LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY

(REQUEST FOR ADVISORY OPINION)

ORDER OF 19 DECEMBER 2003

WRITTEN STATEMENT OF
THE LEAGUE OF ARAB STATES

January 2004

LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY

(REQUEST FOR ADVISORY OPINION)

ORDER OF 19 DECEMBER 2003

WRITTEN STATEMENT OF
THE LEAGUE OF ARAB STATES

January 2004

Table of Contents

INTRODUCTION

I. Terms and scope of the request

II. The position of the League of Arab States in the proceedings before the Court

PART ONE

Procedural Questions

III. The competence of the General Assembly and the jurisdiction of the Court

1. The competence of the General Assembly to request the Advisory Opinion

2. The qualification of the question as a "legal" one

IV. The duty of the Court to render the requested Opinion

1. The so-called "discretionary character" of the advisory function of the Court

2. Possible arguments against the Court rendering an opinion

a. The allegedly political nature or motivation of the question

b. The alleged absence of any useful legal purpose served by an advisory opinion on the question

c. The allegedly nefarious effect of an advisory opinion on ongoing or future settlement efforts

PART TWO

Substantive Questions

A. The illegality of the wall

V. Historical Background: The Development of the Palestine question

1. The Palestinian Mandate (24 July 1922)
2. The U.N. General Assembly resolution 181 (II) on the Future Government of Palestine (November 29, 1947)
3. General Assembly resolution 194 (III): the right to return
4. The occupation of the West Bank and the Gaza Strip, 1967
5. Security Council resolution 242 (1967) of 22 November 1967
6. The Madrid Conference
7. The Oslo Accords
8. The Wye River Plantation Accord
9. Camp David II
10. The Second Intifada
11. The Road Map: President George W. Bush's vision
12. Arab Peace Initiatives

VI. The Wall: factual, humanitarian, political and socio-economic impact

VII. The Wall as an internationally unlawful act - applicable law

VIII. The Wall – a violation of fundamental rules of general international law and of the Charter of the United Nations, in particular of the right to self-determination

1. Introduction
2. The international status of the territory as a mandated territory
3. The international status of the territory flowing from the right to self-determination
    a. The right to self-determination in international law
    b. The competence and responsibility of the General Assembly in the realisation of the right to Self-Determination and the legal effects of the resolutions
    c. The right to Self-Determination of the Palestinian People
    d. The right of the Palestinian People to Permanent Sovereignty over its Natural Resources

e. The territory over which the right to Self-Determination of the Palestinian People may be exercised
f. The duties of the General Assembly and the Security Council in the peace process
4. The Wall – a violation of Art. 2 (4) of the Charter

IX. The Wall – a violation of international humanitarian law
1. Introduction
2. The applicability of the Fourth Geneva Convention
3. Alleged justifications of measures taken by the occupying power
a. Military necessity or similar considerations
b. The irrelevance of the argument of self-defence
4. The duty to ensure adequate living conditions for the population of the occupied territory
5. The duty to respect private property in occupied territory
6. The duty not to expel the civilian population of the occupied territory
7. The duty not to transfer the occupying power's population into occupied territory
8. The duty not to change the status of an occupied territory

X. The Wall – a violation of of human rights law and standards

1. The applicability of human rights law in a territory occupied during an international armed conflict
2. The question of the limitations of fundamental human rights – general considerations
3. The Covenant on Civil and Political Rights
a. Article 12
b. Article 13
c. Article 26
4. The Covenant on Economic, Social and Cultural Rights
5. The Convention on the Rights of the Child

B. The Wall - legal consequences arising from the unlawful construction of the wall

1. The law of State responsibility – the obligations of the State of Israel
2. The law of State responsibility – the rights and duties of other States
3. The responsibilities and duties of the United Nations and the Specialised Agencies
4. Personal criminal liability

C. Conclusions and submissions

INTRODUCTION

I. Terms and Scope of the Request

1.1. By resolution A/RES/ES-10/14 of 8 December 2003, adopted at its 10th Emergency Session, the General Assembly of the United Nations decided, pursuant to Article 96, paragraph 1, of the Charter of the United Nations, to request the International Court of Justice urgently to render an advisory opinion on the following question:

> "What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?"

1.2. The General Assembly made this request following the obstinate refusal by Israel to heed to all pleas to discontinue the construction of and to dismantle the wall which is built well inside the Palestinian Occupied Territories and does not follow the Armistice Line of 1949 that now marks the boundary between Palestine and Israel. When a draft resolution urging Israel to desist from constructing that wall was not adopted by the Security Council due to a veto by the United States,[1] the General Assembly adopted Resolution ES-10/13 which, inter alia,

> "1. Demands that Israel stop and reverse the construction of the wall in the Palestinian Occupied Territory, including in an around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law;"

[1] UN Doc. S/2003/980 of 14 October 2003.

The Secretary-General, requested by the General Assembly to report on Israel's compliance with this resolution, concluded, in his report of 24 November 2003, that Israel had not complied with its obligations.[2]

1.3. The scope of the request has to be interpreted in the light of this history. By Resolution ES-10/13, the General Assembly had determined that the construction of the wall was a breach of international law. As it has then been confronted with Israeli non-compliance, it seeks to be enlightened by the Court as to the legal consequences of this continued refusal to comply. The ambit of the term "legal consequences", however, is not limited to a general declaration on international responsibility. The judicial function of the Court requires that the Court reaffirm the existing legal situation, which encompasses the breach of a wide catalogue of specific and detailed rules of general and conventional international law, the Charter and relevant resolutions of the Security Council and General Assembly, including the right to self-determination, international humanitarian law, human rights law, and contractual obligations, etc. Therefore, the Court is expected to answer to layers of questions: to clearly state that and why the construction of the wall is unlawful under international law and to state the legal consequences flowing from that illegality.

1.4. In performing this task, the Court must determine the nature of that Wall which has a devastating effect on the life of the Palestinian population and possesses all the features of a permanent structure. This means that although the existence of the wall is undisputed, the Court will have to ascertain a number of facts as to the impact and lasting effect of the wall. It should do so bearing in mind that the evidence strongly suggests that Israel is determined to create facts on the ground amounting to *de facto* annexation in violation of the Charter of the United Nations. The footprint of the wall itself is a cause of huge confiscation of land. By cutting the Palestinian territories into five barely contiguous territorial units deprived of international borders, it threatens the potential of any future viable Palestinian State with effective control and with a functioning economy. In the immediate, as well as long term, the construction of an apartheid wall through Palestinian land is denying the most fundamental economic and social rights to many thousands of

[2] UN Doc. A/ES-10/248, paras. 28 and 29.

Palestinians, leaving many of them separated from their lands or imprisoned by the winding route of the wall or in the closed military zone along the edge of the wall. This is a structured deprivation of lands, homes, crops and means of subsistence. The clear statement of the illegal character of the wall will then constitute the basis for the Court pronouncing itself on the legal consequences thereof: cessation, restitution, compensation, and a corresponding duty of all States and of the United Nations to take measure to ensure that these consequences are implemented.

II. The standing of the League of Arab States in the Proceedings before the Court

2.1. The Palestinian question has always been the core of the Arab- Israeli conflict, and at the top of the League of Arab States' agenda since its creation in 1945. The League's Pact asserted the right of Palestine to independence. Accordingly, Palestine was granted the full membership in the Arab League.

2.2. The League of Arab States as a regional governmental organization, and being a regional agency in the meaning of the U.N. Charter, is interested in settling the Palestinian question in all its aspects, and in reaching a comprehensive, just and lasting peace for the Arab-Israeli conflict. It deployed many efforts and took several initiatives to put an end to that conflict, and has adopted the Arab Peace Initiative in the Beirut summit of March 2002.

2.3. This is the reason why the League of Arab States requested the Court's permission to submit a written statement and also to appear before the Court in the oral proceedings. Pursuant to Art. 66 of its Statute, the Court decided that the League is likely to be able to furnish information on the question before it.

*

* *

This written statement is divided into two parts. Part One shows the competence of the Court to give an advisory opinion on the subject-matter of the request. It establishes that the request comes from an authorized organ and that the request is phrased as and addresses a legal question. It also addresses the question of admissibility, and shows that the Court has no grounds to reject the request for an advisory opinion on the basis of judicial propriety (or has no compelling reasons to refuse the request for an advisory opinion).

Part Two is divided in three sections. Section A demonstrates that the construction of the wall being built by Israel in the Occupied Palestinian Territory is incompatible with a number of fundamental rules of international law. Section B asks of the Court to state the legal consequences which flow from this violation both *ratione materiae* and *ratione personae.* Section C summarises the argument in the form of submissions.

PART ONE

Procedural Questions

III. Competence of the General Assembly and the Jurisdiction of the Court

1. The competence of the General Assembly to request the Advisory Opinion

3.1. Article 65 of the Statute of the Court stipulates that:

> "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

There is no doubt that the two prerequisites for the giving of an advisory opinion: namely that the request be made by a duly authorized organ and that the question put to the Court be a legal one, are both fulfilled in the present request as detailed in the following.

3.2. According to Article 96(1), the General Assembly (like the Security Council), in contrast to other authorized organs and specialized agencies, "may request the International Court of Justice to give an advisory opinion *on any legal question.*"[3] The broad scope of this article, which reflects the very broad competence of the General Assembly under UN Charter Articles 10, 11 and 13, and hence, the almost complete liberty of the Assembly in requesting an opinion of the Court, has been confirmed by the Court.[4] Thus, there is no

---

[3] Italics added.

[4] Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons, 8 July 1996*, para. 11.

basis whatsoever for an objection pretending that the General Assembly, in seeking an opinion on questions relevant to the exercise of its broad powers under the Charter in relation to a territory with an international status over which it has continuing responsibility, went beyond the scope of this competence.

2. The qualification of the question as a "legal" one

3.3. The General Assembly now requests an advisory opinion from the Court on a legal question. The advisory opinion requested relates to the legality of the construction of the wall under international law, which necessarily, and by definition, is a "legal question". It concerns the *international legal aspects* of a set of facts, *i.e.* the question of the incompatibility of the construction of the wall with the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions. Furthermore, the Court is requested to advise on the legal consequences of this incompatibility under international law, including the Charter. This question, too, involves the *interpretation* of international norms which might be applicable to the circumstances leading to the present proceedings which is an essentially a judicial task. The question submitted by the General Assembly has been "framed in terms of law and raise[s] problems of international law. ... [it is by its] very nature susceptible of a reply based on law", hence it is a question of a legal character.[5]

3.4. That the Court may be called upon, as pointed out above, to ascertain certain facts in order to assess their legal significance is part of the traditional judicial function. It does not exclude that the request concerns a legal question.[6]

3.5. In sum, the Assembly's request for an advisory opinion satisfies the conditions of Article 65 of the Statute of the Court and Article 96(1) of the Charter both *ratione personae* (the GA being a duly authorised organ) and *ratione materiae* (the request being on a legal

---

[5] *Western Sahara, Advisory Opinion,* I.C.J. Rep. 1975, p. 18, para. 15.
[6] *Namibia*, ICJ Rep. 1971, p. 27; *Western Sahara, loc. cit.* p.19).

question). And, accordingly, the Court is called upon to render the advisory opinions required.

