

SEPARATE OPINION OF JUDGE KOOIJMANS

Reasons for negative vote on operative subparagraph (3) (D) — Background and context of request for advisory opinion — Need for balanced treatment — Jurisdictional issues — Article 12, paragraph 2, of the Charter and General Assembly resolution 377 A (V) — Question of judicial propriety — Purpose of request — Merits — Self-determination — Proportionality — Self-defence — Legal consequences — Obligations for other States — Article 41 of the International Law Commission Articles on State Responsibility — Duty of non-recognition — Duty of abstention — Duty to ensure respect for humanitarian law — Common Article 1 of the Geneva Conventions.

I. INTRODUCTORY REMARKS

1. I have voted in favour of all paragraphs of the operative part of the Advisory Opinion with one exception, viz. subparagraph (3) (D) dealing with the legal consequences for States.

I had a number of reasons for casting that negative vote which I will only briefly indicate at this stage, since I will come back to them when commenting on the various parts of the Opinion.

My motives can be summarized as follows.

First, the request as formulated by the General Assembly did not make it necessary for the Court to determine the obligations for States which ensue from the Court's findings. In this respect an analogy with the structure of the Opinion in the *Namibia* case is not appropriate. In that case the question about the legal consequences for States was at the heart of the request and logically so since it was premised on a decision of the Security Council. That resolution, and in particular its operative paragraph 5 which was addressed to "all States", was considered by the Court to be "essential for the purposes of the present advisory opinion" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, *I.C.J. Reports 1971*, p. 51, para. 108).

A similar situation does not exist in the present case, where the Court's view is not asked on the legal consequences of a decision taken by a political organ of the United Nations but of an act committed by a Member State. That does not prevent the Court from considering the issue of consequences for third States once that act has been found to be illegal but then the Court's conclusion is wholly dependent upon its reasoning and not upon the necessary logic of the request.

It is, however, this reasoning that in my view is not persuasive (see paras. 39-49, below) and this was my second motive for casting a negative vote.

And, third, I find the Court's conclusions as laid down in subparagraph (3) (D) of the *dispositif* rather weak; apart from the Court's finding that States are under an obligation "not to render aid or assistance in maintaining the situation created by [the] construction [of the wall]" (a finding I subscribe to) I find it difficult to envisage what States are expected to do or not to do in actual practice. In my opinion a judicial body's findings should have a direct bearing on the addressee's behaviour; neither the first nor the last part of operative subparagraph (3) (D) meets this requirement.

2. Although I am in general agreement with the Court's Opinion, on some issues I have reservations with regard to its reasoning. I will, in giving my comments, follow the logical order of the Opinion:

- (a) jurisdictional issues;
- (b) the question of judicial propriety;
- (c) the merits;
- (d) the legal consequences.

Before doing so I wish, however, to make some remarks about the background and context of the request.

II. BACKGROUND AND CONTEXT OF THE REQUEST FOR THE ADVISORY OPINION

3. In paragraph 54 of the Opinion the Court observes (in the context of judicial propriety) that it is aware that the question of the wall is part of a greater whole but that that cannot be a reason for it to decline to reply to the question asked. It adds that this wider context will be carefully taken into account. I fully share the Court's view as laid down in that paragraph including the Court's observation that it can nevertheless only examine other issues to the extent that is necessary for the consideration of the question put to it.

4. In my opinion the Court could and should have given more explicit attention to the general context of the request in its Opinion. The situation in and around Palestine has been for a number of decades not only a virtually continuous threat to international peace and security but also a human tragedy which in many respects is mind-boggling. How can a society like the Palestinian one get used to and live with a situation where the victims of violence are often innocent men, women and children? How can a society like the Israeli society get used to and live with a situation where attacks against a political opponent are targeted at innocent civilians, men, women and children, in an indiscriminate way?

