentation will be classically in two parts. In the first part I will briefly remind the Court of the words you have used in earlier cases when deciding to respond to advisory opinions. Your own words answer all the *general* objections that have been made against the admissibility of the request.

4. Then, in a second part I propose to deal with three particular arguments made against admissibility, arguments having *particular* relevance to the Occupied Territory as such. I will show that each of these arguments, properly understood, is a reason *for* you to respond to the request. Far from being objections, they are arguments in favour.

A. General objections against jurisdiction and admissibility

5. I turn to the general objections in my first part.

(1) Israel's *ultra vires* objection

6. First, Israel objects that: “the request is *ultra vires* the competence of the 10th Emergency Special Session and/or the General Assembly . . . [as] there was no failure by the Security Council to act”.

7. There is an initial and simple answer to this. The General Assembly's request for this opinion was made in a validly adopted resolution. In the *Namibia* case, you said: "A resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted."¹⁰ I stress that this is not a matter of fundamental competence but of internal procedure, to use the distinction you drew in the *Use of Nuclear Weapons*¹¹ Advisory Opinion.

8. But if it is necessary to go beyond this, the answer is still quite clear. Ambassador Al-Kidwa has outlined the circumstances surrounding the General Assembly's request. In the light of what he has said, nothing in the Uniting For Peace Resolution prevented the Assembly's adoption of this request. The request does not of course require the Court to take "action" within the meaning of Article 11, paragraph 2, of the Charter, nor did it involve such "action" by the General Assembly. No question involving the Charter distribution of authority between the General Assembly and the Security Council is raised. Again, I quote your words: "The Court considers that the kind of action referred to in Article 11, paragraph 2, is coercive or enforcement action . . . The word 'action' must mean such action as is solely within the province of the Security Council."¹² Requesting this advisory opinion is not solely within the province of the Security Council¹³. It is as simple as that.

9. I turn to the other general objections. The starting point here is that the Court "should not, in principle, refuse to give an advisory opinion", as you have many times said. As you recalled in *Threat or Use of Nuclear Weapons*: "In accordance with the . . . jurisprudence of the Court, only 'compelling reasons' could lead it to such a refusal . . . There has been no refusal, based on the discretionary power of the Court, to act upon a request for an advisory opinion in the history of the present Court . . ."¹⁴

¹⁰*I.C.J. Reports 1971*, p. 22 , para. 20.

¹¹*I.C.J. Reports 1996 (I)*, p. 82, para. 29. See also *Expenses Advisory Opinion, I.C.J. Reports 1962*, p. 168.

¹²*I.C.J. Reports 1962*, p. 164.

¹³See also *Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, p. 233, para. 12.

¹⁴*I.C.J. Reports 1996 (I)*, p. 235, para. 14.

10. This position applies even more powerfully to the General Assembly, which the Charter expressly authorizes to request “an advisory opinion upon *any* legal question”¹⁵. And there can be no doubt that the question asked of the Court is a legal question, as you have consistently defined that term¹⁶.

(2) The politicization objection

11. Then it is objected that the request “politicizes the Court” and that the Court should therefore refuse to give the opinion¹⁷. But as you said in *Threat or Use of Nuclear Weapons*:

“Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law.”¹⁸

12. Indeed, as you noted in the WHO Regional Headquarters Advisory Opinion: “in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable to the matter under debate . . .”¹⁹ — *particularly*.

(3) The objection that the Court would be repeating the General Assembly’s views

13. Then it is objected that the General Assembly has already made up its mind and so you should remain silent. According to one statement: “An opinion by the Court would provide no guidance to the General Assembly, as that body has already pronounced itself on the issue.”²⁰ But the General Assembly had already pronounced itself on the underlying issue in earlier cases — in *Namibia*, both the General Assembly and the Security Council had done so. Here, as in *Namibia*, you are asked to look at the legal consequences of a given situation in the light of certain resolutions; here, as there, you need to look at the legal position underlying those resolutions.

¹⁵Charter, Article 96, paragraph 1 (emphasis added).

¹⁶E.g., *Western Sahara, I.C.J. Reports 1975*, p. 18, para. 15, cited in *Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, pp. 233-234, para. 13.

¹⁷Italian Written Statement, p. 4.

¹⁸*I.C.J. Reports 1996 (I)*, p. 234, para. 13.

¹⁹*I.C.J. Reports 1980*, p. 87, para. 33.

²⁰Germany, Written Statement, p. 8.

14. Even more fundamentally what this objection ignores is that you do not give just another political opinion. You give a reasoned judicial opinion as the principal judicial organ of the United Nations. In giving the opinion the Court remains “faithful to the requirements of its judicial character”²¹. The result is a judicial decision: it is not just a repetition of something the Assembly has already done. And if ever a situation needed a recent judicial opinion, it is this one.

(4) Usefulness of the advisory opinion

15. Then it is said that the opinion is not useful. According to one statement: “there is a striking degree of consensus amongst those most closely involved in promoting the peace process in the Middle East that an advisory opinion would be of no assistance and would be likely to be unhelpful”²².

16. The first point to note is that this conclusory statement is untrue. Ambassador Al-Kidwa has shown that there was no consensus within the European Union or among the Quartet that the Court should decline to give an advisory opinion.

17. Furthermore the Court gives an advisory opinion to the organ which requests it, not to a self-appointed group of States. You made this point in the *Peace Treaties Opinion*²³, and you have repeated it frequently since²⁴. And as you said in *Threat or Use of Nuclear Weapons*: “it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.”²⁵

B. Specific arguments related to the OPT: the case for admissibility

18. Mr. President, Members of the Court, I move now to consider three more specific issues in my second part. Each of these, although they have been cited against your answering the request, properly understood *support* your doing so.

²¹*Western Sahara*, p. 21, para. 23.

²²United Kingdom, para. 3.23.

²³*I.C.J. Reports 1950*, p. 71.

²⁴See the cases referred to in *Threat or Force of Nuclear Weapons*, *I.C.J. Reports 1996*, p. 235, para. 14.

²⁵*Threat or Use of Nuclear Weapons*, p. 237, para. 16.

(5) This is a dispute between two States: the principle of consent

19. The first of these issues is that of consent. Australia objects that: “The effect of the request is to bring key elements of the Israeli-Palestinian conflict before the Court for determination without the consent of Israel.”

20. But South Africa did not consent to the *Namibia* request, Spain did not consent to the *Western Sahara* request, Romania did not consent to the *Mazilu* request, Malaysia did not consent to the *Cumaraswamy* request. All those requests involved the responsibility of a particular State. Yet you gave the Opinions.

21. As you said in *Western Sahara*: “In the present case, Spain is a Member of the United Nations and has accepted the provisions of the Charter and Statute; it has thereby in general given its consent to the exercise by the Court of its advisory jurisdiction.”²⁶ Moreover Israel cannot object, any more than could Spain, to the exercise by the General Assembly of its competence in the field of self-determination. It cannot object to the General Assembly dealing with the situation of Palestine. These competences of the General Assembly were exercised even before Israel came into existence, notably in the passage of the Partition Resolution, General Assembly resolution 181(II) which signalled the wish of the international community that Israel come into existence.

22. The General Assembly has always had a vitally important role in relation to Palestine — as it had in relation to the other former mandated territory left over after 1945, South West Africa. This is a key aspect of the role it has consistently exercised with respect to dependent and colonized peoples ever since 1945. Israel and Palestine are not two States Members of the United Nations and the dispute over the Wall is not a pre-existing bilateral dispute on a matter falling in principle within Israel’s domestic jurisdiction. That was the situation in the *Eastern Carelia* case. It is not the situation here. There is no pre-existing bilateral dispute arising between Israel and Palestine, no dispute which (to use your words in *Western Sahara*) arose “independently in bilateral relations”²⁷. There is no trace in the record of such a prior, independent bilateral dispute.

23. Rather the Wall is an attempt by Israel to impose a unilateral settlement in relation to a multilateral conflict and to do so in violation of fundamental obligations, obligations *erga omnes*.

²⁶*I.C.J. Reports 1975*, p. 24, para. 30.

²⁷*I.C.J. Reports 1975*, p. 25, para. 34.