IV. The duty of the Court to render the requested Opinion

4.1. Being the principal judicial organ of the United Nations, it is the foremost and noble task of the Court to assist the political organs of the United Nations by giving them advice on legal questions. This is the object and purpose of Art. 96 para. 1 of the Charter. Thus, it is in principle a legal duty of the Court to provide such advice.

4.2. Nevertheless, it has become customary even in advisory proceedings that States, by pleading preliminary objections, to try to convince the Court not to give an opinion an the substance of the matter. In view of the accelerated procedure contained in the Order of 19 December 2003 by which the Court has limited the written statements to only one followed by oral hearings, the League of Arab States is compelled to present counter-arguments in anticipation of certain possible allegations *ex hypothesi* by some States aimed at preventing the Court from performing its judicial function. This conjecture is not fictitious; it is based on previous contentions and allegations made in connection with advisory proceedings of the Court.

1. The so-called "discretionary character" of the advisory function of the Court

4.3. In the advisory opinion concerning the *Legality of the Threat or Use by a State of Nuclear Weapons in Armed Conflict* of 1996,[7] the Court was requested by some States not to give its opinion on the basis of an alleged "discretionary" power not to do so. In giving its opinion on the request made by the General Assembly, it responded to this allegation by

[7] Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons, 8 July 1996.*

emphatically reiterating that "it should not, in principle, refuse to give an advisory opinion".[8] It explained that "once it has established its competence to [give an opinion] ... only 'compelling reasons' could lead to such a refusal".[9] In fact, there has been no refusal, based on discretionary power, to act upon a request for advisory opinion in the history of the present Court. In the advisory opinion concerning the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* requested by the World Health Organization, the Court justified the refusal to give the opinion requested on the basis of the Court's lack of jurisdiction.

4.4. But, can the Court exercise an unfettered discretion when exercising its advisory function? True, certain of its *dicta* when read out of context, may lead to such a conclusion. This issue has been argued in detail before this Court by Professor Georges Abi-Saab, on behalf of Egypt, in the public sitting held by the Court on 1 November 1995 concerning the *Legality of Nuclear Weapons*. The present case recalls these arguments.

4.5. In the advisory opinion on *Certain Expenses of the UN*,[10] the Court said that its power to give advisory opinions "is of a discretionary character."[11] Similarly in its opinion on the *Western Sahara*[12] it said that Article 65, paragraph 1, of the Statute, which establishes the power of the Court to give an advisory opinion, was "*permissive* and under it, that power is discretionary in character."[13] But, one should read what comes after that and interpret the adjective "discretionary" in the light of the total statement. In order to understand that, one has to go back to the origins of the advisory function.

---

[8] *Ibid*, para. 14.

[9] Italics added. *Loc cit.*

[10] *Certain Expenses of the UN, (Article 17, paragraph 2, of the Charter), Advisory opinion of 20 July 1962, I.C.J. Reports 1962,* p. 151.

[11] *Ibid.*, p. 155.

[12] *Western Sahara, Advisory opinion of 16 October 1975, I.C.J. Reports 1975*, p. 12.

[13] *Ibid.*, p. 21. Italics added.

4.6. The advisory function of the Court was introduced by Article 14 of the Covenant of the League of Nations which provided for the establishment of the Permanent Court of International Justice (PCIJ). Besides specifying that that Court was "competent to hear and determine any dispute of an international character which the Parties thereto submit to it", Article 14 stipulated that the Court "*may also give* an advisory opinion about any dispute or question referred to it by the Council or by the Assembly."[14] In French, the other official language of the League, the formula was quite different. It was not permissive as the words "may also give" suggest, but it was mandatory; it read: "Elle donnera aussi ...".

However, the difference between the two was not as fundamental as it was made to appear. The "permissive" English formula, in the circumstances, served no more than an "enabling clause" which was not meant to define the nature or character of the activity of the Court but simply to authorize it. It does not mean that the exercise of this activity is "discretionary", nor does it necessarily exclude that such an exercise was "mandatory".

4.7. The issue was not solved in either the original Statute of the Court nor in its first Rules. The question was not, however, ignored during the preparation of the Rules. It was raised in relation to a draft Rule which would have reserved the right of the Court "to refrain from replying to questions put to it which require an advisory opinion on a theoretical case". At this early stage there were doubts as to the compatibility of the advisory activity with the judicial function of the Court and whether it constituted part of that function. There were fears lest it would undermine the credibility and prestige of the Court, particularly if it had to answer any question put to it by the political organs. The Court preferred, however, not to include any regulation on advisory opinions and thus leave the question open to be dealt with according to the circumstances of each case.

In the following year the Court had to address the issue in the famous *Eastern Carelia* case.[15] It is usually invoked wrongly, it is submitted, to prove that the Court has an

---

[14] Italics added.

[15] *P.C.I.J., Series B, No 5, 1923.*

"unfettered discretion" to refuse to give advisory opinions. A careful reading of the case, however, reveals a very different picture.

4.8. In that case, Finland, a Member of the League of Nations, brought before the League Council a dispute it had with a non-Member State, the Soviet Federative Republic of Russia (as it was then called). Russia energetically rejected an invitation to submit the question of *Eastern Carelia* to the examination of the Council on the basis of Article 17 of the Covenant.[16] But the Finnish Government persisted and brought the case before the Council. The Council ended up putting to the Court a question, which really would have decided the central point at issue between the two parties.

The Court declined to give the opinion. Its refusal, contrary to what was largely alleged, was mainly based on the absence of Russia's consent to the advisory procedure itself, as a State which was neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, hence based on inherent limitations posed by its Statute. There was no mention or question of discretion or discretionary power.[17]

The record shows that the *Eastern Carelia* precedent remains a solitary one throughout the span of life of both Courts - until came the request of the WHO mentioned above - and that the ICJ in its *dicta*, while describing its power to give advisory opinions as "discretionary" - which the old Court did not say - justified this on the grounds of the Court's lack of jurisdiction in that case.

4.9. The Advisory Opinion on *Certain Expenses* is paradigmatic in this regard. The Court said that its power to give an advisory opinion is derived from Article 65 of the Statute. The power granted is of a discretionary character. In exercising its discretion, the present Court, like the PCIJ, has always been guided by the principle which the Permanent Court stated in

---

[16] *Ibid.*, p. 24. Article 17 dealt with the settlement of disputes between Members and non-Members with the acceptance of the non-Member.

[17] It is true that having reached its decision on this solid basis in *Eastern Carelia*, the Court - probably *ex abundante cautela* - added other reasons which might seem less constraining in nature, and which are the ones usually cited in support of the "discretionary power" interpretation of the Opinion. But these were only "supporting" arguments, not the main grounds of the decision.

the case concerning the *Status of Eastern Carelia* when it said that "The Court, being a Court of justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court."[18] Therefore, and in accordance with Article 65 of its Statute, the Court explained, it can give an advisory opinion only on a legal question. If a question was not a legal one, the Court had no discretion in the matter; it must decline to give the opinion requested. But even if the question was a legal one, which the Court was undoubtedly competent to answer, it may nonetheless decline to do so. As the Court said in its Opinion on the *Interpretation of Peace Treaties*,[19] the permissive character of Article 65 "gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request."[20]

And here comes the second part of the statement. But as the Court also said in the same Opinion, that "[t]he reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and in principle should not be refused."[21] Still more emphatically, in its Opinion of 23 October 1956,[22] the Court said that only "compelling reasons" should lead it to refuse to give a requested opinion.[23]

There are similar statements in the *Western Sahara*[24] case and elsewhere.

4.10. Is the permissive language of the beginning reconcilable with the constraining language of the end? Is the coexistence of two apparently contradicting propositions possible? On the one hand, it is said that the power is discretionary and that the Court can,

---

[18] *P.C.I.J., Series B, No. 5, p. 29.*

[19] Interpretation of Peace Treaties with Bulgaria, Hungary and Romania of 30 March 1950, *I.C.J. Reports 1950*, 65.

[20] *I.C.J. Reports 1950*, p. 65 at p. 72.

[21] *Ibid.*, p. 71; and *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 15 at p. 19.

[22] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., Advisory Opinion of October 23rd, 1956, I.C.J. Reports 1956,* p. 77.

[23] *Loc. cit.*, p. 86. Also *cf., I.C.J. Reports 1962*, p. 151 at p. 155.

[24] *I.C.J. Reports 1975*, p. 12, para. 23 at p. 21.

therefore, decline to give the opinion even if it was competent. On the other hand, it is argued that it is the Court's main contribution to, and form of participation in, the work of the Organization, the Court being "the principal judicial organ of the United Nations", to give advisory opinions and that in principle it should not refuse to do so, unless there are "compelling reasons" for that refusal. An interpretation which reconciles the two parts of the statement is proposed.

It all hinges on how the adjective "discretionary" is construed. If what is meant by it is *unfettered* discretion, then there is no way of avoiding the inner contradiction of the statement. But if it is interpreted by using the construction of the words of the statement itself one can find the way out of contradiction. That in certain cases, while "the Court is undoubtedly competent to answer, it may nonetheless decline to do so." If this is the definition of discretion, then it is fully reconcilable with the second compelling part of the statement.

They are reconcilable because the conditions of the exercise of the consultative function, the same as with the conditions of the exercise of the contentious function, go beyond the limits of the competence of the Court which are in this field, advisory jurisdiction, that the question be legal and that it falls within the jurisdiction of the requesting organ. The other conditions relate to *admissibility* which lies beyond competence. However, unlike in the context of the contentious function, where admissibility could settle and crystalize in the form of generally recognizable and concrete conditions, admissibility presented itself in the context of the new advisory function in the form of general considerations rather than precise conditions.

4.11. The general considerations of admissibility, while leaving to the Court a wider margin of appreciation than the concrete conditions, remain within the realm of admissibility. They are considerations of "propriety" and not of "opportunity". Propriety is subject to the test of what is proper for a judicial organ to do, *i.e.*, what is compatible with the judicial function. It is not a question of unfettered discretion or convenience.