5. The construction of the wall is explained by Israel as a necessary protection against the latter category of acts which are generally considered to be international crimes. Deliberate and indiscriminate attacks against civilians with the intention to kill are the core element of terrorism which has been unconditionally condemned by the international community regardless of the motives which have inspired them.

Every State, including Israel, has the right and even the duty (as the Court says in paragraph 141) to respond to such acts in order to protect the life of its citizens, albeit the choice of means in doing so is limited by the norms and rules of international law. In the present case, Israel has not respected those limits, and the Court convincingly demonstrates that these norms and rules of international law have not been respected by it. I find no fault with this conclusion nor with the finding that the construction of the wall along the chosen route has greatly added to the suffering of the Palestinians living in the Occupied Territory.

6. In paragraph 122 the Court finds that the construction of the wall, along with measures taken earlier, severely impedes the exercise by the Palestinian people of its right to self-determination, and therefore constitutes a breach of Israel's obligation to respect that right. I have doubts whether the last part of that finding is correct (see paragraph 32, below), but it is beyond doubt that the mere existence of a structure that separates the Palestinians from each other makes the realization of their right to self-determination far more difficult, even if it has to be admitted that the realization of this right is more dependent upon political agreement than on the situation *in loco*.

But it is also true that the terrorist acts themselves have caused "great harm to the legitimate aspirations of the Palestinian people for a better future", as was stated in the Middle East Quartet Statement of 16 July 2002. And the Statement continues: "Terrorists must not be allowed to kill the hope of an entire region, and a united international community, for genuine peace and security for both Palestinians and Israelis." (Written Statement of Israel, Annex 10.)

7. The fact that the Court has limited itself to report merely on a number of the historical facts which have led to the present human tragedy may be correct from the viewpoint of what is really needed to answer the request of the General Assembly: the result, however, is that the historical résumé, as presented in paragraphs 70 to 78, is rather two-dimensional. I will illustrate this by giving one example which is hardly relevant for the case itself.

8. Before giving its historical résumé, the Court says that it will first make a brief analysis of the status of the territory and it starts by mentioning the establishment of the Mandate after the First World War. Nothing is said, however, about the status of the West Bank between the conclusion of the General Armistice Agreement in 1949 and the occupation by Israel in 1967, in spite of the fact that it is a generally known fact

that it was placed by Jordan under its sovereignty but that this claim to sovereignty, which was relinquished only in 1988, was recognized by three States only.

9. I fail to understand the reason for this omission of an objective historical fact since in my view the fact that Jordan claimed sovereignty over the West Bank only strengthens the argument in favour of the applicability of the Fourth Geneva Convention right from the moment of its occupation by Israel in June 1967.

If it is correct that the Government of Israel claims that the Fourth Geneva Convention is not applicable *de jure* in the West Bank since that territory had not previously to the 1967 war been under Jordanian sovereignty, that argument already fails since a territory, which by one of the parties to an armed conflict is claimed as its own and is under its control, is — once occupied by the other party — by definition occupied territory of a *High Contracting Party* in the sense of the Fourth Geneva Convention (emphasis added). And both Israel and Jordan were parties to the Convention.

That this at the time also was recognized by the Israeli authorities is borne out by the Order issued after the occupation and referred to in paragraph 93 of the Opinion.

10. The strange result of the Court's reticence about the status of the West Bank between 1949 and 1967 is that it is only by implication that the reader is able to understand that it was under Jordanian control (paragraphs 73 and 129 refer to the demarcation line between Israel and Jordan (the Green Line)) without ever being explicitly informed that the West Bank had been placed under Jordanian authority. This is all the more puzzling as the Court would in no way have been compelled to comment on the legality or legitimacy of that authority if it had made mention of it.

11. In a letter of 29 January from the Deputy Director General and Legal Adviser of the Israeli Ministry of Foreign Affairs to the Registrar of the Court it is stated that "Israel trusts and expects that the Court will look beyond the request to the wider issues relevant to this matter" (Written Statement of Israel, covering letter). In this respect it was said that resolution ES-10/14 is "absolutely silent" on the terrorist attacks against Israeli citizens and thus "reflects the gravest prejudice and imbalance with the requesting organ". Israel, therefore, requested the Court not to render the opinion.