These relate to humanitarian law and human rights, including self-determination. The people of Palestine have an unfulfilled right to self-determination. Israel cannot veto or negate the interest of the General Assembly in having a legal answer to the question asked. Indeed that interest, and the General Assembly's long-standing and legitimate institutional role, is a compelling reason for answering the question — as it was in *Western Sahara*, on a much more abstract question.

(6) The issue of fact-finding

24. Then secondly, it is objected that the request is inadmissible because there is insufficient evidence before the Court to enable it to make the findings of fact required. According to Israel: “the Court has received no evidence from Israel bearing on the substantive question, and evidence received from others, including the United Nations Secretariat, cannot be regarded as authoritative or reliable”²⁸.

25. But in all the Opinions you have given, you have used the information publicly available, where organizations could help you, you have asked them to help. You have used the information before you as best you could. It is true that in *Eastern Carelia* the Permanent Court gave as a subsidiary reason for not answering the question an issue of fact — the intention of Russia in making a declaration during the negotiation of a bilateral treaty²⁹ that had nothing whatever to do with the League of Nations. The position is quite different here. This is not a matter within Israel's domestic jurisdiction and not a matter on which it has a sovereign privilege to act.

26. Much more relevant is the approach of the Permanent Court in *European Commission of the Danube*. That was a dispute under a regional multilateral treaty between Romania and four other States. The Court referred to the findings of a Special Committee whose report had been adopted by an Advisory and Technical Committee of the League of Nations. It said:

“The Court is fully aware that the Romanian Government has refused to accept the facts established by the Committee . . . but the Court is of opinion that, for the purposes of the present procedure, it must accept the findings of the Committee on issues of fact unless in the records submitted to the Court there is evidence to refute them.”³⁰

²⁸Israel, Written Statement, para. 6.15.

²⁹1923, *P.C.I.J., Series B, No. 5*, p. 28.

³⁰1927, *P.C.I.J., Series B, No. 14*, p. 46.

27. In the present case there is not one report but many, the reports of competent bodies including the International Committee of the Red Cross, the Human Rights Committee, the Special Rapporteur of the Commission on Human Rights and so on. They are in the Secretary-General's dossier and have been supplemented by others. They tell a concordant story. The Court is perfectly well informed.

28. If Israel wished to challenge the circumstances and facts set out in these reports it could have done so, as Romania did in *European Commission of the Danube*. Israel cannot plead lack of facts as a ground to have the Court refuse to decide, when any deficiency in the facts could have been corrected by Israel itself. Israel does not have a veto, any more than Spain did in *Western Sahara* — and if a veto in principle does not exist then it cannot be created by the back door of refusing to present substantive arguments.

29. Anyway the basic facts are perfectly clear. The dominant fact is the US\$2billion fact of the Wall, growing daily and dividing Palestinian communities from each other and from their lands and water. That is the essential fact, this US\$2billion so-called “temporary” edifice. So much is now known about the Wall, and what is not known can be deduced from its route, its size, its cost, its régime, its effects and the avowed intentions of those who are building it to impose a unilateral settlement.

(7) Prejudicing the Road Map and future status negotiations

30. This brings me to my final point, which is the impact of the request on the Road Map and on future status negotiations. The United States expresses the point in the following way:

“The United States . . . and the other members of the Quartet are deeply involved in efforts to advance those negotiations, with the support and encouragement of the Security Council and the General Assembly. It would be extremely damaging to future negotiating efforts if the Court were to set forth, even on a non-binding advisory basis, legal conclusions with respect to permanent status issues.”³¹

31. Now formulated in these terms this is not an objection to your giving the request at all. It is a cautionary note as to the permanent status issues. In this moderate formulation (certain Written Statements were more extreme), it goes to the content of the Opinion, not to the question whether

³¹United States, Written Statement, para. 4.4.

you should give it at all. And this recalls an answer you gave to an analogous objection in *Threat or Use of Nuclear Weapons*. You said:

“It has also been submitted that a reply from the Court in this case might adversely affect disarmament negotiations . . . The Court is aware that, no matter what might be its conclusions . . . they . . . would present an additional element in the negotiations on the matter. Beyond that, the effect of the opinion is a matter of appreciation . . . The Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.”³²

32. In the present case the relationship between the Road Map and the Wall can be put in a couple of sentences. The Road Map is a project for the final settlement to be reached by agreement of interested parties, including Palestine. Substantively it has its origins in United Nations resolutions going back to Security Council resolution 242. The Wall is not in the Road Map. Indeed it is the Wall itself which is inconsistent with the Road Map, and the Wall, if allowed to be completed, will destroy the Road Map. The request, and the Court’s opinion, can only support the multilateral process presently embodied in the Road Map.

33. There is a further point, equally fundamental. The question you are asked relates to the *present* situation, not the future. You are not asked what the content of the final settlement should be. You are not asked to determine the boundaries of a future Palestinian State. It is sufficient for the purposes of this opinion that the Wall is being constructed for the most part, and indisputably, in the Occupied Palestinian Territory.

34. That is not a negative point, it is a positive point. In determining the present legality of the Wall in relation to the powers of Israel over the Occupied Palestinian Territory, you will be helping to elucidate and thereby to preserve the legal status quo pending the final status negotiations. You are asked to give an authoritative legal opinion on the legal consequences of the construction of the Wall *now*. Your answer will be relevant to *existing* questions of legal status and its consequences. This will help to secure the foundations for a future agreement— unlike the Wall, which undermines those foundations.

Conclusion

35. Mr. President, Members of the Court, the principle of self-determination, one of the constitutive, one might say constitutional, principles of the United Nations Charter, has not done

³²*I.C.J. Reports 1996*, p. 237, para. 17.

well out of bilateral contentious cases. Recall *South West Africa* in 1966³³. Recall, if I may say so, *East Timor*³⁴. Self-determination is above all a multilateral norm, and disputes about self-determination are multilateral disputes. Moreover they are disputes as to which the General Assembly has always played a significant role. Contrast with the three contentious cases I have mentioned, the five advisory opinions you have given on such issues — four on Namibia, one on Western Sahara. They became key parts of the legal perspective for the resolution of those disputes; in Western Sahara this is still true. Recall above all Namibia — the *Status* Opinion of 1950³⁵, the *Legal Consequences* Opinion of 1971³⁶. Would that we had had their equivalents for Palestine. The successful outcome of that long-standing dispute owes much to the Court's judicial role. With respect, it is submitted that you should continue to perform that role today.

Mr. President, Members of the Court, thank you for your careful attention. Mr. President, it is up to you, the next speaker is Professor Abi-Saab, before or after the break.

The PRESIDENT: Thank you, Professor Crawford. I now give the floor to Professor Abi-Saab.

Mr. ABI-SAAB:

APPLICABLE LAW

Mr. President, Members of the Court, it is my privilege and pleasure to stand before you again today, on behalf of Palestine, to address the issue of the applicable law to the Occupied Palestinian Territory.

This issue is treated at some length in Palestine's Written Statement, so I shall limit myself to highlighting and elaborating further only on some salient points.

The question put to the Court by the General Assembly focuses mainly on international humanitarian law via the reference to the Fourth Geneva Convention and by characterizing the Territory as "occupied" by reference to that law. But the rules and principles of international laws that have a bearing on the situation have a much wider scope than that. In the first place, closest to

³³*I.C.J. Reports 1966*, p. 6.

³⁴*I.C.J. Reports 1995*, p. 90.

³⁵*I.C.J. Reports 1950*, p. 128.

³⁶*I.C.J. Reports 1971*, p. 16.

the rules and principles of international humanitarian law, and increasingly intertwined with them are those of the international law of human rights.

But there are also the general rules of international law, particularly two of its cardinal, constitutive, principles Professor Crawford has just been referring to. One of them, namely, the prohibition of the individual use of force and its corollary, the prohibition of conquest or the taking of territory by force, and the principle of equal rights of peoples and their right to self-determination. But as my colleagues Professors Vaughan Lowe and Jean Salmon will be dealing with aspects of the latter two categories and given the limitations of time, I shall concentrate my remarks on international humanitarian law, or the *jus in bello*.

Up to the Geneva Conventions of 1949, the instruments codifying these rules did not explicitly define the circumstances triggering their application.