Indeed, if we consider the advisory activity of the Court as part of its judicial function, we cannot consider it at the same time as "discretionary" in the sense of unfettered discretion according to *opportunity* and *convenience*. The difference between a right and a

function is that right is a power or a faculty which we can exercise or not, keep or abandon; while a function conjugates a power with a *charge or an obligation to exercise* it in the pursuit of a specific finality. This description applies as much to the advisory function as it does to the contentious function of the Court; it is not the preserve of the advisory function.

4.12. Even in relation to the contentious function - whose contours are much clearer and conditions of admissibility well settled and crystallized - there remains an illusive margin which cannot be reduced to precise conditions. Significantly enough, when the Court had to identify it, it did so by reference to the advisory function, thus confirming the identity of the problem and the solution in both. The Court did this in the *Northern Cameroons* case[25] where it said that:

> "Both Courts have had occasion to make pronouncements concerning requests for advisory opinions, which are applicable to the proper role of the Court in disposing of contested cases; in both situations, the Court is exercising a judicial function. That function is circumscribed by inherent limitations which are none the less imperative because they may be difficult to catalogue, and may not frequently present themselves as a conclusive bar to adjudication in a concrete case. Nevertheless, it is always a matter for the determination of the Court whether its judicial functions are involved."[26]

The Court then added that like the PCIJ, it has always been guided by the principle which the latter stated in the case concerning the *Status of Eastern Carelia* on 23 July 1923 when it said that:

---

[25] *Case concerning the Northern Cameroons Cameroon* v. *United Kingdom, Preliminary Objections, Judgment of 2 December 1963, I.C.J Reports 1963*, p. 15.

[26] *Ibid.*, p. 30.

"The Court, being a Court of justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court. (*P.C.I.J., Series B, No. 5, p. 29.*)"[27]

This *dictum* explicitly identifies and unifies the *problematique* of the "general considerations of admissibility" for the two species of the judicial function.

4.13. Consequently, the so-called "discretion" is in fact reduced to a special duty of vigilance for the Court lest in any advisory proceedings (but also in any contentious proceedings) be trespassed by those "inherent limitations" of the judicial function "which are none the less imperative because they may be difficult to catalogue".

In other words, the "discretionary power" of the Court thus comes down to no more than a wider margin of appreciation of the general considerations of admissibility of requests for advisory opinions; considerations whose default would mean that answering the question would be incompatible with the judicial function and not merely "inopportune" or "inconvenient" for the Court or for any other instance; and would constitute one of those "compelling reasons" which alone "should lead [the Court] to refuse to give the requested opinion".

2. Possible arguments against the Court rendering the Opinion

4.14. It may be alleged that the Court should decline to give the requested advisory opinion. It may thus be argued that the 'propriety' of judicial involvement with the question is more than doubtful, and that the Court should not give the requested advisory opinion in the present case because there were several "compelling reasons" for it not to do so, e.g., that the General Assembly's request leads to the question of the Court's integrity since there is the danger of a pointless procedure.

---

[27] *Loc. cit.*

4.15. The reasons which may be given for this negative attitude can be synthetically formulated, *inter alia*, as follows:

- That it is political or politically motivated
- That the opinion can have no useful legal effect; or alternatively, and paradoxically
- That it will definitely have a nefarious effect on the ongoing and future negotiations between the parties to the Middle East conflict.

These arguments are explained and refuted *seriatim*.

a. The allegedly political nature or motivation of the question

4.16. It may be suggested that the question posed by the General Assembly is not a legal question but a political one, and that an opinion by the Court offering advice on what is essentially a political matter could undermine its authority and effectiveness. It may also be alleged that the legality and consequences of the construction of the Wall cannot be assessed using the norms of international law without such an assessment turning from a judicial into a political one.

4.17. The mere fact that the question may have political aspects, be related to an on-going political process or have been politically motivated, or that the opinion may have political implications, cannot deprive it of its character as a legal question nor prevent the Court from rendering its advisory opinion.

The Court has stated that:

"It is not concerned with the motives which may have inspired ... [the] request ..."[28]

It has also affirmed that:

---

[28] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), I.C.J. Reports 1948*, p. 57 at p. 61.

"in institutions 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 with respect to the matter under debate ..."[29]

On another occasion, the Court said:

"It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task ..."[30]

Thus, it is not for the Court to delve into the motivation which leads a duly authorized organ to request an advisory opinion on a legal question obviously falling within the jurisdiction of that organ even when that question relates to an issue which has other important political facets or is itself, *arguendo*, essentially political. In the request before the Court, the legal questions are clear and the Court can answer them without enquiring into any apparent or hidden political motives or other political facets of the issue.

4.18. In the same vein, it may be suggested, as a basis for the contention that the Court should decline to give the opinion, that there is disagreement within the international community as to whether such a request was appropriate in light of the circumstances of the adoption of General Assembly resolution A/RES/ES-10/14 of 8 December 2003. On a previous occasion the Court had clearly indicated that the political controversy at the background of the question was not a reason for it to decline to give the advisory opinion

---

[29] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, p. 73, para. 33 at p. 87.

[30] *Certain Expenses of the UN, Advisory opinion of 20 July 1962, I.C.J. Reports 1962*, p. 151 at p. 155.

requested.[31] "Differences of views among States on legal issues", explained the Court, "have existed in practically every advisory proceeding; if all were agreed, the need to resort to the Court for advice would not arise."[32]

It makes no difference that resolution A/RES/ES-10/14 was adopted amidst political controversy or whether it was adopted by a large majority or not. What matters is that it was properly adopted by the constitutionally required majority. It has thus to be considered as the expression of the legally valid will of the General Assembly.

Furthermore, the way in which the decision was adopted is not a concern for the Court for the purposes of Art. 65 of the Statute, for neither the Charter nor the rules of procedure of the GA contains specific provisions regarding the method of adopting a request for an advisory opinion.

4.19. In the final analysis, the argument that the Court should not deal with a request considered to be "political" boils down to restricting the Court to only dealing with the technical details, not with the fundamental questions of the international legal order, which would mean a restraint on the Court's powers which is, of course, totally unacceptable.

b. The alleged absence of any useful legal purpose served by an advisory opinion on the question

4.20. It may be argued that an advisory opinion on the question put to the Court would serve no useful legal purpose, and would thus be a futile exercise of the judicial function, which disqualifies the request on grounds of "propriety". The argument may go on to

---

[31] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, I.C.J. Reports 1971*, p. 16, para. 40 at p. 27.

[32] *Ibid.*, para. 34 at p. 24.

explain that this is because the question does not fall in any of the categories of cases on which the Court has given advisory opinions up to the present.

4.21. The list of questions and matters dealt with by the Court obviously cannot limit the ambit of its advisory jurisdiction in any way. It is not a fast and hard list. In fact, it is quite natural for a Court of law to be requested to address different issues. However, what is controlling here is not this or any other list but the Statute of the Court. And the Statute is crystal clear when it provides that "[t]he Court may give an advisory opinion on any legal question".[33] The only condition is that the question be of a "legal nature" and falling within the jurisdiction of the requesting organ, which is for the General Assembly coextensive with the Charter.

4.22. Here again would be an impermissible confusion between the advisory and contentious functions of the Court. There is no need here, as in contentious proceedings, to prove a "legal interest" as a pre-condition of admissibility of a case before the Court. In advisory proceedings, the Charter, including the Statute, leaves it to the discretion of the requesting organ to evaluate the appropriateness and the eventual usefulness of the requested advisory opinion for its current and future work.

4.23. The Court has on numerous occasions affirmed its duty as "the principal judicial organ of the United Nations",[34] to respond to such requests. It stated that:

> "The reply of the Court, itself Organ of the United Nations, represents its participation in the activities of the Organization, and in principle should not be refused."[35]

---

[33] Article 65 of the Statute of the Court.

[34] Article 92, Charter of the United Nations.

[35] *Interpretation of Peace Treaties (first phase), Advisory Opinion, I.C.J. Reports 1950*, p. 65 at p. 71; and *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 15 at p. 19.

Indeed, the Court ruled that:

> "no State, ... can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take."[36]

It is not for the Court to decide in place of the General Assembly on the "desirability" or the "opportunity" of the request or to over rule it, when the Assembly itself had already considered it desirable.

4.24. It may be argued, nevertheless, that the nature of the case is such that the Court would be unable to give an advisory opinion which would be of positive assistance to the General Assembly and other organs of United Nations. It may also be argued that the Court would be forced to overstep the bounds of its function as "the principal judicial organ of the United Nations" to become a political body.

4.25. It is submitted, however, that the advisory opinion of the Court can be of great practical value. The Court has abundantly reiterated that its advisory activity constitutes its main form of participation in the activities of the United Nations of which it is the principal judicial organ and that a request in principle should not be refused.[37] The present request relates to an issue that lies within the hard core of the first purpose and principal function of the United Nations, namely the maintenance of international peace and security. It also relates to other areas in which the General Assembly is directly involved such human rights, decolonisation, including principle of self-determination, etc.

The question falls squarely within the ambit of the Assembly's large mandate under Article 10 covering "all matters falling within the Charter", as well as Articles 2(4), 11, 12

---

[36] *I.C.J. Reports 1950*, p. 65 at p. 71.

[37] *Loc. Cit.*; and *I.C.J. Reports 1951*, p. 15 at p. 19.

and 14 of the Charter. Answering the request by the Court would enlighten the General Assembly on the legal context in which its activities are carried out. A statement by the Court on the legal consequences arising from the construction of the Wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions, cannot fail to have a positive effect on the long-standing negotiations in the United Nations and elsewhere, at least by reducing the scope of a legal controversy.

c. The alleged nefarious effect on ongoing or future settlement efforts

4.26. It may be argued that a judgment on the legal consequences of the construction of the Wall might jeopardize the ongoing and future settlement efforts. This, it is submitted, is pure conjecture, and even odd. A pronouncement by the Court on the subject is in no way incompatible with the pursuit of negotiations, especially if they were to be conducted in the light of an authoritative declaration on the issues involved.

4.27. In the *Legality of the threat or use of nuclear weapons,* the Court refused to regard the contention that a reply from the Court might adversely affect ongoing negotiations and, therefore, be contrary to the interest of the United Nations as a compelling reason to decline to exercise its jurisdiction. The Court answered this allegation by asserting that "no matter what might be its conclusions in any opinion it might give, they would have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter. ... That being so, the Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction."[38]

4.28. It is difficult to understand how it can be believed by some that the declaration and clarification of the law, especially when this is furnished by the highest international legal

[38] *I.C.J Reports, 1996*, para. 17

instance, would not only have no relevance to a solution of a dispute, but even may have a harmful effect on the achievement of such a solution?