12. I am of the view that the Court, in deciding whether it is appropriate to respond to a request for an advisory opinion, can involve itself with the political debate which has preceded the request only to the extent necessary to understand the question put. It is no exception that such debate is heated but, as the Court said in the case of the *Legality of the Threat or Use of Nuclear Weapons*

“once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution” (*I.C.J. Reports 1996 (I)*, p. 237, para. 16).

The Court, however, does not function in a void. It is the principal judicial organ of the United Nations and has to carry out its function and responsibility within the wider political context. It cannot be expected to present a legal opinion on the request of a political organ without taking full account of the context in which the request was made.

13. Although the Court certainly has taken into account the arguments put forward by Israel and has dealt with them in a considerate manner, I am of the view that the present Opinion could have reflected in a more satisfactory way the interests at stake for all those living in the region. The rather oblique references to terrorist acts which can be found at several places in the Opinion are in my view not sufficient for this purpose. An advisory opinion is brought to the attention of a political organ of the United Nations and is destined to have an effect on a political process. It should therefore throughout its reasoning and up till the operative part reflect the legitimate interests and responsibilities of *all* those involved and not merely refer to them in a concluding paragraph (para. 162).

III. JURISDICTIONAL ISSUES

14. I fully share the view of the Court that the adoption of resolution ES-10/14 was not *ultra vires* since it did not contravene the provision of Article 12, paragraph 1, of the Charter; nor did it fail to fulfil the essential conditions set by the Uniting for Peace resolution (resolution 377 A (V)) for the convening of an Emergency Special Session.

15. I doubt, however, whether it is possible to describe the practice of the political organs of the United Nations with respect to the interpretation of Article 12, paragraph 1, of the Charter without taking into account the effect of the Uniting for Peace resolution on this interpretation. In the Opinion, the Court deals with resolution 377 A (V) as a separate item and merely in relation to its procedural requirements. In my opinion this resolution also had a more substantive effect, namely with regard to the interpretation of the relationship between the competences of the Security Council and the General Assembly respectively, in the field of international peace and security and has certainly expedited

the development of the interpretation of the condition, contained in Article 12, paragraph 1, namely that the Assembly shall not make a recommendation with regard to a dispute or situation *while* the Security Council is exercising its functions in respect of such dispute or situation (emphasis added).

16. This effect is also recognized in doctrine. “The adoption of the ‘Uniting for Peace’ resolution . . . could not fail to have an effect on the weight to be given to the restriction in Article 12, paragraph 1.” (Philippe Manin, in J.-P. Cot, *La Charte des Nations Unies*, 2nd ed., 1981, p. 298 [translation by the Registry]; see also E. de Wet, *The Chapter VII Powers of the United Nations Security Council*, 2004, p. 46.) In actual practice the adoption of the Uniting for Peace resolution has contributed to the interpretation that, if a veto cast by a permanent member prevents the Security Council from taking a decision, the latter is no longer considered to be exercising its functions within the meaning of Article 12, paragraph 1. And the fact that a veto had been cast when the Security Council voted on a resolution dealing with the construction of the wall is determinative for the conclusion that the Security Council was no longer exercising its functions under the Charter with respect to the construction of the wall. In the present case, therefore, the conclusion that resolution ES-10/14 did not contravene Article 12, paragraph 1, of the Charter cannot be dissociated from the effect resolution 377 A (V) has had on the interpretation of that provision.

17. That such practice is accepted by both Assembly and Security Council also with regard to the procedural requirements of resolution 377 A (V) is borne out by the fact that none of the Council’s members considered that the reconvening of the Assembly in Emergency Special Session on 20 October 2003 was unconstitutional and that the adoption of the resolution demanding that Israel stop and reverse the construction of the wall was therefore *ultra vires*. In this respect it is telling that this resolution (resolution ES-10/13) was tabled as a compromise by the Presidency of the European Union, among whose members were two permanent and two non-permanent members of the Security Council, less than a week after a draft resolution on the same subject had been vetoed in the Council.