By contrast, the Geneva Conventions — instructed by the experiences of the Second World War — in Article 2 common to the four Conventions, state in paragraph 1: “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”.

The Hague Regulations, for their part, define, in Article 42, the circumstances under which “a territory is considered occupied” and these circumstances are, again according to that Article, “when it is actually placed under the authority of the hostile army”.

That is exactly what happened in 1967. In the course of an armed conflict between several States, Israel invaded and occupied militarily, *inter alia*, the West Bank and Gaza, formerly part of the British mandated territory of Palestine, which had never been before under Israeli jurisdiction or administration. In other words, an armed conflict as provided for in Article 2, paragraph 1, of the Geneva Convention, brought about a situation falling under Article 42 of the Hague Regulations. A typical case of belligerent occupation.

These are clear texts that dispose clearly of the matter. But Israel contests this conclusion on the basis of the second paragraph of Article 2 of the Fourth Convention, which provides: “The Convention shall also apply” — so this is a second case — “to all cases of partial or total

occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”

This provision was added *ex abundante cautela* in 1949 to cover the case of *occupatio pacifica*, that meets with no armed resistance, like the occupation of the Suddeten in 1938. Even that is considered an occupation, and triggers the application of the Convention. But in such cases, as there is no visible armed conflict, there is a need for another criterion which explains the reference to the legal status or title to the territory thus occupied, a title which does not belong to the occupant.

But in cases of belligerent occupation, covered by the first paragraph of Article 2, what matters is the taking of control over the territory in the course of an international armed conflict, and maintaining it by military force; not the title of the entity that was peacefully administering the territory before the occupation, or any other entity that may have a claim on this.

This particularly applies to claims laid by the belligerent occupant on the occupied territory. It would make a mockery of the law if an invader could evade the application of the *jus in bello* by merely formulating a claim on the territory it occupies by force. It would be tantamount to an invitation to annex the territory.

This rule also applies, regardless of the characterization of the use of force by the belligerent occupant, that is whether it is an alleged aggressor or allegedly exercising self-defence. For it is a cardinal principle of *jus in bello* that its rules apply equally to all parties, irrespective of their rights and wrongs under the *jus ad bellum*.

I shall not go into the specific arguments of Israel relating to the non-incorporation of the Hague Rules and the Fourth Geneva Convention into its municipal law, nor on the alleged application *de facto* of only the humanitarian components of the Fourth Geneva Convention. After all, are there any non-humanitarian components in the Geneva Conventions? Even the procedural aspects provide guarantees for the observance of the substantive protective rules. And can one apply only *de facto* instruments and rules by which one is legally bound? Indeed, this august Court itself has found that both the Hague Regulations and the Geneva Conventions have passed into general international law (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996*, para. 79) and even characterize them as being intransgressable not to use *jus cogens*. As such they

are universally binding, regardless of the conventional limitations that may be attached to them as treaties.

The same can be said of most of the provisions of Additional Protocol I to the Geneva Conventions, in any case those provisions that may be relevant here, such as Article 75 on Fundamental Guarantees.

Mr. President, Members of the Court, I have been addressing the legal rationale of the applicability of the law of belligerent occupation to the Occupied Palestinian Territory. But this rationale, moreover, has been endorsed by almost the unanimity of the international community apart from Israel.

I need not recapitulate here all the resolutions of the General Assembly and the Security Council, or of the Conference of the Contracting Parties to the Fourth Geneva Convention or the declarations of the International Committee of the Red Cross, the latest being on the 18th of this month — and the ICRC is the institutional guardian of the Conventions — or of the different States or groups of States. All these declarations assert the applicability *de jure* of the Fourth Convention to the Occupied Palestinian Territory (Palestine Written Statement, paras. 387-392).

I would like simply in this respect to make a short remark on the status and role of the General Assembly and Security Council resolutions which are specifically referred to in the request for the advisory opinion.

The Israeli statement in these proceedings, in an attempt to undermine the basic role of the General Assembly, which has just been described by Professor Crawford, declares: “Resolution ES-10/13, which purports to determine illegality, cannot properly be relied upon as an authoritative determination of legality. It is not binding.” (P. 116, para. 9.9.)

The Statement contrasts that resolution with Security Council Resolution 276 (1970) (*ibid.*, para. 9.10), which was referred to in the request for an advisory opinion in the *Namibia* case (*I.C.J. Reports 1971*). However, in that very Advisory Opinion on *Namibia* the Court has said:

“it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative designs” (*ibid.*, p. 50, para. 105).

Making determinations is part and parcel of the functions of the General Assembly and the Security Council. It is only on the basis of such determinations that they can envisage further action, on items they deal with, within the limits of their powers under the Charter. This is the quasi-judicial role of these two organs, as has been already described by the regretted Professor Oskar Scharffer already in 1964.

The Court has, on numerous occasions, particularly in advisory proceedings, recognized and acted upon such determinations by the General Assembly and the Security Council, and has never, to my knowledge at least, ignored or set aside such a determination.

Of particular significance to the question put to the Court are the resolutions of the General Assembly and the Security Council relating to settlements and the annexation of East Jerusalem and its surroundings. These resolutions, particularly several resolutions of the Security Council, adopted unanimously with the positive vote of the United States, determine — I am quoting from the *dispositif* of such resolutions — the illegality of the settlements (see Palestine Statement, paras. 165-167), and of the annexation of Jerusalem, characterizing this annexation as a flagrant violation of the Fourth Geneva Convention, that does not affect the continued applicability of that Convention to Jerusalem and the rest of the Occupied Territory (*ibid.*, paras. 168, 361-364). Resolution 478 goes even further and determines that “all legislative and administrative measures taken by Israel, the occupying Power, which have altered or purport to alter the status and character of the Holy City of Jerusalem . . . are null and void . . . and must be rescinded forthwith . . .” (Security Council res. 478(1980)).

Mr. President, I turn now very briefly to the content of international humanitarian law inasmuch as it regulates belligerent occupation.

Article 42 of the Hague Regulations defines belligerent occupation as a *de facto* status arising from the effective control of the territory by a hostile army, and extending only as far as this effective control (or “authority” as it calls it) “has been established and can be exercised”.

International humanitarian law takes cognizance of this *de facto* status, to which it attaches legal consequences or a régime. This legal régime is guided by two major principles:

(1) The first is that occupation is a *temporary* (or *transient*) state of affairs. It is an abnormal or emergency situation, and the law of occupation tries to strike a balance between, on the one

hand, accommodating the military needs of the Occupying Power in prosecuting the war and its war aims and, on the other hand, protecting the rights, freedoms and welfare of the population of the occupied territory, as well as their normal way and train of life from being excessively disturbed and affected by the occupation.

In this respect, international humanitarian law, while recognizing to the Occupying Power the prerogatives of government over the occupied territory, imposes on it the positive obligations of government in terms of restoring and ensuring “public order and safety” (Article 43 of the Hague Regulations), as well as ensuring food and medical supplies and services for the population to the fullest extent possible (Articles 55 and 56 of the Fourth Geneva Convention) as well as respecting their human rights and dignity and so forth.

(2) The second governing principle of the law of occupation is that occupation, being a temporary, transient régime, cannot affect nor transfer sovereignty to the Occupying Power. In this respect, the régime of occupation operates to a large extent as an interim measure (*une mesure conservatoire*), by freezing the *status juris* of the occupied territory for as long and as far as occupation remains effective; so that it cannot be changed by any unilateral act or action on the part of the Occupying Power.

The legal effects of this principle are reflected in Article 47 of the Fourth Convention which provides:

“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 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, nor by any annexation by the latter of the whole or part of the occupied territory.”

But the law of occupation goes even further. It enjoins the Occupying Power to leave things as they were before the occupation to the fullest extent possible; for example, “not [to] alter the status of public officials and judges” in Article 54 of the Geneva Convention. In the same vein, Article 43, which I have just referred to, of the Hague Regulations directs the Occupying Power to “take all measures in his power to restore and to ensure, as far as possible, public order and safety” — and here is a clause I want to underline — “*while respecting, unless absolutely* — not

necessarily — *absolutely prevented, the laws in force in the country*” (and the same about criminal laws in Article 64 of the same Convention).