Confirming the illegality of the construction of the Wall and the determination of its legal consequences by an authoritative statement of the Court would play a major role in clarifying the law. Therefore, such a pronouncement cannot harm the ongoing or future negotiations aimed at settling the Middle East conflict. On the contrary, a pronouncement by the Court would likely facilitate such settlement.

PART TWO

Substantive Questions

A. The illegality of the Wall

V. Historical Background: The Development of the Palestine Question

1. The Palestinian Mandate (24 July 1922)

5.1. At the Peace Conference following the First World War, the Allied Powers divided up the Arab Territories under the former Ottoman Empire into Mandates; Palestine being assigned to Great Britain. Incorporated into the Mandate was the 1917 Balfour Declaration, which favoured the establishment in Palestine of a homeland for the Jews. The Preamble of the Mandate document stated that

> "Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish Communities in Palestine, or the rights and political status enjoyed by Jews in any other Country;"

Article 2 of the Mandate document went on to declare that

"The Mandatory shall be responsible for placing the Country under such political, administrative and economic conditions as well secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion."

5.2. It should be noted that Palestine had been put under British Mandate according to the Covenant of the League of Nations signed as a part of the Treaty of Versailles on June 28, 1919. Article 22 of the Covenant contained the following paragraph:

"Certain Communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be of principal consideration in the selection of the Mandatory."

Palestine and the Palestinian People were a matter of concern during the Peace Conference (1919). Such concern was reflected in the King-Crane Commission's report on August 30, 1919.

5.3. President Wilson appointed two Americans, Henry King and Charles Crane.[39] Britain and France, however, declined to nominate members to the Commission[40], perhaps for fear of being confronted by recommendations from their own delegates which might conflict with their policies. The Commission's findings were suppressed and kept secret for three years. Their report was not published until 1947.

---

[39] They were assisted by others who had already made some study of Near East questions. See John, Robert and Hadawi, Sami.
The Palestine Diary – vol. 1, 1914-1945- Beirut 1970 p. 137.

[40] In fact, the British delegates, provisionally appointed, went to Paris early in May 1919, but the French had not appointed their delegates, the British Government declared that it was willing to agree to a purely American delegation.
ibid p. 137.

5.4. For Palestine, the King-Crane Commission, recommended serious modification of the extreme Zionist program "of unlimited immigration of Jews, looking finally to making Palestine distinctly a Jewish state." The Balfour Declaration in favour of "a national home for the Jewish people"' was not equivalent to making Palestine a Jewish State; nor could the establishment of such a state be accomplished without the gravest trespass upon the "civil and religious rights of existing non-Jewish Communities in Palestine". The fact was repeatedly exposed in the Commission's Conferences with Jewish representatives, for "the Zionists looked forward to a practically complete dispossession of the present non-Jewish inhabitants of Palestine, by various forms of purchase. Subjecting the Palestinian to unlimited Jewish immigration, and to steady financial and social pressure to surrender the land, would be a gross violation of the principle (self-determination) just quoted, and of the people's rights, though it kept within the forms of law. The feeling against the Zionist program was not confined to Palestine, but shared very generally throughout Syria... One effect of urging the extreme Zionist program would be an intensification of anti-Jewish feeling both in Palestine and in all other portions of the world which look to Palestine as the Holy Land."[41]

5.5. A telegram was sent to from President Wilson Jerusalem by Mr. Crane and Dr. King on June 20, 1919. It warned that,

> "Probably at no time has race feeling been so sensitive as just now. There was deep belief in American peace declarations as in those of the British and French Governments of 9 November 1918 on right of people to self-determination. Here older population, both Moslem and Christian, take united and most hostile attitude towards any extent of Jewish sovereignty over them. We doubt if any British Government or American official here believes that it is possible to carry out Zionist program except through support of large army."[42]

---

41 Ibid p. 139.

42 Ibid p. 137

5.6. Palestinian demands for independence and resistance to Jewish immigration led to a rebellion in 1937. By that time the British Government received the Report of Palestine Royal Commission (Peal Commission) on July 7, 1937, which was appointed in 1936 under Lord Peal. The commission recommended the termination of the Mandate for Palestine and the creation of two sovereign independent states. During the 25 years of the Palestine Mandate, from 1922 to 1947, large-scale Jewish immigration from abroad, mainly from Eastern Europe took place, the numbers swelling in the 1930s with the notorious Nazi persecution of Jewry. Over this period the Jewish population of Palestine, composed principally of immigrants, increased from less than 10 per cent in 1917 to over 30 per cent in 1947. By the mid-1940s, the Arab inhabitants comprised about two thirds of the territory's population of 2 millions.

5.7. Faced by continuing terrorism and violence during and immediately after the Second World War, Great Britain, as the Mandatory Power, tried to implement various formulas to bring independence to a land ravaged by violence. A partition scheme, a formulae for provisional autonomy, a unified independent Palestine were all considered and abandoned. In 1947, a frustrated Great Britain, turned the problem over to the United Nations.

5.8. When the United Nations was founded on 24 October 1945, the territory of Palestine was still administrated by the United Kingdom of Great Britain and Northern Ireland under a mandate received in 1922 from the League of Nations.

Drawing attention to *"the desirability of an early settlement in Palestine"*, the British Government asked that a Special Session of the General Assembly be called immediately in order to constitute and instruct a special committee to prepare a preliminary study on the question of Palestine for consideration by the Assembly at its next regular session.

2. U.N. General Assembly resolution 181 (II) on the Future Government of Palestine (November 29, 1947)

5.9. At the First Special Session of the General Assembly, which began on 28 April 1947, a Special Committee on Palestine was established. At the second regular session, after an intense two-month-long debate, the General Assembly, on 29 November 1947, adopted resolution 181 (II), approving with minor changes the Plan of Partition with Economic Union as proposed by the majority in the Special Committee on Palestine. The partition plan, a detailed four-part document attached to the resolution, provided for the termination of the Mandate, the progressive withdrawal of British armed forces and the delineation of boundaries between the two States and Jerusalem.

The plan included:

1. The creation of the Arab and Jewish States not later than 1 October 1948;
2. The division of Palestine into eight parts: three were allotted to the Arab State and three to the Jewish State; the seventh, the town of Jaffa, was to form an Arab enclave within Jewish territory; and
3. The international regime for Jerusalem, the eighth division, to be administered by the United Nations Trusteeship Council.

5.10. The adoption of resolution 181 (II) was followed by outbreaks of violence in Palestine. As the situation deteriorated, the Security Council called for a special session of the General Assembly, which then met from 16 April to 14 May 1948. On 17 April, the Security Council called for the cessation of all military and paramilitary activities in Palestine, and on 23 April it established the Truce Commission to supervise and help bring about a ceasefire. For its part, the General Assembly relieved the Palestine Commission of its responsibilities and decided to appoint a mediator entrusted with promoting a peaceful settlement in cooperation with the Truce Commission. On 20 May, Count Folke Bernadotte, President of the Swedish Red Cross, was chosen as United Nations Mediator.

5.11. On 14 May 1948, the United Kingdom relinquished its Mandate over Palestine and disengaged its forces. On the following day, the Jewish Agency proclaimed the

establishment of the State of Israel on the territory allotted to it by the partition plan. Fierce hostilities immediately broke out between the Arab and Jewish communities. The next day, regular troops of the neighboring Arab States entered the territory to assist Palestinian Arabs.

The fighting was halted after several weeks, through a four week truce called for by the Security Council on 29 May 1948.

The truce went into effect on 11 June and was supervised by the United Nations Mediator with the assistance of a group of international military observers, which came to be known as the United Nations Truce Supervision Organization (UNTSO).

Despite the efforts of the Mediator, no agreement could be reached on an extension of the truce, and fighting broke out again on 8 July.

5.12. On 15 July 1948, the Security Council decided in a resolution that the situation in Palestine constituted a threat to the peace. It ordered a ceasefire and declared that failure to comply would be construed as a breach of the peace requiring immediate consideration of enforcement measures under Chapter VII of the United Nations Charter. In accordance with that resolution, the second truce came into force. By that time, Israel controlled much of the territory allotted to the Arab State by the partition resolution, including the western part of Jerusalem.

5.13. Egypt and Jordan respectively administered the remaining portions of Gaza and the West Bank of the Jordan River (which included East Jerusalem, or the old city). More fighting took place in October 1948 and March 1949, during which Israel took over other areas, some originally allotted to the Arab State. In 1950, Jordan brought the West Bank including East Jerusalem formally under its jurisdiction pending a solution to the problem.

5.14. The hostilities also created a major humanitarian crisis, with almost 750,000 Palestinians being uprooted from their land and becoming refugees. While in the middle of negotiations between the parties, Count Bernadotte was shot and killed on 17 September

1948 in the Israel-held sector of Jerusalem. Ralph Bunche, of the United States of America, was appointed as Acting Mediator.

5.15. Between February and July 1949, under United Nations auspices, armistice agreements were signed between Israel, on the one hand, and Egypt, Jordan, Lebanon and Syria on the other.

The agreements, which were similar in general content, accepted the establishment of the armistice as an indispensable step towards the restoration of peace in Palestine. They also made clear that the purpose of the armistice was not to establish or recognize any territorial, custodial or other rights, claims or interests of any party.

3. General Assembly resolution 194 (III): The right to return

5.16. At its third regular session, on 11 December 1948, the General Assembly adopted resolution 194 (III), in which it delineated ways to resolve the Palestine problem. Following suggestions contained in the report prepared by Count Bernadotte for a solution to the increasingly intractable situation in Palestine, the Assembly declared that:

- Refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date; and

- Compensation should be paid for the property of those choosing not to return.

The Assembly also called for the demilitarization and internationalization of Jerusalem and for the protection of, and free access to, the holy places in Palestine. Resolution 194 (III) also provided for the establishment of a three member United Nations Conciliation Commission for Palestine, which was to assume the functions of the United Nations Mediator insofar as it considered necessary. It was instructed to assist the parties in achieving a final settlement on all outstanding questions and to facilitate the

repatriation, resettlement and economic and social rehabilitation of the refugees. The Assembly subsequently named France, Turkey and the United States to the Commission.

5.17. In periodic reports submitted to the General Assembly since 1952, the Commission has repeatedly stressed that its efforts to advance matters towards the implementation of resolution 194 (III) depend on substantial changes in the attitudes of the parties.