18. Let me add that I agree with the Court that there has developed a practice enabling the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security. I doubt, however, whether a resolution of the character of resolution ES-10/13 (which beyond any doubt is a recommendation in the sense of Article 12, paragraph 1) could have been lawfully adopted by the Assembly, whether in a regular session or in an Emergency Special Session, if the Security Council had been considering the specific issue of the construction of the wall without yet having taken a decision.

IV. THE QUESTION OF JUDICIAL PROPRIETY

19. I must confess that I have felt considerable hesitation as to whether it would be judicially proper to comply with the request of the Assembly.

20. This hesitation had first of all to do with the question whether the Court would not be unduly politicized by giving the requested advisory opinion, thereby undermining its ability to contribute to global security and to respect for the rule of law. It must be admitted that such an opinion, whatever its content, will inevitably become part of an already heated political debate. The question is in particular pertinent as three members of the Quartet (the United States, the Russian Federation and the European Union) abstained on resolution ES-10/14 and do not seem too eager to see the Court complying with the request out of fear that the opinion may interfere with the political peace process. Such fears cannot be taken lightly since the situation concerned is a continuous danger for international peace and security and a source of immense human suffering.

21. While recognizing that the risk of a possible politicization is real, I nevertheless concluded that this risk would not be neutralized by a refusal to give an opinion. The risk should have been a consideration for the General Assembly when it envisaged making the request. Once the decision to do so had been taken, the Court was made an actor on the political stage regardless of whether it would or would not give an opinion. A refusal would just as much have politicized the Court as the rendering of an opinion. Only by limiting itself strictly to its judicial function is the Court able to minimize the risk that its credibility in upholding the respect for the rule of law is affected.

22. My hesitation was also related to the question of the object of the Assembly's request. What was the Assembly's purpose in making the request? Resolution ES-10/14 seems to give some further information in this respect in its last preambular paragraph which reads as follows:

“Bearing in mind that the passage of time further compounds the difficulties on the ground, as Israel, the occupying Power, continues to refuse to comply with international law vis-à-vis its construction of the above-mentioned wall, with all its detrimental implications and consequences . . .”

Evidently the Assembly finds it necessary to take speedy action to bring to an end these detrimental implications and consequences and for this purpose it needs the views of the Court.

But the question remains: Views on what? And why the views of a judicial body on an act which has already been determined not to be in conformity with international law and the perpetrator of which has already been called upon to terminate and reverse its wrongful conduct (resolution ES-10/13)?

23. The present request recalls the dilemma as seen by Judge Petré in the *Namibia* case. He felt that the purpose of the request for an advisory opinion was in that case “above all to obtain from the Court a reply such that States would find themselves under obligation to bring to bear on South Africa pressure . . .”. He called this a reversal of the natural distribution of roles as between the principal judicial organ and the political organ of the United Nations since, instead of asking the Court its opinion on a legal question in order to deduce the political consequences following from it, the opposite was done (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, *I.C.J. Reports 1971*, p. 128).

24. In the present Opinion the Court responds to the argument that the Assembly has not made clear what use it would make of an advisory opinion on the wall, with a reference to the *Nuclear Weapons* case where it said that

“it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.” (Para. 61.)

And the Court continues that it “cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly” (para. 62).