Referring to Article 43, the ICRC Commentary on the Fourth Geneva Convention says the following: “This provision of the Hague Regulations is not applicable only to the inhabitants of the occupied territory, it also protects the separate existence of the State, its institutions and its laws.” (Pp. 273-274.)

Indeed, the protection of the separate status and corporate existence of the occupied territory is reflected in the Hague Regulations by the protection they provide not only to private property (Arts. 46 and 47), but also to the commons and to public property in the form of “public buildings, real estate, forests and agricultural estates” of which “the occupying power shall be regarded only as administrator and usufructuary” and “must safeguard the capital of these properties and administer them in accordance with the rules of usufruct” (Art. 55).

The prohibition of effecting durable changes by the unilateral act or action of the Occupying Power is not limited to the formal legal status of the territory (through a purported change of sovereignty). It extends also to such changes in the human and material components of the occupied territorial entity — whence the prohibition, in Article 49 of the Fourth Convention, of demographic changes through “individual or mass forcible transfer as well as deportation” of civilians outside the occupied territory; as well as the deportation or transfer by the Occupying Power of “parts of its own civilian population into the territory it occupies”.

These prohibited acts constitute, under the Geneva Conventions and Article 147 particularly of the Fourth Convention, as well as Article 85 of Protocol I and Article 8 of the recent Rome Statute, grave breaches of international law which entail individual criminal responsibility.

Mr. President, it is by the standards of this legal régime that the legality of the Wall has to be assessed, and the justifications provided by Israel for its construction have to be weighted.

One of these justifications, *self-defence*, does not belong to international humanitarian law or the *jus in bello*, but to the *jus ad bellum*. Israel makes here an impermissible confusion between the two branches of the law of war that have to be kept radically apart. Once an armed conflict is brought into being, the *jus in bello* (or international humanitarian law) comes into play, as the *lex specialis* governing the ensuing situation regardless of the rules of the *jus ad bellum*.

Moreover, logically, how can one say that a State exercises self-defence against a territory under its own military occupation, that is under its effective control, and in which it has the authority and even the obligation to “ensure public order and safety” according to Article 43 of the Hague Regulations?

Can the Wall be then be justified as a *military necessity*?

One of the great advances of international humanitarian law is that it has moved away from Clausewitz’s concept of military necessity as *Kriegsraison*, i.e. the idea that the aims of war justify using any means considered necessary to achieve them.

That concept of military necessity is ultimately negatory of international humanitarian law. Fortunately, at least since the Hague Regulations of 1899, it has been replaced by the modern and much narrower concept of military necessity, strictly limited to the contexts in which it is expressly recognized and under the conditions set by the provision in the relevant instruments that recognizes it.

Those conditions include, in particular, specificity and proportionality.

It is in this sense that the Declaration of the Contracting Parties to the Fourth Geneva Convention states in paragraph 5 that “the Fourth Geneva Convention, *which takes fully into account imperative military necessity*, has to be respected in all circumstances” (United Nations Secretary-General dossier No. 67).

Then we have to look in the Geneva Convention or the Hague Regulations. Where can we find in them a recognition of a military necessity (or even of a legitimate military need) that can be invoked to justify the Wall?

In my submission, the only possible justification for the Wall is as a safety measure taken by Israel in the exercise of its authority as an Occupying Power under Article 43 of the Hague Regulations and Article 27 of the Fourth Geneva Convention.

As my colleague Professor Vaughan Lowe will explain, neither provision justify the building of a Wall to protect civilian citizens of the Occupying Power implanted in the occupied territory.

The argument that a similar barrier around Gaza has proved effective in reducing the attacks — while debatable, as Ambassador Al-Kidwa has mentioned in his introductory speech — still this argument, even if it were true, intentionally ignores the fact that the wall around Gaza had

for purpose — had for avowed purpose — to seal it off hermetically; and that is what Israel is emphatically denying being the purpose and effect of the Wall in the West Bank. Why? Because if it admits that the purpose is for it to hermetically seal what is within the Wall, that will confirm all its flagrant features violative of international humanitarian law.

The Wall also starkly fails the test of necessity and proportionality as a security measure, because of the hundreds of thousands of Palestinians who remain unchecked on the other side of the Wall, on the western side for example. Unless of course they are made, directly or indirectly, to leave that area; which would constitute another flagrant grave breach of Article 49 of the Geneva Convention. Not much for possible justification.

Finally, Mr. President, may I say in conclusion, that arguing on the basis of the law of occupation does not mean recognition or acceptance of the legality of this occupation, particularly when it turns into prolonged occupation that borders on annexation. Thank you, Mr. President.

The PRESIDENT: Thank you, Professor Abi-Saab. It is now time for a break of 15 minutes. The Court will resume its hearings at five minutes to noon.

The Court adjourned from 11.45 a.m. to 11.55 a.m.

The PRESIDENT: Please be seated. I now give the floor to Professor Lowe.

Mr. LOWE: Thank you, Mr. President.

THE VIOLATIONS OF INTERNATIONAL LAW

Introduction

1. Mr. President, Members of the Court. It is an honour for me to appear before you, and to have been entrusted with this part of Palestine's presentation.

2. My task is to present Palestine's observations on the manner in which the rules of international law apply to the factual situation in the Territory.

3. The Court is not, of course, asked to rule upon particular breaches of international law. It is asked, as the principal judicial organ of the United Nations, to respond to requests for advice from the United Nations General Assembly.

4. The Assembly has determined in resolution ES 10/13 that the Wall is “in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law”. That resolution does not, however, answer all questions; it leaves open important questions. For example, in what respects, and under which rules of international law, is the Wall illegal? What must be done to restore the situation to legality? And what are the duties of States in the meantime?

The tasks

5. I have three main points to put before the Court:

- (a) first, that Israel has, in the Occupied Palestinian Territory, only the rights of an Occupying Power, which are conferred by and limited by international law, and that the construction and operation of the Wall does not fall within those rights;
- (b) second, that Israel, as the Occupying Power, is legally bound to ensure the rights prescribed by international law for those persons lawfully resident in Palestine, and that the Wall violates those rights; and
- (c) third, that the effect of the Wall is to change the status of the Territory in a manner tantamount to annexation, in violation of international law.

The basic illegality of the Wall

6. [Screen: photograph 4] Let me begin with the underlying question of the legality of the Wall. The issue here is not whether Israel has the right to build a wall: it is whether it has the right to build the Wall in the Occupied Palestinian Territory. Palestine’s main point is that whatever security effects the Wall might have could be secured by building the Wall along the Green Line, on Israeli territory, so that there is no legal justification for building it in the Occupied Palestinian Territory.

7. As you have already seen, the construction of the Wall has involved both the taking of land and the destruction of Palestinian property in the Occupied Palestinian Territory. Under international law the requisitioning of land and the destruction of property are permissible only within narrow and closely defined limits.

8. Requisitioning of land is governed by Article 52 of the 1907 Hague Regulations, which stipulates that “[r]equisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation”.

9. [Screen schematic map showing the green line and the route of the Wall and the settlements] Israel admits that the route of the Wall is designed to protect Israeli civilian settlements which have been built in the Occupied Palestinian Territory, including East Jerusalem. It has explicitly said so, for example in the confiscation notice which is quoted beneath photograph 9 in Volume 1 of the Annex to our Written Statement. In any event, the map speaks for itself. The Wall departs from the Green Line in order to fix the settlements on what is no doubt thought of as the “Israeli” side of the line. Perhaps the most striking examples are in the areas around Qalqilya and the Israeli settlement “Ariel”, and in and around East Jerusalem.

10. Those settlements were themselves created in violation of international law. Article 49 (6) of the Fourth Geneva Convention prohibits the transfer by an Occupying Power of parts of its own civilian population into the occupied territory. As a Legal Adviser to the United States State Department said, in relation to Israeli settlement policy, that prohibition “extends clearly to reach such involvements of the occupying power as determining the location of settlements, making land available and financing of settlements, as well as other kinds of assistance and participation in their creation” (paras. 464 and 465 of Palestine’s Written Statement). He concluded that Israel was in breach of that prohibition. Numerous Security Council and General Assembly resolutions have determined that the settlement activities breach international law.

11. Now the breach is a serious matter. It is declared to be a “grave breach” of international law by Article 85 of Additional Protocol I to the Geneva Conventions.