The provisions of that resolution on the right of Palestinian refugees to return have been reasserted by the Assembly virtually every year since 1948.

Meanwhile, on 11 May 1949, Israel became a member of the United Nations. In admitting Israel, the General Assembly specifically took note of Israel's declarations and explanations made earlier to the Assembly's Ad Hoc Political Committee regarding the implementation of resolutions 181 (II) and 194 (III). Those declarations and explanations referred, *inter alia*, to the international regime envisaged for Jerusalem, the problem of Arab refugees and boundary Questions.[43]

---

[43] The preamble to the GA resolution (273) admitting Israel to United Nations membership specifically referred to Israel's undertakings to implement General Assembly resolutions 181 (II) and 194 (III), the two resolutions that formed the centre of the Palestine issue in the United Nations:
" Having received the report of the Security Council on the application of Israel for membership in the United Nations,

" Noting that in the judgment of the Security Council, Israel is a peace-loving State and is able and willing to carry out the obligations contained in the Charter,
" Nothing that the Security Council has recommended to the General Assembly that it admit Israel to membership in the United Nations,
"Noting furthermore the declaration by the State of Israel that it unreservedly accepts the obligations of the United Nations Charter and undertakes to honour them from the day when it becomes a Member of the United Nations',
" Recalling its resolutions of 29 November 1947 and 11 December 1948 and taking note of the declarations and explanations made by the representative of the Government of Israel before the hoc Political Committee in respect of the implementation of the said resolutions,
" The General Assembly,
" Acting in discharge of its functions under Article 4 of the Charter and rule 125 of its rules of procedure,
" 1. Decides that Israel is a peace-loving State which accepts the obligations contained in the Charter and is able and willing to carry out those obligations;
" 2. Decides to admit Israel to membership in the United Nations."

4. The occupation of the West Bank and the Gaza Strip, 1967

5.18. In the 1967 war, Israel occupied the remaining territory of Palestine, until then under Jordanian and Egyptian control (the West Bank and Gaza Strip). This included the remaining part of Jerusalem, which was subsequently annexed by Israel. The war brought about a second exodus of Palestinians, estimated at half a million.

As a result of the 1967 Arab-Israel war, approximately 360,000 Palestinians were forced to leave the West Bank and Gaza Strip for Jordan, Syria, Lebanon and Egypt. More camps were constructed to accommodate this large number of refugees.

The military victory scored by Israel against the Arab armies encouraged it to launch air strikes against Palestinian cities and towns adjacent to the 1948 truce line. The air raids pushed scores of thousands of Palestinians to flee their village and towns to seek shelter out of the range of Israel artillery bombardment to more secure places like Ramallah and Jericho cities.

However, the continued Israeli hostilities against civilian targets prompted more people to leave these cities and towns for Jordan, where UNRWA had established camps at Nemria and Karam villages east of the Jordan river.

5.19. The 1967 war was a chapter of the Israeli strategy which has been exposed and described by Mr. Moshe Shertock (Sharett), former Prime Minister of Israel, as reported by Livia Rokach:

1. The Israel political/military establishment aimed at pushing the Arab States into military confrontations which the Israeli leaders were certain of winning. The goal of these confrontations was to modify the balance of power in the region radically, transforming Israel into the major power in the Middle East.

2. In order to achieve this strategic purpose, Israeli leaders carried out large and small-scale military operations aimed at civilian populations across the

armistice lines, especially in the Palestinian territories of the West Bank and Gaza, then under the control of Jordan and Egypt respectively. These operations had a double purpose: to terrorize the populations, and to create a permanent destabilization stemming from tensions between the Arab governments and the populations who felt they were not adequately protected against Israeli aggression.

3. The objectives of the Israeli leaders were to achieve a new territorial conquest through war. They were not satisfied with the size of the State, and sought to occupy at least the borders of Palestine under the mandate.

4. They made political and military plans to disperse the Palestine refugees in order to liquidate the claim of these refugees to be allowed to go back to their homeland.

5. They planned and carried out subversive operations designed to dismember the Arab World, defeat the Arab National Movement, and create puppet regimes which would gravitate to the regional Israeli power.[44]

5. Security Council resolution 242 (1967) of 22 November 1967

5.20. The Security Council met on June 5, 1967, and continued its debates until November 22, 1967. It unanimously adopted resolution 242 (1967) which states:

" The Security Council,

Expressing its continuing concern with the grave situation in the Middle East,

---

[44] Rokach, Livia, Israel's Sacred Terrorism, Belmont, Massachusetts, 1980, pp. 4-5 and Nakhleh, Encyclopedia of the Palestine Problem, 1991 vol. II, p. 883.

Emphasizing the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security,

Emphasizing further that all Member States in their acceptance of the Charter of the United Nations have undertaken a commitment to act in accordance with Article 2 of the Charter.

1. Affirms that the fulfillment of Charter principles requires the establishment of a just and lasting peace which should include the application of both the following principles:

(i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;

(ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;

2. Affirms further the necessity

(a) For guaranteeing freedom of navigation through international waterways in the area;

(b) For achieving a just settlement of the refugee problem;

(c) For guaranteeing the territorial inviolability and political independence of every State in the area, through measures including the establishment of demilitarized zones;

3. Requests the Secretary-General to designate a Special Representative to proceed to the Middle East to establish and maintain contacts with the States concerned in order to promote agreement and assist efforts to achieve a peaceful and accepted settlement in accordance with the provisions and principles in this resolution;

4. Requests the Secretary- General to report to the Security council on the progress of the efforts of the Special Representative as soon as possible."

5.21. It should be noted that the General Assembly at its Fifth Emergency Session discussed the Israeli aggression on the three Arab countries from June 19 to July 3, 1967.

Although the terms of resolution 242 were clear, Israel tried to misinterpret it in order to avoid its (*i.e.*, Israel's) withdrawal from the whole occupied Arab territories.

The proper and legal interpretation of resolution 242 must be made in the light of the debates in the General Assembly and the Security Council on the subject and in accordance with the principles of international law.

5.22. Many speakers at the Fifth Emergency Session in June-July, 1967, and in meetings of the Security Council in June to November stressed the principles [45] enshrined in the resolution which may be summarised as follows:

1. The principles are derived from Article 2 of the United Nations Charter which states that "All members shall refrain in their international relations from the

[45] General Assembly, Fifth Emergency Special Session, June United Nations General Assembly Official Records, 1526th Plenary Meetings, 19 June, 1967; 1529th Plenary Meetings, 21 June, 1967; 1530th Plenary Meetings, 21 June, 1967; 1531th Plenary Meetings, 22 June, 1967; 1532th Plenary Meetings, 22 June, 1967; 1533th Plenary Meetings, 23 June, 1967; 1536th Plenary Meetings, 26 June, 1967; 1537th Plenary Meetings, 27 June, 1967; 1538th Plenary Meetings, 27 June, 1967; 1539th Plenary Meetings, 28 June, 1967; 1542nd Plenary Meetings, 29 June, 1967; 1546th Plenary Meetings, June, 1967; and Official Records of the Security Council, 1373rd Meeting, 9 November, 1967; 1379th Meeting, 16 November, 1967; 1381st Meeting, 20 November, 1967; and 1382nd Meeting, 22 November, 1967.

threat or use of force against the territorial integrity or political independence of any state."

2. United Nations members do not accept war as means of settling disputes, nor that a State should be allowed to extend its frontiers as a result of war. This means Israel must withdraw.

3. The principle of the inadmissibility of territorial acquisition by force.

4. Total withdrawal of Israel forces from all the territories occupied by Israel as a result of the war which began on 5 June, 1967.

5. Article 2 of the United Nations Charter outlaws war:
   (a) All members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.

   (b) All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

6. International Law condemns the use of force as an instrument of national policy.

7. No aggressor can be permitted to enjoy and retain the fruits of his aggression.

8. It is not permissible for a country to acquire territory of another state in order to bargain from a position of strength.

9. Rights cannot be established, territorial disputes cannot be settled, boundaries cannot be adjusted through the use of force.

10. Israeli forces must withdraw completely from all the lands occupied in the 1967 war and must return to the boundaries of the Armistice lines which existed on the 4th of June, 1967.

It has been claimed that Resolution 242 does not demand a total withdrawal from occupied territories, but only from some of them. This is based first on the resolution's reference to the right of every State to secure and recognized boundaries. It is also based on the wording of the English version of the text which calls for "withdrawal of Israeli armed forces from territories occupied in the recent conflict", without a definite article before the word "territories". This interpretation cannot be upheld for the Council's injunction is unambiguous. The preamble refers unequivocally to "the inadmissibility of the acquisition of territory by war". This interpretation is supported also by the equally authentic French version which requires Israel to withdraw "des territoires occupés". In addition, the resolution's drafting history indicates that the Security Council had no intention of endorsing Israeli annexation of any part of the West Bank or Gaza Strip. For example, the Indian ambassador to the Council stated in no uncertain terms that "(t)he principle of the inadmissibility of force is absolutely fundamental to our approach and we cannot accept or acquiesce in any decision that leaves out territories occupied by military conquest from the provision of withdrawal."[46] The Indian representative further cited two statements of policy delivered at the General Assembly's Fifth Emergency Session on 21 June 1967 by the British Foreign Secretary, Mr. George Brown, who stated the principles guiding the attitude of the British Government:

> "Clearly, such principles must derive from the United Nations Charter (with reference to Article 2(4)) ... Here the words "territorial integrity" have a direct bearing on the question of withdrawal ... I see no two ways about this; and I can

[46] S/PV.1382, 222 November 1967, para.49.

state our position very clearly. In my view, it follows from the words in the Charter that war should not lead to territorial aggrandizement."[47]

The ambassadors of a number of other States expressed similar views, including those of the U.S.S.R. and France.

5.23. Resolution 242 emphasized the principle of the inadmissibility of the acquisition of territory by force and emphasized the duty of all States to act according to Article 2(4) of the Charter and demanded the withdrawal of Israel armed forces from territories occupied in the recent conflict. This means that all the Israeli armed forces must withdraw from all the occupied Arab Territories. The argument of Israel and its supporters that the article "the" was not used in Resolution 242 with "territories occupied in the recent conflict" and, therefore, Israel is not bound to withdraw from all the occupied territories is false. The statements of various delegations in the General Assembly and the Security Council quoted above stated clearly, "that all Israeli armed forces must be withdrawn from all the occupied Arab territories" and there is no ambiguity. The phrase used was withdrawal of Israeli armed forces from territories occupied in the recent conflict". Does the use of "Israeli armed forces" without "the" means that some of Israel armed forced may remain in the occupied territories? Certainly not! Moreover, the words in the French text are, "Retrait des forces armées des territoires occupés lors du récent conflit" means "the armed forces" and "the occupied territories".