25. I do not consider this answer fully satisfactory. There is quite a difference between substituting the Court’s assessment of the usefulness of the opinion for that of the organ requesting it and analysing from a judicial viewpoint what the purpose of the request is. The latter is a simple necessity in order to find out what the Court as a judicial body is in a position to say. And from that point of view the request is phrased in a way which can be called odd, to put it mildly. And in actual fact the Court makes this analysis when in paragraph 39 of the Opinion it says that the use of the terms “legal consequences” arising from the construction of the wall “necessarily encompasses an assessment of whether that construction is or is not in breach of certain rules and principles of international law”. I agree with that statement but not because the word “necessarily” is related to the terms of the request but because it is related to the judicial responsibility of the Court. To quote the words of Judge Dillard in the *Namibia* case:

“when these [political] organs do see fit to ask for an advisory opinion, they must expect the Court to act in strict accordance with its judicial function. This function *precludes* it from accepting, without any enquiry whatever, a legal conclusion which itself conditions the nature and scope of the legal consequences flowing from it. It would be otherwise if the resolutions requesting an opinion were legally neutral . . .” (*I.C.J. Reports 1971*, p. 151; emphasis added.)

26. In the present case the request is far from being “legally neutral”. In order not to be precluded, from the viewpoint of judicial propriety, from rendering the opinion, the Court therefore is duty bound to reconsider the content of the request in order to uphold its judicial dignity. The Court has done so but in my view it should have done so *proprio motu* and not by assuming what the Assembly “necessarily” must have assumed, something it evidently did not.

27. Let me add that in other respects I share the views the Court has expressed with regard to the issue of judicial propriety. In particular the Court’s finding that the subject-matter of the General Assembly cannot be regarded as being “only a bilateral matter between Israel and Palestine” (para. 49) is in my view worded in a felicitous way since, in regard to the issue of the existence of a bilateral dispute, it avoids the dilemma of “either/or”. A situation which is of legitimate concern to the organized international community and a bilateral dispute with regard to that same situation may exist simultaneously. The existence of the latter cannot deprive the organs of the organized community of the competence which has been assigned to them by the constitutive instruments. In the present case the involvement of the United Nations in the question of Palestine is a long-standing one and, as the Court says, the subject-matter of the request is of acute concern to the United Nations (para. 50). By giving an opinion the Court therefore in no way circumvents the principle of consent to the judicial settlement of a bilateral dispute which exists simultaneously. The bilateral dispute cannot be dissociated from the subject-matter of the request, but only in very particular circumstances which cannot be spelled out in general can its existence be seen as an argument for the Court to decline to reply to the request. In this respect, I find the quotation from the *Western Sahara* Opinion in paragraph 47 of the Opinion, which contains pure circular reasoning, less than helpful.

28. If the request has been legitimately made in view of the United Nations long-standing involvement with the question of Palestine, Israel’s argument that the Court does not have at its disposal the necessary evidentiary material, as this is to an important degree in the hands of Israel as a party to the dispute, does not hold water. The Court has to respect Israel’s choice not to address the merits, but it is the Court’s own responsibility to assess whether the available information is sufficient to enable it to give the requested opinion. And, although it is a matter for sincere regret that Israel has decided not to address the merits, the Court is right when it concludes that the available material allows it to give the opinion.

V. MERITS

29. I share the Court’s view that the 1907 Hague Regulations, the Fourth Geneva Convention of 1949, the 1966 Covenants on Civil and

Political Rights and on Economic, Social and Cultural Rights and the 1989 Convention on the Rights of the Child are applicable to the Occupied Palestinian Territory and that Israel by constructing the wall and establishing the associated régime has breached its obligation under certain provisions of each of these conventions.

I find no fault with the Court's reasoning in this respect although I regret that the summary of the Court's findings in paragraph 137 does not contain a list of treaty provisions which have been breached.

30. The Court has refrained from taking a position with regard to territorial rights and the question of permanent status. It has taken note of statements, made by Israeli authorities on various occasions, that the "fence" is a temporary measure, that it is not a border and that it does not change the legal status of the territory. I welcome these assurances which may be seen as the recognition of legal commitments on the side of Israel but share the Court's concern that the construction of the wall creates a *fait accompli*. It is therefore all the more important to expedite the political process which has to settle all territorial and permanent status issues.