12. The logic is inescapable. The civilian settlements are unlawful. Therefore there is no right to divert the Wall from the Green Line in order to protect those unlawful settlements. Therefore the confiscations of Palestinian land for that purpose violate international humanitarian law. The Wall, away from the Green Line, has been constructed, and Palestinian property has been taken, for a legally impermissible purpose. There is no need to examine security concerns and arguments in depth in order to appraise the legality of those diversions.

13. [Screen: photograph 9] Similarly, the destruction of Palestinian property for the purpose of constructing the Wall is far removed from anything that is, in the words of Article 53 of the Fourth Geneva Convention, “rendered absolutely necessary by military operations”. There are no such military operations, in the sense in which Article 53 of the Convention uses the term. Indeed the route of the Wall sometimes seems to have been devised with a view to the infliction of wanton damage. The photograph is of the former market of Nazlat Issa, on which the livelihood of hundreds of Palestinian families depended. It was destroyed by the Israeli army “out of necessity to protect Israeli settlements in the area”. The nearest Israeli settlement is 4 km away.

14. On this point, Palestine accordingly respectfully suggests that the Court should advise the General Assembly that the building and operation of the Wall in the Occupied Palestinian Territory, including in and around East Jerusalem, violates international law.

The Wall violates Palestinian human rights

15. The impact of the Wall on the basic human rights of the men, women and children in the Occupied Palestinian Territory is graphically illustrated in the United Nations reports, and by the reports of B’Tselem, the Israeli human rights organization.

16. There are two broad categories of violations. First, there are the direct seizures of land and destruction of property that the construction of the Wall entails. And those I have addressed already. Second, there are the rights that are violated as a result of the restrictions on the movement and residence of the Palestinian population that are imposed under the régime of the Wall. These violations affect the entire population of the Occupied Palestinian Territory, not simply those whose property is taken or those who have been walled in by the Israeli Government.

17. The scale of those violations must be understood. This is not a technical squabble over Israeli trespass on Palestinian land. Three of the United Nations reports within the last year (the Bertini³⁷, Dugard³⁸ and Ziegler³⁹ reports) concluded that there is a humanitarian crisis — their words, not mine — in the Occupied Palestinian Territory, and one that is man-made.

³⁷Annex 14 to Palestine’s Written Statement, para. 3.

³⁸Annex 6 to Palestine’s Written Statement, para. 41.

³⁹Dossier No. 56 accompanying the United Nations Secretary-General’s submission, paras. 8, 58.

18. We had intended to take the Court to passages in those reports that epitomise conduct in clear violation of international humanitarian law and international human rights law. We understand, however, the Court's desire to focus at this stage on law rather than facts; and last Wednesday the International Committee of the Red Cross issued a statement which captures the essence of what we, and the various United Nations and other reports, are trying to communicate and fixes it precisely in its legal context. It states the following:

“The ICRC is increasingly concerned about the humanitarian impact of the West Bank Barrier on many Palestinians living in occupied territory.

Where it deviates from the ‘Green Line’ into occupied territory, the Barrier deprives thousands of Palestinian residents of adequate access to basic services such as water, health care and education, as well as sources of income such as agriculture and other forms of employment. The Palestinian communities situated between the ‘Green Line’ and the Barrier are effectively cut off from the Palestinian society to which they belong. The construction of the West Bank Barrier continues to give rise to widespread appropriation of Palestinian property and extensive damage to or destruction of buildings and farmland.

The ICRC has repeatedly condemned deliberate attacks against Israeli civilians and stressed that all acts intended to spread terror among the civilian population are in clear violation of international humanitarian law (IHL). It recognizes Israel's right to take measures to ensure the security of its population. However, these measures must respect the relevant rules of IHL.

The ICRC's opinion is that the West Bank Barrier, in as far as its route deviates from the ‘Green Line’ into occupied territory, is contrary to IHL. The problems affecting the Palestinian population in their daily lives clearly demonstrate that it runs counter to Israel's obligation under IHL 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 occupied territory go far beyond what is permissible for an occupying power under IHL. These findings are based on the ICRC's monitoring of the living conditions of the Palestinian population and on its analysis of the applicable IHL provisions. The Israeli authorities have been regularly informed about the ICRC's humanitarian and legal concerns.

The ICRC therefore calls upon Israel not to plan, construct or maintain this Barrier within occupied territory.”

19. I would respectfully direct the Court's attention to the Written Statement submitted in this case by the Swiss Government, which has a particular position as the official depository of the Geneva Conventions. It is helpful to read the words of the ICRC alongside that statement.

20. Palestine's Written Statement identifies the main provisions of international humanitarian law and international human rights law that are applicable in this context. It identifies breaches of several provisions of the International Covenant on Civil and Political Rights,

which Israel has ratified. They include Articles 12, on freedom of movement, and 17 on the right to family life. There are breaches of the International Covenant on Economic, Social and Cultural Rights, also ratified by Israel, including Articles 11 and 12, on the right to food and to medical care, and Article 13 on the right to education. There are also breaches of the Convention on the Rights of the Child, again, ratified by Israel. Palestine attaches particular importance to this. Children constitute over half of the Palestinian population. The Written Statement identifies breaches of Articles 24 and 27, on the right to food and medical care, Article 28 on the right to education, and Article 16 on the right to family life.

21. The response of many Israeli officials has been: the Wall is the price that supporters of terrorism must pay; the solution lies in the hands of the Palestinian Authority. That is an unacceptable response, and not only because of Israel's repeated incursions into the territory, its destruction of the Palestinian security apparatus and institutions, its imposition of curfews and roadblocks, and its construction of the Wall — all of which steps have undermined the Palestinian Authority.

22. The response is unacceptable first, because Israel, as Occupying Power, carries the legal responsibility to ensure basic human rights in the Occupied Palestinian Territory. It cannot claim the rights of a military occupant without accepting the corresponding responsibilities.

23. Second, that response is tantamount to the imposition of a collective punishment. The Palestinian Authority has consistently condemned terrorist attacks on Israeli civilians; and it is as absurd as it is offensive to imply that all Palestinians are engaged in a murderous conspiracy to attack Israel. To impose the Wall, and all the consequent restrictions on movement and access to property, jobs, welfare, education and families, as a punishment on the whole Palestinian population is unfair, unprincipled, and illegal. It appears to be, as was noted in one of the United Nations reports, a form of collective punishment in retribution for attacks on Israel⁴⁰. Collective punishments are specifically prohibited by the Laws of War, under Article 147 of the Fourth Geneva Convention and Article 75 of Additional Protocol I.

24. Third, it is evident that the Wall, in so far as it departs from the Green Line and is built in Occupied Palestinian Territory, cannot be justified by appeals to Israel's security interests. Israel's

⁴⁰Ziegler report, dossier No. 56 accompanying the United Nations Secretary-General's submission, para. 38.

legitimate interests can, as we have explained in our Written Statement, be protected by building the Wall on Israel's soil; Israel has no legal right to take Palestinian land and destroy Palestinian property in order to protect unlawful settlements in the Occupied Palestinian Territory. Palestine accepts the right of every State to take protective measures. But those measures must be lawful. States cannot cast off all legal and moral constraints by merely calling on the name of "security interests".

25. The question before the Court is whether the Wall, as described in the Secretary-General's report, violates international humanitarian law and international human rights law. Our Written Statement sets out detailed submissions on this issue; but the point is a simple one. Having read the Secretary-General's report and the reports that are appended to it, can the Court realistically say that it doubts whether Israel is violating international law in the Occupied Palestinian Territory? Having read through the supporting documents put before it in response to its request to States to provide relevant information, can it say that there is no reason to believe that, as the ICRC put it, "the measures taken by the Israeli authorities linked to the construction of the Barrier in occupied territory go far beyond what is permissible for an occupying power"?

26. Palestine respectfully suggests that the Court should advise the General Assembly that Israel is obliged to ensure for the residents of the Occupied Palestinian Territory the rights to which they are entitled under international humanitarian law and international human rights law; that those rights include the rights listed in paragraphs C and D of Chapter 12 of Palestine's Written Statement; and that those rights have been violated by the construction and operation of the Wall.