The matter was summed up by the statement of Mr. Aiken, Deputy Prime Minister and Minister for External Affairs of Ireland, before the Fifth Emergency Session of the General Assembly, who stated:

> "I submit, Israel has no right whatever to annex the territory of her neighbours, and if the Security Council did not insist on the restoration of the boundaries as of June 4, the very basis of the Charter would be destroyed."[48]

---

[47] GAOR, Fifth Emergency Special Session, 1529th meeeting, paras. 14 and 15.

[48] General Assembly Fifth Emergency Session, June, United Nations General Assembly official Records. Plenary Meeting, 1538th, June 27, 1967, P.5

5.24. The Security Council, by its Resolution 338 (1973) October 22, 1973, reaffirmed resolution 242 by stating that:

> "The Security Council,
> 1. Calls upon all parties to the present fighting to cease all firing and terminate all military activity immediately, no later than 12 hours after the moment of the adoption of this decision, in the positions they now occupy;
>
> 2. Calls upon the parties concerned to start immediately after the cease-fire the implementation of Security Council resolution 242 (1967) in all of its parts;
>
> 3. Decides that, immediately and concurrently with the cease-fire, negotiations start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East."

6. The Madrid Conference

5.25. A Peace Conference on the Middle East was convened in Madrid on 30 October 1991, with the aim of achieving a just, lasting and comprehensive peace settlement through direct negotiations along two tracks: between Israel and the Arab States, and between Israel and the Palestinians, based on Security Council resolutions 242 (1967) and 338 (1973) (the "land for peace" formula).

5.26. There were many documents paving the way for the Madrid peace Conference, but special attention should be given to three of these documents for their significant importance to the Palestinian issue.

5.27. President Bush's speech in his Address to Congress on 6 March, 1991, has been repeatedly cited as the Administration's principal policy statement on the post (Gulf) war

order in the Middle East, particularly for the four 'future challenges' it outlines and its reference to the principle of territory for peace. He said: [49]

> "Our commitment to peace in the Middle East does not end with the liberation of Kuwait. So tonight let me outline four key challenges to be met.
>
> First, we must work together to create shared security arrangement in the region.
>
> Second, we must act to control the proliferation of weapons of mass destruction and the missiles used to deliver them.
>
> And third, we must work to create new opportunities for peace and stability in the Middle East. On the night I announced Operation Desert Storm, I expressed my hope that out of the horrors of war might come new momentum for peace. We have learned in the modern age geography cannot guarantee security and security does not come from military power alone.
>
> A comprehensive peace must be grounded in United Nations Security Council Resolutions 242 and 338 and the principle of territory for peace. This principle must be elaborated to provide for Israelis security and recognition, and at the same time for legitimate Palestinian political rights. Anything else would fail the twin tests of fairness and security. The time has come to put an end to Arab-Israeli conflict".

5.28. The second important text is the Invitation to the Madrid Peace Conference on 30 October, 1991:

> "After extensive consultations with Arab states, Israel and the Palestinians, the United States and the Soviet Union believe that an historic opportunity exists to

[49] These excerpts are taken from the full text published in the Washington Post on 7 March, 1991

advance the prospect for genuine peace throughout the region. The United States and the Soviet Union are prepared to assist the parties to achieve a just, lasting and comprehensive peace settlement, through direct negotiations along two tracks, between Israel and the Arab states, and between Israel and the Palestinians, based on United Nations Security Council Resolutions 242 and 338. The objective of this process is real peace. Toward that end, the president of the U.S. and the president of the USSR invite you to a peace conference, which their countries will-sponsor, followed Immediately by direct negotiations. The conference will be convened in Madrid on October 30, 1991.

...

With respect to negotiations between Israel and Palestinians who are part of the joint Jordanian-Palestinian delegation, negotiations will be conducted in phases, beginning with talks on interim self-government arrangements. These talks will be conducted with the objective of reaching agreement within one year. Once agreed, the interim self-government arrangements will last for a period of five years; beginning the third year of the period of interim self-government arrangements, negotiations will take place on permanent status. These permanent status negotiations, and the negotiations between Israel and the Arab states, will take place on the basis of Resolutions 242 and 338 ..."

5.29. The third document to be quoted in this connection is the US Letter of Assurances to Palestinians of 18 October, 1991:

"The Palestinian decisions to attend a peace conference to launch direct negotiations with Israel represents an important step in the search for a comprehensive, just and lasting peace in the region. The United States has long believed that Palestinian participation is critical to the success of our efforts.

In the context of the process on which we are embarking, we respond to your requests for certain assurances related to this process. These assurances

constitute US understanding and intentions concerning the conference and ensuring negotiations.

These assurances are consistent with United States policy and do not undermine or contradict United Nations Security Council Resolutions 242 and 338. Moreover, there will be no assurances provided to one party that are not known to all the others. By this we can foster a sense of confidence and minimize chances for misunderstandings.

As President Bush stated in his March 6, 1991 address to Congress, the United States continues to believe firmly that a comprehensive peace must be grounded in United Nations Security Council Resolutions 242 and 338 and the principle of territory for peace. Such an outcome must also provide for security and recognition for all states in the region, including Israel, and for the legitimate political rights of the Palestinians people. Anything else, the President noted, would fail the twin tests of fairness and security.

The process we are trying to create offers Palestinians a way to achieve these objectives. The United States believes that there should be an end to the Israeli occupation which can occur only through genuine and meaningful negotiations. The United States also believe that this process should create a new relationship of mutuality where Palestinians and Israelis can respect one another's security, identity, and political rights. We believe Palestinians should gain control over political, economic and other decisions that affect their lives and fate.

...

The United States understands how much importance Palestinians attach to the question of east Jerusalem. Thus, we want to assure you that nothing Palestinians do in choosing their delegation members in this phase of the process will affect their claim to east Jerusalem, or be prejudicial or precedential to the outcome of negotiations. It remains the firm position of the United States that Jerusalem must never again be a divided city and that its final status should be

decided by negotiations. Thus, we do not recognize Israel's annexation of east Jerusalem or the extension of its municipal boundaries, and we encourage all sides to avoid unilateral acts that would exacerbate local tension or make negotiations more difficult or preempt their final outcome. It is also the United States position that a Palestinian resident in Jordan with ties to a prominent Jerusalem family would be eligible to join the Jordanian side of the delegation.

...

The United States has long believed that no party should take unilateral actions that seek to predetermine issues that can only be resolved through negotiations. In this regard the United States has opposed and will continue to oppose settlement activity in the territories occupied in 1967, which remains an obstacle to peace. ..."

7. The Oslo Accords

5.30. Negotiations between the Palestinian Liberation Organization (PLO) and Israel resulted in mutual recognition in September 1993. Norwegian diplomats played a key role in the process of negotiations which ended in Oslo. The Palestinians were granted limited autonomy in the West Bank and the Gaza Strip according the Declaration of Principles on the autonomy of the Israeli-occupied territories.

5.31. A series of subsequent negotiations culminated in the mutual recognition between the Government of State of Israel and Palestine Liberation Organization, the representative of the Palestinian People, and the signing by the two parties of the Declaration of Principles on Interim Self-Government Arrangements in Washington, D.C., on 13 September, 1993, as well as the subsequent implementation agreement. That agreement led to several other positive developments, such as the partial withdrawal of Israeli forces, the elections to the Palestinians Council and the Presidency of the Palestinian National Authority, the partial release of prisoners and the establishment of a functioning

administration in the areas under Palestinians self-rule. The involvement of the United Nations has been essential to the peace process.

5.32. In the Oslo Accords, the Palestinians recognized Israeli sovereignty over 78% of historic Palestine (23% more than Israel was granted pursuant to the 1947 UN partition plan) on the assumption that the Palestinians would be able to exercise sovereignty over the remaining 22%. The majority of Palestinians accepted this compromise.

5.33. Pursuant to the Oslo agreements, Israeli forces withdrew from Jericho and the Gaza Strip in May 1994. The Palestinian National Authority, assumed control of the areas.

In July 1994 President Arafat entered Gaza as the President of the newly founded Palestinian National Authority, a political body responsible for governing the self-rule Palestinian areas, and in the mobilization and provision of international assistance.

5.34. The UN General Assembly welcomed the Declaration of Principles as an important step forward. The Assembly also reaffirmed that "the United Nations has a permanent responsibility with respect to the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy."

8. The Wye River Plantation Accord

5.35. The peace process suffered many setbacks in the first few years of the Israeli Prime Minister Benjamin Netanyahu's administration; a breakthrough was needed to keep the peace process alive.

The Palestinian Authority President Yasser Arafat and Prime Minister Netanyahu met at the Wye River Conference on 15 October, 1998 for intensive peace negotiations. On 23 October, 1998. A peace deal was signed, following a 21 hours marathon bargaining session and the mediation of United States President Bill Clinton and King Hussein of Jordan. The land-for-security deal was hailed as a major accomplishment.

On 14 December, 1998, in implementation of the conditions set by the Wye Plantation agreement, members of the Palestine National Council voted to remove clauses from the Palestine Liberation Organization's Charter calling for the destruction of Israel.

5.36. In December 1998, the Netanyahu government failed to obtain a confidence vote by the Israeli Knesset. The Knesset voted to dissolve and hold early elections in May 1999. This was mainly in protest over the government's handling of the peace process with the Palestinian authorities. The succeeding Israeli Prime Minister, Ehud Barak, was to lead Israel into the peace process with the Palestinians and neighbouring states.

9. Camp David II

5.37. Between 11 and 24 July, 2000, President Clinton, President Arafat and Prime Minister Barak, along with other officials and technical advisers met at Camp Dived in order to negotiate a final settlement of the Palestine-Israel conflict based on the Oslo accords.

The negotiations ended in failure. The Palestinians demanded sovereignty over East Jerusalem including the Al-Haram-Al-Sharif (Al-Aqsa Mosque). They demanded full implementation of the right of return of the refugees under UN resolution 194(III). Israel offered proposals regarding the settlements that were modified in subsequent negotiations. These were modified in various ways by U.S. compromise proposals. Israel claims that they were far reaching and generous. The Palestinians claimed that the proposals would have perpetuated the precise situation of the interim agreements, in which the West Bank is divided into numerous small areas of Palestinian sovereignty interspersed with a much larger area of Israeli sovereignty.