31. *Self-determination* — In my view, it would have been better if the Court had also left issues of self-determination to this political process. I fully recognize that the right of self-determination is one of the basic principles of modern international law and that the realization of this right for the people of Palestine is one of the most burning issues for the solution of the Israeli-Palestinian conflict. The overriding aim of the political process, as it is embodied *inter alia* in the Roadmap, is "the emergence of an independent, democratic and viable Palestinian State living side by side in peace and security with Israel and its other neighbours" (dossier of the Secretary-General, No. 70). This goal is subscribed to by both Israel and Palestine; both are, therefore, in good faith bound to desist from acts which may jeopardize this common interest.

32. The right of self-determination of the Palestinian people is therefore imbedded in a much wider context than the construction of the wall and has to find its realization in this wider context. I readily agree with the Court that the wall and its associated régime impede the exercise by the Palestinian people of its right to self-determination be it only for the reason that the wall establishes a physical separation of the people entitled to enjoy this right. But not every impediment to the exercise of a right is by definition a breach of that right or of the obligation to respect it, as the Court seems to conclude in paragraph 122. As was said by the Quartet in its statement of 16 July 2002, the terrorist attacks (and the failure of the Palestinian Authority to prevent them) cause also great harm to the legitimate aspirations of the Palestinian people and thus

seriously impede the realization of the right of self-determination. Is that also a breach of that right? And if so, by whom? In my view the Court could not have concluded that Israel had committed a breach of its obligation to respect the Palestinians' right to self-determination without further legal analysis.

33. In this respect I do not find the references to earlier statements of the Court in paragraph 88 of the Opinion very enlightening. In the *Namibia* case the Court referred in specific terms to the relations between the inhabitants of a mandate and the mandatory as reflected in the constitutive instruments of the mandate system. In the *East Timor* case the Court called the rights of peoples to self-determination in a colonial situation a right *erga omnes*, therefore a right opposable to all. But it said nothing about the way in which this "right" must be translated into obligations for States which are not the colonial Power. And I repeat the question: Is every impediment to the exercise of the right to self-determination a breach of an obligation to respect it? Is it so only when it is serious? Would the discontinuance of the impeding act restore the right or merely bring the breach to an end?

34. *Proportionality* — The Court finds that the conditions set out in the qualifying clauses in the applicable humanitarian law and human rights conventions have not been met and that the measures taken by Israel cannot be justified by military exigencies or by requirements of national security or public order (paras. 135-137). I agree with that finding but in my opinion the construction of the wall should also have been put to the proportionality test, in particular since the concepts of military necessity and proportionality have always been intimately linked in international humanitarian law. And in my view it is of decisive importance that, even if the construction of the wall and its associated régime could be justified as measures necessary to protect the legitimate rights of Israeli citizens, these measures would not pass the proportionality test. The route chosen for the construction of the wall and the ensuing disturbing consequences for the inhabitants of the Occupied Palestinian Territory are manifestly disproportionate to interests which Israel seeks to protect, as seems to be recognized also in recent decisions of the Israeli Supreme Court.

35. *Self-defence* — Israel based the construction of the wall on its inherent right of self-defence as contained in Article 51 of the Charter. In this respect it relied on Security Council resolutions 1368 (2001) and 1373 (2001), adopted after the terrorist attacks of 11 September 2001 against targets located in the United States.

The Court starts its response to this argument by stating that

Article 51 recognizes the existence of an inherent right of self-defence in the case of an armed attack by one State against another State (para. 139). Although this statement is undoubtedly correct, as a reply to Israel's argument it is, with all due respect, beside the point. Resolutions 1368 (2001) and 1373 (2001) recognize the inherent right of individual or collective self-defence without making any reference to an armed attack by a State. The Security Council called acts of international terrorism, without any further qualification, a threat to international peace and security which authorizes it to act under Chapter VII of the Charter. And it actually did so in resolution 1373 (2001) without ascribing these acts of terrorism to a particular State. This is the completely new element in these resolutions. This new element is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years. The Court has regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence.