The Wall alters the status of the territory

27. The hardships that are borne all day, and every day, by the Palestinian people in the Occupied Palestinian Territory are naturally the main focus of concern. But as a matter of law, and in the long term, there is another matter of cardinal importance. It is that the Wall is, entirely foreseeably and probably deliberately, changing the status of the Occupied Palestinian Territory.

28. It is a fundamental principle of international law that an Occupying Power is not entitled to change the status of occupied territory. It is allowed to remain in territory that is not its own, and to exercise limited powers there, because international law recognizes that in situations of armed conflict such action may be necessary in order effectively to protect the State. Those rights are

essentially defensive, and they are temporary: occupying armies are expected to withdraw once the conflict that led to the occupation has ended. Occupying Powers have no right to treat the occupied territory as their own, or to decide its future.

29. International law does not prohibit only the annexation of occupied territory. It prohibits *all* changes in the status of that territory: plainly, the territory could not lawfully be made into a protectorate, or a colony, or otherwise have its status changed.

30. That prohibition has been affirmed by the Security Council, for example in resolution 446, which required Israel

“to desist from taking any actions which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem, and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories”.

31. No State can evade the prohibition by refraining from making a formal and explicit annexation or other change in status while tying up the territory and its residents in a mass of restrictive legislation and physical constraints. International law looks to the reality of situations, not to the artifice of forms. In the *Starrett* case⁴¹, for example, it was held that property could be expropriated without a formal transfer of title, if the owner’s rights of enjoyment were seriously interfered with. And in the *Nottebohm* case⁴², this Court looked behind the formality of naturalization to determine the reality of a man’s link with the territory of his putative State.

32. The Wall is changing the status of the Occupied Palestinian Territory. It is, entirely foreseeably, causing demographic and other changes in the Occupied Palestinian Territory that will eliminate the possibility of the Palestinian people effectively exercising their right to self-determination, and this is tantamount to a *de facto* annexation of territory.

33. Israel maintains that the Wall, on which it is said to be spending around US\$2 billion — US\$2,000 million — is temporary. That is difficult to believe. One might take a different view if the Israeli Government were to announce publicly, now, that it recognizes that the Palestinian territory is occupied territory; that it recognizes that all of the settlements — including settlements such as Ariel, Ma’ale Adumin, and the settlements in East Jerusalem — are in Occupied Palestinian Territory, and as such within the territory that is in principle the Palestinian State under

⁴¹*Starrett Housing Corp v. Iran* 4 Iran-USCTR 122 (1983).

⁴²*I.C.J. Reports*1955, p. 4.

the two-State vision of the Road Map. But far from saying that, it appears from recent reports that the Israeli Government is planning to relocate settlers withdrawn from Gaza into the West Bank, thus consolidating its hold on the West Bank.

34. Israeli regulations are dividing the Occupied Palestinian Territory into the area “inside” the Wall, and the area outside and adjoining Israel. Prior to the Wall, people were free to move across that part of the Occupied Palestinian Territory, to their farms, workshops, schools, and hospitals. They were free to live in the area now covered by the Wall and the Closed Zone. Now, under these regulations, people need permits to move within that same Palestinian territory if that involves crossing the Wall; and they need permits to stay in their homes. And in a substantial proportion of cases permits are awarded late, capriciously, or not at all. All of this is explained, in detail, in our Written Statement.

35. Many Palestinians are now moving out of the worst affected areas, such as Qalqilya, displaced deeper into the Occupied Palestinian Territory. This creates facts on the ground. Palestinians are, in fact, being driven out of areas adjacent to the Wall, and adjacent to Israel.

36. Some think that Israel is content to rule the Occupied Palestinian Territory without formally annexing it, because annexation would make it difficult to deny citizenship, voting rights and equality before the law to those born in that territory. But whatever its reason, its status is plainly changed. And a recent United Nations report hit the point exactly. It said: “the wall is manifestly intended to create facts on the ground. It may lack an act of annexation, as occurred in the case of East Jerusalem and of the Golan Heights. But its effect is the same: annexation.”⁴³

37. That puts this case in context. It arises from two concerns: one, that the lives of Palestinians have, already, been made nearly unbearable by the calculated imposition of a series of constraints and hardships, of which the Wall is the culmination; and the other, that the Wall is not simply a present hardship, but marks the boundary of the miserable patch of land into which Israel intends to force the Palestinian people, in a grotesque caricature of the two-State vision that is as far from justice as it is from legality.

⁴³Dugard, 2003 (United Nations doc. E/CN.4/2004/6, 8 September 2003, reproduced as Annex 6 to Palestine’s Written Statement), para. 14.

38. Palestine respectfully suggests that the Court should advise the General Assembly that the construction and operation of the Wall is changing the status of the Occupied Palestinian Territory, in violation of international law and Security Council resolutions, including resolution 446.

39. The effect of the Wall upon the right of the Palestinian people to self-determination, and upon the Road Map, will be addressed by my colleague, M. Jean Salmon, who will conclude Palestine's presentation.

40. Mr. President, Members of the Court; unless I can help you further, that concludes my part of this presentation. And I would ask you to call now on my colleague, Professor Jean Salmon.

The PRESIDENT: Thank you, Professor Lowe. I now give the floor to Professor Jean Salmon.

M. SALMON :

**MANŒUVRES POUR QUE LA COUR NE REPONDE PAS A LA DEMANDE D'AVIS ET EXPECTATIVES
LEGITIMES DE L'ASSEMBLEE GENERALE DE RECEVOIR CET AVIS**

1. Monsieur le président, Madame, Messieurs de la Cour, c'est toujours un grand honneur de se retrouver à cette barre. Pour un juriste dont les premiers pas professionnels furent accomplis comme conseiller juridique à l'UNRWA, il est émouvant de devoir aujourd'hui cet honneur à la confiance de la Palestine.

Il m'appartient de développer devant vous deux aspects de la question portée devant la Cour : il s'agit de traiter, d'une part, de certaines manœuvres utilisées pour que la Cour ne réponde pas à la demande d'avis et, d'autre part, des attentes de l'Assemblée générale à recevoir un avis sur les aspects juridiques de la question.

**I. Les manœuvres utilisées pour que la Cour ne réponde pas
à la demande d'avis de l'Assemblée générale**

Mon collègue, le professeur James Crawford, a déjà entretenu la Cour de l'ensemble de ces manœuvres. On reviendra cependant ici sur deux aspects particuliers.

2. Il est notoire que quelques Etats souhaiteraient que la Cour ne se prononce pas sur la question posée par l'Assemblée générale. On avance, à l'appui de cette aspiration, le fait que l'avis demandé serait inutile. L'Assemblée générale ayant déjà déclaré que le mur est illégal, son siège est fait. C'est oublier que certains Etats, en particulier Israël, ont dénié à l'Assemblée toute compétence pour prononcer une opinion juridique faisant autorité sur la validité internationale du mur.

A lui seul cet Etat de choses justifie que la Cour se prononce sur la légalité de cette construction litigieuse avant de déterminer les conséquences qui s'y attachent. Les Etats qui ont abordé le fond de la question dans leurs exposés écrits n'ont-ils pas consacré l'essentiel de leur démonstration au problème de l'illégalité ? Il convient que le principal organe judiciaire des Nations Unies exprime, avec l'autorité qui est la sienne, les fondements juridiques de l'illégalité afin que cela ne puisse plus à l'avenir être contestée.

Il est temps, en effet, que l'Assemblée qui a conduit à l'indépendance les deux tiers de l'humanité reçoive de la Cour l'appui qu'elle demande pour aider un territoire, auquel le droit à l'autodétermination fut promis en 1920, à pouvoir réaliser le droit sans que son assise territoriale soit amputée par un mur.

Il ne faut pas être grand clerc pour comprendre que les arguments relatifs à l'inutilité de l'avis ont, en réalité, pour but d'empêcher la Cour de dire le droit afin de laisser Israël continuer tranquillement le dépeçage de la Palestine en prétendant ne pas être tenu en la matière par quelque règle de droit.

3. Il en va de même de l'autre argument utilisé pour bâillonner la Cour, celui qui prétend que son intervention serait de nature à mettre en péril la «feuille de route».