5.38. For a true and lasting peace between the Israeli and Palestinian peoples, there must be two viable and independent States living as equal neighbours. Israel's Camp David proposal denied the Palestinian State viability and independence by dividing Palestinian territory into four separate cantons entirely surrounded, and, therefore, controlled, by

Israel. The Camp David proposal also denied Palestinians control over their own borders, airspace and water resources while legitimising and expanding illegal Israeli settlements in Palestinian territory. Israel's Camp David proposal presented a 're-packaging' of military occupation, not an end to military occupation.

10. The Second Intifada

5.39. On 28 September, 2000, a visit to Al-Aqsa Mosque by Israeli Prime Minister Ariel Sharon (then the Likud opposition leader) sparked a massive Palestinian rage in what soon came to be known as the second *Intifada*. Ever since, daily confrontations have been taking place between Palestinians and the Israeli army, the latter backed-up by armed settlers.

An escalation of a bloody suppressive campaign against the Palestinian people has, since, been underway. That campaign aimed at the assassination of leaders and civilians, demolition of homes, siege of cities and village, in addition to the destruction of the Palestinian infrastructure. All weapons available to Israel were utilized. The campaign reached its peak with the utilization of F-16 fighter jets and Apache helicopters, as well as heavy armoury, against the Palestinian people.

5.40. The Security Council, in resolution 1322(2000,) deplored the provocation carried out at Al-Haram-Al-Sharif in Jerusalem on 28 September, 2000, and the subsequent violence there and in other holy places, as well as, in other areas throughout the territories occupied by Israel since 1967, resulting in many Palestinian death and many other casualties. It condemned acts of violence, especially the excessive use of force against Palestinians, resulting in injury and loss of human life. It called upon Israel, the occupying Power, to abide scrupulously by its legal obligations and its responsibilities under the Fourth Geneva Convention and called for the immediate cessation of violence. It also requested that new provocative actions were avoided, and that the situation be returned to normality in a way which promoted the prospects for the Middle East peace process. I further stressed the importance of establishing a mechanism for a speedy and objective

inquiry into the tragic events of the past few days with the aim of preventing their repetition, and welcomed any efforts in that regard. The Council also called for the immediate resumption of negotiations within the Middle East peace process on its agreed basis with the aim of achieving an early final settlement between the Israeli and Palestinian sides.

11. The Road Map: President George W. Bush's Vision

5.41. By a letter dated 7 May, 2003, the United Nations Secretary-General transmitted to the President of the Security Council, for the attention of the members of the Security Council, the text of the Quartet's Performance-based Roadmap to a Permanent Two-State Solution to the Israeli- Palestinian Conflict (S/2003/529) to realize the vision of President Bush of two States, Israel and Palestine, living side by side in peace and security, as affirmed in the Council's resolution 1397(2002). The Secretary-General indicated that the text of the Road Map has been prepared by the Quartet (consisting of representatives of the United States of America, the European Union, the Russian Federation and the United Nations) and was presented to the Government of Israel and the Palestinian Authority on 30 April, 2003.

5.42. The above mentioned text is a performance-based and goal-driven road map, with clear phases, timelines, target dates, and benchmarks aimed at progress through reciprocal steps by the two parties in the political, security, economic, humanitarian, and institution-building fields, under the auspices of the Quartet.

The three successive and detailed phases are as follows:

Phase I	Ending terror and violence, normalizing Palestinian life, and building Palestinian Institutions - present to May 2003.
Phase II	Transition: June 2003 - December 2003.

Phase III Permanent Status Agreement and end of the Israeli-Palestinian conflict 2004-2005.

5.43. By resolution 1515(2003) the Security Council endorsed the Road Map, and called on the parties to fulfill their obligations under the Road Map in cooperation with the Quartet and to achieve the vision of two States living side by side in peace and security.

12. Arab Peace Initiatives

5.44. It should be noted that the Arab States, members of the Arab League, in line with their previous peace initiatives, have reaffirmed at the Beirut Summit of March 2002 the resolution taken in June 1996 at the Cairo Extra-Ordinary Arab Summit that a just and comprehensive peace in the Middle East is the strategic option of the Arab Countries, to be achieved in accordance with international legality, which would require a comparable commitment on the part of the Israeli Government.

The Beirut Summit adopted an Arab Peace Initiative based on the statement made by Crown-Prince Abdullah bin Abdul Aziz of the Kingdom of Saudi Arabia calling for full Israeli withdrawal from all the Arab territories occupied since June 1967, in implementation of Security Council Resolutions 242 and 338, reaffirmed by the Madrid conference of 1991 and the land for peace principle, and Israel's acceptance of an independent Palestinian State, with East Jerusalem as its capital, in return for the establishment of normal relations in the context of a comprehensive settlement with Israel. This initiative was welcomed by the Security Council through resolutions 1397(2002) and 1435(2002).

5.45. It is unfortunate that neither the Arab Peace Initiative nor the Road Map received a positive reaction from the Government of Israel. Since the Road Map was made public early in the year 2002, Prime Minister Ariel Sharon was doing whatever he could to avoid, by all means, the implementation of the Road Map while declaring his readiness to join the Map. At the time when the Quartet was involved in drafting the Road Map Mr. Sharon

started to undertake the implementation of an old project which had been rejected by his predecessors: to build a huge Wall to separate Israel and its settlements in the Palestinian occupied territories including East Jerusalem.

5.46 That unilateral project is a mere pre-emptive action against the Road Map and all peace process initiatives. The construction of the Wall is a gross violation of laws and customs and specific Israeli obligations and commitments as will be shown in the following.

VI. The Wall: factual, humanitarian, political and socio-economic impact

6.1. As to the true nature and the impact of the Wall on the life of the Palestinian population, there exist a number of documents within the framework of the United Nations, by Specialised Agencies of the United Nations system, by other governmental organisations, by human rights bodies and also by non-governmental organisations. The most important documents written under the auspices of the United Nations are the Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13[50] and reports submitted by Special Rapporteurs of the Commission on Human Rights, the Report of the Special Rapporteur, John Dugard, on the situation of human rights in the Palestinian territories occupied since 1967[51] and that of the Special Rapporteur, Jean Ziegler, on the Right to food.[52] Specialised Agencies (the World Bank and the IMF) have joined forces with the European Union and the Governments of the United States and of Norway in forming a Local Aid Coordinating Committee which has submitted a report with regular updates.[53] As to human rights treaty bodies, various conclusions, observations and general comments of the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child have to be mentioned. As to non-governmental organisations, a recent report by Amnesty International deserves attention.[54]

6.2. There is a remarkable concurrence among these documents as to the evaluation of the true nature and impact of the Wall.

The Wall has been established pursuant to a number of executive decisions taken by the Israeli Cabinet, the Ministerial Committee for Security Matters, the Prime Minister and the Minister of Defence. In addition, there are regulatory instruments (Orders) relating

---

[50] Doc. A/ES-10/248 of 24 November 2003.
[51] Doc. E/CN4/2004/6 of 8 September 2003.
[52] Doc. E/CN.4/2004/10/Add.2 of 31 October 2003.
[53] The Impact of Israel's Separation Barrier on Affected West Bank Communities, Report of the Mission to the Humanitarian and Emergency Policy Group (HEPG) of the Local Aid Coordination Committee (LACC), May 2003, updates July and September 2003.
[54] Amnesty International: Israel and the Occupied Territories. Surviving under siege: The impact of movement restrictions on the right to work, September 2003.

to specific collateral measures, in particular the right to reside in, enter into or leave closed areas.[55] The construction also requires measures for the expropriation of private land.

6.3. The course of the Wall is described in the Report of the Secretary-General:

> **"Phases of the route completed or under construction**
>
> 12. Phase A (excluding occupied East Jerusalem). This initial part of the Barrier, which runs 123 kilometres from the Salem checkpoint north of Jenin to the settlement of Elkana in the central West Bank, was declared completed 31 July 2003, although work continues in some parts. Much of Phase A construction deviates from the Green Line,[56] and incorporates Israeli settlements. United Nations offices on the ground calculate that the Barrier has put approximately 56,000 Palestinians in enclaves, areas encircled by the Barrier that open into the West Bank. They include about 5,300 Palestinians in "closed areas" between the Barrier and the Green Line where Israel requires permits or identity cards for Palestinians who reside there or want to enter the area. The enclaves include the town of Qalqiliya (pop. 41,606) and, to its south, a cluster of three villages with about 7,300 residents.
>
> ...
>
> 14. Jerusalem. The existing barrier and planned route around Jerusalem is beyond the Green Line and, in some cases, the eastern municipal boundary of Jerusalem as annexed by Israel. Completed sections include two parts totalling 19.5 kilometres that flank Jerusalem, and a 1.5-kilometre concrete wall in the eastern Jerusalem neighbourhood of Abu Dis. The planned route includes a section due east of Jerusalem that links up with the existing Abu Dis wall; levelling of land has started at its southern end. A second section runs through the northern Jerusalem suburb of Al-Ram, which will be cut off from Jerusalem, and links with the existing northern

[55] Report of the Secretary-General, *loc. cit.*para. 19 *et seq.*
[56] This is often referred to as the "Seam-Zone" (footnote not in the original).

barrier section at the Qalandia checkpoint. A third section will surround five Palestinian communities north-west of Jerusalem, creating a 2,000-acre enclave with 14,500 people. A gap remains in the planned route due east of Jerusalem near the settlement of Maale Adumim.

5. Planned phases of the route

15. Elkana to Ofer Camp. This section links the north-western end of the Jerusalem Barrier with the southern point of Phase A construction at Elkana. It includes two "depth barriers" that together create enclaves encompassing around 29,000 acres and 72,000 Palestinians in 24 communities. The route deviates up to 22 kilometres from the Green Line to include several large settlements and approximately 52,000 settlers in the "Ariel salient". Cabinet Decision 883 of 1October does not explain the nature of the Barrier around this area, where the Government of Israel has said it would build disconnected "horseshoes" around the settlements. However, the official map shows a planned route that seamlessly encompasses the settlement block.

16. Southern West Bank. According to the official map, this route of the Barrier in the southern West Bank runs 115 kilometres from the Har Gilo settlement near Jerusalem to the Carmel settlement near the Green Line south-east of Hebron. It cuts several kilometres into the West Bank to encompass the Gush Etzion settlement block and the settlement of Efrat, creating enclaves with around 17,000 Palestinians. Ministry of Defence documents say that construction on this stage, which has not started yet, is slated for completion in 2005."