36. The argument which in my view is decisive for the dismissal of Israel's claim that it is merely exercising its right of self-defence can be found in the second part of paragraph 139. The right of self-defence as contained in the Charter is a rule of international law and thus relates to international phenomena. Resolutions 1368 (2001) and 1373 (2001) refer to acts of *international* terrorism as constituting a threat to *international* peace and security; they therefore have no immediate bearing on terrorist acts originating within a territory which is under control of the State which is also the victim of these acts. And Israel does not claim that these acts have their origin elsewhere. The Court therefore rightly concludes that the situation is different from that contemplated by resolutions 1368 (2001) and 1373 (2001) and that consequently Article 51 of the Charter cannot be invoked by Israel.

VI. LEGAL CONSEQUENCES

37. I have voted in favour of subparagraph (3) (B), (C) and (E) of the operative part. I agree with the Court's finding with regard to the consequences of the breaches by Israel of its obligations under international law for Israel itself and for the United Nations (paras. 149-153 and 160). Since I have voted, however, against operative subparagraph (3) (D), the remainder of my opinion will explain the reasons for my dissent in a more detailed way than I did in my introductory remarks.

38. The General Assembly requests the Court to specify what are the

legal consequences arising from the construction of the wall. If the object of the request is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions (para. 50) it is only logical that a specific paragraph of the *dispositif* is addressed to the General Assembly. That the paragraph is also addressed to the Security Council is logical as well in view of the shared or parallel responsibilities of the two organs.

Since the Court has found that the construction of the wall and the associated régime constitute breaches of Israel's obligations under international law, it is also logical that the Court spells out what are the legal consequences for Israel.

39. Although the Court beyond any doubt is entitled to do so, the request itself does not necessitate (not even by implication) the determination of the legal consequences for other States, even if a great number of participants urged the Court to do so (para. 146). In this respect the situation is completely different from that in the *Namibia* case where the question was exclusively focused on the legal consequences for States, and logically so since the subject-matter of the request was a decision by the Security Council.

In the present case there must therefore be a special reason for determining the legal consequences for other States since the clear analogy in wording with the request in the *Namibia* case is insufficient.

40. That reason as indicated in paragraphs 155 to 158 of the Opinion is that the obligations violated by Israel include certain obligations *erga omnes*. I must admit that I have considerable difficulty in understanding why a violation of an obligation *erga omnes* by one State should necessarily lead to an obligation for third States. The nearest I can come to such an explanation is the text of Article 41 of the International Law Commission's Articles on State Responsibility. That Article reads:

“1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40. [Article 40 deals with serious breaches of obligations arising under a peremptory norm of general international law.]

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.”

Paragraph 3 of Article 41 is a saving clause and of no relevance for the present case.

41. I will not deal with the tricky question whether obligations *erga omnes* can be equated with obligations arising under a peremptory norm of general international law. In this respect I refer to the useful commentary of the ILC under the heading of Chapter III of its Articles. For argument's sake I start from the assumption that the consequences of the violation of such obligations are identical.

42. Paragraph 1 of Article 41 explicitly refers to a duty to co-operate. As paragraph 3 of the commentary states, “What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches.” And paragraph 2 refers to “[c]ooperation . . . in the framework of a competent international organization, in particular the United Nations”. Article 41, paragraph 1, therefore does not refer to individual obligations of third States as a result of a serious breach. What is said there is encompassed in the Court’s finding in operative subparagraph (3) (E) and not in subparagraph (3) (D).

43. Article 41, paragraph 2, however, explicitly mentions the duty not to recognize as lawful a situation created by a serious breach just as operative subparagraph (3) (D) does. In its commentary the ILC refers to unlawful situations which — virtually without exception — take the form of a legal claim, usually to territory. It gives as examples “an attempted acquisition of sovereignty over territory through denial of the right of self-determination”, the annexation of Manchuria by Japan and of Kuwait by Iraq, South Africa’s claim to Namibia, the Unilateral Declaration of Independence in Rhodesia and the creation of Bantustans in South Africa. In other words, all examples mentioned refer to situations arising from formal or quasi-formal promulgations intended to have an *erga omnes* effect. I have no problem with accepting a duty of non-recognition in such cases.