Cet argument, sous couleur de préoccupations liées à la sauvegarde du processus de paix et du règlement négocié de la question, met, en réalité, doublement en péril le droit à l'autodétermination du peuple palestinien, sur le territoire duquel Israël construit un nouveau mur de la honte.

1) Il occulte le fait que l'exercice du droit à l'autodétermination du peuple palestinien sur l'intégrité des territoires occupés est, en réalité, un des fondements mêmes du processus de paix et de la feuille de route.

2) Il occulte le fait que c'est le mur qui enfreint gravement les obligations contenues dans la feuille de route.

En un mot, c'est un épouvantail pour empêcher la Cour de procéder à ces deux constatations.

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Envisageons les, tour à tour.

1. L'argument de la feuille de route occulte le fait que l'exercice du droit à l'autodétermination du peuple palestinien sur l'intégrité des territoires occupés est, en réalité, un des fondements mêmes du processus de paix et de la feuille de route

4. Le Conseil de sécurité, par sa résolution 1515 du 19 novembre 2003, «Demande aux parties de s'acquitter des obligations qui leur incombent en vertu de la feuille de route, en coopération avec le Quatuor, et de concrétiser la vision de deux Etats vivant côte à côte dans la paix et la sécurité.»

La vision de «deux Etats vivant côte à côte» repose sur un socle juridique dont la première pierre est la résolution 181 (II) de l'Assemblée générale de 1947, prévoyant la création de deux Etats sur le territoire de l'ancien mandat britannique sur la Palestine. Elle s'appuie, en outre, sur une série de résolutions obligatoires du Conseil de sécurité auxquelles elle se réfère expressément : en particulier, la résolution 242 (1967) qui prévoit la non-acquisition de territoire par la force et le retrait des territoires occupés lors du récent conflit, résolution qui fut confirmée par les résolutions 338 (1973) et 1397 (2002) du même organe.

Ainsi est fixée l'assise territoriale sur laquelle le peuple palestinien a le droit de disposer de lui-même. Il s'agit des territoires occupés par Israël depuis 1967, délimités par la ligne de démarcation qui résulte de la convention générale d'armistice entre le Royaume hachémite de Jordanie et Israël, signée à Rhodes le 3 avril 1949, et de son application.

C'est ce que l'on appelle communément la «Ligne verte».

5. Le processus de paix repose donc sur deux droits fondamentaux du peuple palestinien :

- le droit à disposer de lui-même sur les territoires palestiniens occupés depuis 1967, y compris Jérusalem-Est;
- le droit de mettre en œuvre ce droit par une négociation où son consentement ne serait pas vicié par l'accumulation de faits accomplis illégaux de l'autre partie tendant à limiter l'exercice de ce droit.

Le document visé sous le nom de «feuille de route» prévoit comme stade ultime de la négociation «deux Etats, Israël et une Palestine souveraine, indépendante, démocratique et viable, coexistant dans la paix et la sécurité». La procédure envisagée est celle de négociations directes pour mettre fin au conflit et définir au stade final un «statut permanent». Ce dernier a été défini, dans des accords avec Israël conclus à Washington en 1993 et à Taba en 1995, de la manière suivante : «Jérusalem, les réfugiés, les implantations, les arrangements en matière de sécurité, les frontières, les relations et la coopération avec d'autres voisins, et d'autres questions d'intérêt commun»⁴⁴.

Pour que l'on puisse prétendre que la présente demande d'avis serait, de la part de l'Assemblée générale, une initiative mettant en danger le processus de paix, encore faudrait-il prouver qu'un prononcé de la Cour sur l'illégalité du mur serait de nature à porte atteinte à ce «statut permanent». C'est ce dont conviennent les exposés écrits du Royaume-Uni⁴⁵ et des Etats-Unis⁴⁶.

Or, tel n'est pas le cas.

Les cent quarante-quatre Etats qui ont estimé que le mur constitue une violation du droit international se sont fondés sur des éléments de droit qui sont au cœur même de la feuille de route :

- le respect du droit du peuple palestinien à l'autodétermination;
- le respect du statut en droit international du territoire occupé et de son assise territoriale;
- le respect des obligations internationales découlant de ce statut quant aux droits de la population civile (droit humanitaire et droits de l'homme).

⁴⁴ Déclaration de principes sur les arrangements intérimaires d'autonomie, signés à Washington le 13 septembre 1993, article V, *RGDIP*, 1994, p. 264; accord intérimaire sur la Cisjordanie et Gaza, signé à Taba le 28 septembre 1995A/51/889, S/1997/357.

⁴⁵ Royaume-Uni., exposé écrit, par. 3.21.

⁴⁶ Etats-Unis d'Amérique, exposé écrit, par. 4.2.

6. En constatant que le mur viole ces droits, la Cour n'interférera ni avec la mise en œuvre de la feuille de route ni avec des questions qui font partie du «statut permanent». La Cour n'est pas appelée à trancher un problème de frontières, mais à faire assurer le respect du statut d'un territoire colonisé (sous la forme mandataire) qui s'est ensuite trouvé occupé par une puissance étrangère. Le peuple de ce territoire a le droit de voir respecter ses droits face à la construction d'un mur au-delà de la ligne de démarcation qui le sépare de la puissance occupante.

A supposer que la Cour soit conduite, en raison de la manière dont le mur est construit, à faire allusion à certaines questions qui relèvent du statut permanent (relatives à Jérusalem, ou aux colonies de peuplement, par exemple), ce sera pour rappeler les obligations préexistantes découlant des résolutions du Conseil de sécurité qui ont un caractère obligatoire et auxquelles il n'est pas permis de déroger par des accords particuliers. Sous la réserve du respect d'obligations ayant ce caractère, les deux parties sont libres, au cours de la négociation, et pourvu que leur consentement ne soit pas vicié, d'opérer les négociations qu'elles jugeront opportunes pour aboutir à un statut de paix définitif.

7. En conclusion de ce premier point, on peut dire que la demande d'avis adressée à la Cour n'empêche en rien la négociation de se poursuivre et que, loin de perturber le processus de paix, la Cour, par ses prononcés, l'encadrera en rappelant quels sont les droits du peuple palestinien qui ne peuvent être enfreints par la construction du mur.

Appeler de ses vœux la négociation entre le loup et l'agneau doit s'accompagner d'un minimum de protection pour l'agneau.

Je passe maintenant au second aspect de l'argument relatif à la feuille de route.

2. Il occulte le fait que c'est le mur qui enfreint gravement les obligations contenues dans la feuille de route

8. La très grande majorité des Etats Membres de l'ONU a souligné que ce qui mettait en péril le processus de paix, c'était non la demande d'avis, mais bien le mur construit par Israël.

Le processus de paix comporte, il ne faut pas l'oublier, l'accord intérimaire israélo-palestinien sur la Cisjordanie et la bande de Gaza signé à Taba le 28 septembre 1995⁴⁷, qui dispose en son article XI, que

⁴⁷ A/51/889, S/1997/357.

«1. Les deux parties considèrent la Cisjordanie et la bande de Gaza comme une seule unité territoriale, dont l'intégrité et le statut seront préservés au cours de la période intérimaire»

et, en son article XXXI, qu'

«7. Aucune des deux parties n'entreprend, ni ne prend de mesure à même de modifier le statut de la Cisjordanie et de la bande de Gaza avant que les négociations sur le statut permanent n'aboutissent.»

Ces dispositions sont au cœur même du processus de paix.

La feuille de route contient, au surplus, une série de dispositions que l'exposé écrit de la République française a mises, à juste titre, en lumière. Je prends ici un certain nombre de passages :

««Israël prend toutes les dispositions nécessaires pour aider à normaliser la vie des Palestiniens» et «gèle toutes les activités d'implantation de colonies»;

«[l]e Gouvernement israélien ne prend aucune [mesure] susceptible de [saper] ... la confiance, notamment les expulsions, ..., la saisie ou la destruction [d'habitations et] de biens palestiniens ..., [en tant que mesure] ... destinée à faciliter ... la construction de [bâtiments israéliens], la destruction d'institutions et d[e l]'infrastructures palestiniennes...»».

9. Au lieu d'observer ces obligations, Israël, par la construction du mur, tourne le dos au droit du peuple palestinien à disposer de lui-même et, en même temps, sabote la feuille de route.

Comme l'exposé écrit de la Palestine l'a démontré⁴⁸

«a) dans la mesure où le mur se situe au-delà de la Ligne verte et est construit en Territoire palestinien occupé, y compris Jérusalem-Est et ses alentours, il ampute l'assiette territoriale sur laquelle le peuple palestinien est fondé à exercer son droit à l'autodétermination. Dans la même mesure, le mur contrevient également au principe juridique qui interdit l'acquisition de territoire par le recours à la force;

b) le tracé du mur est conçu pour modifier la composition démographique du Territoire palestinien occupé, y compris Jérusalem-Est, par le renforcement des colonies de peuplement israéliennes situées en Territoire palestinien occupé et par l'emploi de moyens destinés à faciliter leur expansion — au mépris du fait que ces colonies sont elles-mêmes contraires au droit international;

c) par la création d'enclaves palestiniennes, le mur a pour effet manifeste et prévisible le déplacement forcé de la population palestinienne, il vise à réduire et à morceler l'assiette territoriale de la Palestine occupée et d'établir des secteurs palestiniens non contigus assimilables aux bantoustans, ce qu'interdit le droit international;

d) le mur porte atteinte au droit du peuple palestinien à la souveraineté permanente sur ses ressources naturelles et détruit le tissu économique de la vie du peuple palestinien».

⁴⁸ Par. 548 et suiv.

En un mot,

- e) le mur compromet la praticabilité d'un Etat viable pour le peuple palestinien et porte ainsi atteinte aux futures négociations basées sur le principe des «deux Etats».

En conclusion l'épouvantail de la feuille de route est une manœuvre dont le but est d'empêcher la Cour de dire le droit, au plus grand profit d'Israël qui en tirera argument pour continuer impunément ses voies de fait en Territoire palestinien occupé.

J'en viens maintenant à la seconde partie de mon exposé consacrée aux attentes légitimes de l'Assemblée générale à recevoir un avis sur les aspects juridiques de la question.

II. Les attentes légitimes de l'Assemblée générale à recevoir un avis sur les aspects juridiques de la question

10. Les attentes légitimes ont bien été décrites par la Cour dans l'affaire du *Sahara occidental*, «Cet avis est requis pour aider l'Assemblée générale à définir la politique de décolonisation qu'elle adoptera à l'avenir.»⁴⁹

La Cour est appelée à aider l'Assemblée générale dans la manière dont elle doit exercer sa responsabilité à propos d'un territoire dont elle se préoccupe depuis 1947.

Dans ces conditions, que peut espérer l'Assemblée générale d'un avis de la Cour ?

11. En premier lieu que celle-ci la conforte dans l'invocation qu'elle a faite, dans ses résolutions du 21 octobre 2003 et du 8 décembre 2003, de divers *principes de droit international pour condamner la construction du mur*.

L'exposé écrit de la Palestine a, pour sa part, détaillé, en son chapitre 12, les violations spécifiques du droit international résultant de la construction de ce mur. On ne voudrait pas abuser de la patience de la Cour en les reprenant ici *in extenso*.

12. En second lieu l'Assemblée espère que l'avis de la Cour dégagera les *conséquences juridiques découlant des graves violations du droit international imputables à Israël*.

Il s'agit d'appliquer les principes coutumiers en matière de responsabilité internationale. C'est une matière qui est familière à la Cour. Sa jurisprudence a largement informé les articles de la Commission du droit international consacrés aux conséquences de la responsabilité. Il convient de les envisager dans le chef de l'Etat d'Israël, et dans le chef des autres Etats.

⁴⁹ Affaire du *Sahara occidental*, avis consultatif du 16 octobre 1975, *C.I.J. Recueil 1975*, p. 68, par. 161.

Conséquences juridiques pour l'Etat Israël

13. En ce qui concerne Israël tout d'abord, la première conséquence est l'obligation *de cessation*.

Israël est tenu de cesser immédiatement de poser tous les actes internationaux illicites découlant de l'édification, de la planification et de la gestion du mur dans le Territoire palestinien occupé, y compris Jérusalem-Est.

Israël est également tenu de s'y abstenir de prendre toute autre mesure modifiant, ou visant à modifier, le statut juridique, la structure institutionnelle, le caractère géographique et historique ainsi que la composition géographique de la zone fermée ou d'un secteur de cette zone, ou de toute mesure qui porterait atteinte aux droits des Palestiniens ou du peuple palestinien. En particulier, Israël a l'obligation de s'abstenir de transférer dans ce secteur une partie de sa population civile et d'entraîner le déplacement de la population palestinienne hors de la zone visée. Il doit y appliquer les obligations que lui imposent les résolutions adoptées par le Conseil de sécurité.

14. La seconde conséquence est l'obligation *de restitution c'est-à-dire de rétablissement du statu quo ante*.

A cet effet, Israël doit démanteler immédiatement toutes les portions du mur, situées en Territoire palestinien occupé, qui franchissent la Ligne verte, et supprimer le régime qui y est associé. Israël est notamment tenu de rapporter toutes les mesures et pratiques administratives et législatives adoptées en rapport avec la construction, la gestion et la planification du mur, ceci inclus l'expropriation des terres et des biens situés dans le secteur considéré. Il doit rendre à leurs propriétaires tous les biens saisis ou réquisitionnés. Il doit leur rendre leurs oliviers si c'est possible.

Il est tenu d'annuler toutes les mesures de restrictions imposées à la circulation des personnes et des biens et aux activités des organismes humanitaires.

En outre, Israël a l'obligation de procéder immédiatement au rapatriement de sa population civile qui s'est installée dans les zones adjacentes au mur à l'intérieur du Territoire palestinien occupé depuis le début de la construction du mur et de démanteler les colonies établies dans le secteur considéré. Il doit assurer et faciliter le retour immédiat, en toute circonstance, des civils palestiniens ayant dû quitter le secteur considéré et libérer les personnes détenues en raison de la construction et de l'entretien par Israël du régime d'administration associé au mur.

15. En conformité avec son obligation de réparer les dommages causés, Israël à l'obligation d'indemniser intégralement les préjudices subis par les personnes lésées pour tous les préjudices matériels et personnels subis à la suite de la violation par Israël de ses obligations internationales.

16. Enfin, en conformité avec ses obligations en vertu du droit international humanitaire, de respecter et de faire respecter la quatrième convention de Genève, Israël a aussi des obligations en matière pénale. Il doit rechercher et traduire devant ses tribunaux les personnes suspectées d'avoir commis ou d'avoir ordonné que soient commis de graves manquements au droit international humanitaire; il doit prendre les mesures nécessaires pour empêcher tous autres manquements au droit international humanitaire qui découlent de la construction, de la gestion et de la planification du mur.

Conséquences juridiques pour les Etats autres qu'Israël

17. Cette matière est classique depuis l'avis de la Cour rendu dans l'affaire de la *Namibie*. En conséquence des graves manquements au droit international par l'Etat d'Israël, les autres Etats ont :

- l'obligation de coopérer, les uns avec les autres, ainsi qu'avec les Nations Unies et les autres organismes internationaux compétents, en vue de mettre fin à ces violations;
- l'obligation de ne pas reconnaître les situations illicites qui découlent de ces violations;
- l'obligation de ne pas prêter aide et assistance au maintien de ces situations.

18. Si Israël persiste dans son refus d'appliquer les règles de droit international susdites et ne se plie pas aux conséquences de sa responsabilité, l'Assemblée générale est en droit d'attendre que le Conseil de sécurité prenne les mesures coercitives qui s'imposent et qui, s'agissant de violations de règles de droit impératif, ne devraient pas pouvoir faire l'objet de l'usage de veto par un membre quelconque du Conseil.

Monsieur le président, Madame et Messieurs de la Cour, le présent exposé clôture les plaidoiries orales de la Palestine; il m'appartient au nom de tous ceux qui viennent de s'exprimer à cette barre de remercier la Cour de sa bienveillante attention.

The PRESIDENT: Thank you, Professor Salmon. This concludes the oral statement and comments of Palestine. The oral proceedings will resume this afternoon at 3 o'clock in order for South Africa, Algeria, Saudi Arabia and Bangladesh to be heard on the question submitted to the Court. The sitting is closed.

The Court rose at 1.00 p.m.