44. I have great difficulty, however, in understanding what the duty not to recognize an illegal fact involves. What are the individual addressees of this part of operative subparagraph (3) (D) supposed to do in order to comply with this obligation? That question is even more cogent considering that 144 States unequivocally have condemned the construction of the wall as unlawful (resolution ES-10/13), whereas those States which abstained or voted against (with the exception of Israel) did not do so because they considered the construction of the wall as legal. The duty not to recognize amounts, therefore, in my view to an obligation without real substance.

45. That argument does not apply to the second obligation mentioned in Article 41, paragraph 2, namely the obligation not to render aid or assistance in maintaining the situation created by the serious breach. I therefore fully support that part of operative subparagraph (3) (D). Moreover, I would have been in favour of adding in the reasoning or even in the operative part a sentence reminding States of the importance of rendering humanitarian assistance to the victims of the construction of the wall. (The Court included a similar sentence, be it with a different scope, in its Opinion in the *Namibia* case, *I.C.J. Reports 1971*, p. 56, para. 125.)

46. Finally, I have difficulty in accepting the Court’s finding that the States parties to the Fourth Geneva Convention are under an obligation

to ensure compliance by Israel with humanitarian law as embodied in that Convention (paragraph 159, operative subparagraph (3) (D), last part).

In this respect the Court bases itself on common Article 1 of the Geneva Convention which reads: "The High Contracting Parties undertake to respect and *to ensure respect* for the present Convention in all circumstances." (Emphasis added.)

47. The Court does not say on what ground it concludes that this Article imposes obligations on third States not party to a conflict. The *travaux préparatoires* do not support that conclusion. According to Professor Kalshoven, who investigated thoroughly the genesis and further development of common Article 1, it was mainly intended to ensure respect of the conventions by the population as a whole and as such was closely linked to common Article 3 dealing with internal conflicts (F. Kalshoven, "The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit", in *Yearbook of International Humanitarian Law*, Vol. 2, 1999, pp. 3-61). His conclusion from the *travaux préparatoires* is:

"I have not found in the records of the Diplomatic Conference even the slightest awareness on the part of government delegates that one might ever wish to read into the phrase 'to ensure respect' any undertaking by a contracting State other than an obligation to ensure respect for the Conventions by its people 'in all circumstances'." (*Ibid.*, p. 28.)

48. Now it is true that already from an early moment the International Committee of the Red Cross in its (non-authoritative) commentaries on the 1949 Convention has taken the position that common Article 1 contains an obligation for all States parties to ensure respect by other States parties. It is equally true that the Diplomatic Conference which adopted the 1977 Additional Protocols incorporated common Article 1 in the First Protocol. But at no moment did the Conference deal with its presumed implications for third States.

49. Hardly less helpful is the Court's reference to common Article 1 in the *Nicaragua* case. The Court, without interpreting its terms, observed that "such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression". The Court continued that "The United States [was] thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua" to act in violation of common Article 3 (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, *I.C.J. Reports 1986*, p. 114, para. 220).

But this duty of abstention is completely different from a positive duty to ensure compliance with the law.

50. Although I certainly am not in favour of a restricted interpretation

of common Article 1, such as may have been envisaged in 1949, I simply do not know whether the scope given by the Court to this Article in the present Opinion is correct as a statement of positive law. Since the Court does not give any argument in its reasoning, I do not feel able to support its finding. Moreover, I fail to see what kind of positive action, resulting from this obligation, may be expected from individual States, apart from diplomatic démarches.

51. For all these reasons I felt compelled to vote against operative subparagraph (3) (D).

(Signed) Pieter H. KOOIJMANS.