6.4. To highlight some important points: the Wall does not follow the 1949 Armistice Line. It is obviously designed to protect the numerous Israeli settlements in the West Bank, which are unlawful under international law. It is a means to consolidate these Israeli settlements. It is, thus, a means to create a *fait accompli* in relation to the existence of this Israeli presence which should render any future agreement to the contrary impossible. It, thus, amounts to a *de facto* annexation.

6.5. Israel contradicts this analysis by claiming that the Wall is necessary on security grounds. The legal implications of this claim will be analysed in greater detail below.[57] But they are also contradicted as a matter of fact by a number of the reports mentioned above. Thus, the Special Rapporteur of the UN Commission on Human Rights maintains:[58]

> "Possibly, the Wall will assist in the achievement of the Government's publicly declared goal – to prevent suicide bombers from reaching Israeli territory. Even this, however, by some who point to the fact that most suicide bombers have passed through checkpoints and that the Wall will not deter persons determined to cross into Israel to commit acts of terrorism. That this is a valid complaint is borne out by the comments of the Israeli State Comptroller in his report of July 2002 that 'IDF documents indicate that most of the suicide terrorists and car bombs crossed the seam area into Israel through the checkpoints, where they underwent faulty and even shoddy checks".

The Amnesty International Report [59] goes even further:

> "However, the increasingly sweeping and stringent restrictions imposed indiscriminately on all Palestinians have not put a stop to the attacks. On the contrary, attacks intensified as restrictions on the movements of Palestinians increased, calling into question the effectiveness of indiscriminate restrictions that treat every Palestinian as a security threat and punishes entire communities for the crimes committed by a few people."

6.6. The impact of the Wall on the life of the Palestinian population is also eloquently described in the Report of the Secretary-General:

---

[57] Chapters IX and X.
[58] E/CN.4/2004/6 para. 8.
[59] *Loc. cit. supra.*

"The Barrier, in both completed and planned section, appears likely to deepen the fragmentation of the West Bank created by the closure system Israel imposed after the outbreak of hostilities in September/October 2000. The main component of the closure system is a series of checkpoints and blockades that severely restrict the movement of Palestinian people and goods, causing serious socio-economic harm. Recent reports by the World Bank and the United Nations show that construction has dramatically increased such damage in communities along its route, primarily through the loss of, or severely limited access to, land, jobs, and markets. According to the Palestinian Central Bureau of Statistics, so far the Barrier has separated 30 localities from health services, 22 from schools, 8 from primary water sources and 3 from electricity networks.

Palestinians living in enclaves are facing some of the harshest consequences of the Barrier's construction and route. For example, the Barrier surrounds the town of Qalqiliya, with the only exit and entry point controlled by an Israeli military checkpoint. This has isolated the town from almost all its agricultural land, while surrounding villages are separated from its markets and services. A United Nations hospital in the town has experienced a 40 per cent decrease in caseloads. Further north, the Barrier is currently creating an enclave around the town of Nazlat Issa, whose commercials areas have been destroyed through Israel's demolition of at least seven residences and 125 shops.

Completed sections of the Barrier have had a serious impact on agriculture in what is considered the "breadbasket" of the West Bank. In 2000, the three government of Jenin, Tulkarm and Qalqiliya produced US$ 220 million in agricultural output, or 45 per cent of total agricultural production in the West Bank. Palestinian cultivated land lying on the Barrier's route has been requisitioned and destroyed and tens of thousands of trees have been uprooted. Farmers separated from their

land, and often also from their water sources, must cross the Barrier via the controlled gates. Recent harvests from many village have perished due to the irregular opening times and the apparently arbitrary granting of denial of passage. According to a recent World Food Programme survey, this has increased food insecurity in the area, where there are 25.000 new recipients of food assistance as a direct consequence of the Barrier's construction.

The Barrier's route through Jerusalem will also severely restrict movement and access for tens of thousands of urban Palestinians. A concrete wall through the neighbourhood of Abu Dis has already effected access to jobs and essential social services, notably schools and hospitals. The northern section of the Barrier has harmed long standing commercial and social connections for tens of thousands of people, a phenomenon that will be repeated along much of the route through Jerusalem. ..."

6.7. In the light of the purpose of the Wall to protect and promote the interests of the Israeli settlers, the course of the Wall is drawn exclusively with their interest in mind, regardless of the situation, needs, existing links and economic conditions of the Palestinian communities. Therefore, it cuts the lifelines of the Palestinian populations in various ways. In this respect, it adds to the misery already caused by a number of other existing restrictions: roadblocks, closed areas and the bypass roads for the exclusive use of the settlers (which, for the Palestinians, also constitute barriers). Thus, to go from one place to another becomes impossible or prohibitively burdensome and time consuming. All reports concur in stating that the regulated crossing points for the local population, which Israel claims to have established, do not exist in practice. Thus, contrary to what Israel has claimed on various occasions, measures to mitigate the harm caused by the Wall do not exist in practice.

6.8. The combined effect of these restrictions makes it impossible

- for workers to go to or to return from their place of work;

- for self-employed persons or businesses to have contact with their clients or to deliver their commodities to their clients;
- for farmers to have access to their agricultural land or to bring their products to their traditional markets;
- for farmers to have access to necessary resources, such as fertiliser;
- for persons in need of medical treatment to reach the places where this is available, or for doctors to reach their patients;
- for children to reach their schools; and
- for entire villages to have access to water for any purpose.

As these restrictions exist on a massive scale, they have made meaningful economic activity next to impossible. As a consequence, there is unemployment, widespread misery and malnutrition.

6.9. As a reaction to this misery, the affected population compelled to leave the enclosed areas. The practical effect, if not the intended result, of these measures is inducing Palestinians to leave their traditional homes. It is a *de facto* expulsion.

VII. The Wall as an internationally unlawful act - applicable law

7.1. As has been shown above, major elements of the question put to the Court by the General Assembly relate to the legality of the construction of the Wall in the light of the applicable rules of international law. The request gives two examples of such norms, namely the Fourth Geneva Convention of 1949 and relevant Security Council and General Assembly resolutions. These resolutions, as will be shown, point to two other bodies of international law, namely the law of human rights and to fundamental principles of the Charter of the United Nations. Thus, there are three areas of international law which have to be addressed in order to determine the legality or illegality of the construction of the Wall, i.e. international humanitarian law, in particular those rules concerning occupied territory, the international law of human rights and fundamental rules of general international law and the Charter of the United Nations, in particular the right to self-determination.

7.2. The first set of rules to be considered are fundamental norms contained in the Charter of the United Nations and in general international law, of which the most important principle is the right to self-determination. It has been recognized by many resolutions of United Nations organs that the Palestinian people possesses a right to self-determination. That right has also been recognized by a number of legal instruments adopted during the process which took place in the early 1990's, in particular the so-called Oslo Accords. These instruments, *inter alia*, make it clear that the territorial basis of this right of self-determination is the territory occupied by Israel in 1967. It will be shown that the Wall violates the status of Palestine as it has been authoritatively determined by the United Nations, infringes upon the Palestinian people's right to self-determination, including its ensuing right to statehood, and also its right to permanent sovereignty over natural resources. Another fundamental rule of general international law and of the UN Charter is the prohibition of the use of force (Art. 2 (4) of the Charter). It will be shown that the Wall constitutes an acquisition of territory by the use of force which is prohibited as it constitutes a violation of the said provision.

7.3. The relevance for the occupied Palestinian territory of international humanitarian law concerning occupation has been stressed on many occasions by organs of the United Nations, by the General Assembly, the Security Council and also, in particular, by the Commission on Human Rights. As far as treaty law is concerned, the two most relevant instruments are the Hague Regulations of 1899/1907 (arts. 42 *et seq.*) and the Fourth Geneva Convention (arts. 47 *et seq.*). The Hague Regulations are not binding as a matter of treaty law, as neither Israel nor Palestine are parties thereto. There is no doubt, however, that the relevant provisions of the Hague Regulations constitute an expression of customary international law and, this will be shown in greater detail below, the same holds true for the relevant provisions of the Fourth Geneva Convention. It will be shown that the Wall violates a number of important rules contained in these instruments.

7.4. Last but not least, a third set of norms are international guarantees of human rights. A number of UN-organs have used the law of human rights as a yardstick when dealing with issues relating to Palestinian occupied territory. The applicability of this body of law is the basic assumption underlying recent action by the Commission of Human Rights and its Special Rapporteur.[60] It will be shown below in greater detail that relevant rules of the law of human rights, in particular the Covenant on Civilian Political Rights, the Covenant on Social Economic and Cultural Rights and the Convention on the Rights of the Child apply indeed. Although Israel is a party to these three instruments, it has to be mentioned, in addition, that international human rights also apply as a matter of customary law. It will be shown that the Wall violates a number of fundamental human rights.

[60] Report submitted September 8, 2003, UN Doc. E/CN.4/2004/6, para. 5 *et seq.*

VIII. The Wall – a violation of fundamental rules of general international law and of the Charter of the United Nations, in particular of the right to self-determination

1. Introduction

8.1. This Section will show that the Occupied Palestinian Territory, including East Jerusalem has been recognized by the United Nations and the international community as a territory with an international status – a self-determination unit - with borders based on the Armistice Line of 1949. It will also show that the United Nations has a special responsibility under the Charter and general international law for the Territory and for the achievement of statehood.

8.2. This international status, reaffirmed under the Charter and the relevant resolutions of the General Assembly and Security Council, flows from the recognition by the international community of the right to self-determination of the Palestinian people, a right also recognized as a peremptory norm and an *erga omnes* obligation. This right is exercised within a recognized territory and hence is directly linked to the notion of territorial sovereignty. It entails the right of a people to determine their internal political status, their external status as statehood and their right to permanent sovereignty over their natural resources. As a corollary to this right to self-determination, the obligation is incumbent on all members of the international community, including Israel, to recognise this right and all rights flowing from it, including respect for the unity and territorial integrity of the occupied Palestinian territory. The contours of this Territory have been established and recognized in numerous General Assembly and Security Council resolutions.

8.3. On the other hand, flowing from the fact that this self-determination unit has been occupied since 1967, this Territory also has the status of an Occupied Territory which

entails the applicability of international humanitarian law and international human rights law. This will be examined in later Chapters of this Written Statement.

The Wall constructed by Israel, which cuts deep into the West Bank, isolating communities into cantons, enclaves and "military zones" and entrenching illegal settlements, constitutes a *de facto* annexation of territories parts of the Palestinian territory.

8.4. The Wall is, thus, in direct violation of the territorial integrity of the self-determination unit which it amputates and of the legal right to self-determination and statehood of the Palestinian people. It violates one of the most fundamental principles of contemporary international law: the right to self-determination, by creating a situation which is called "Bantustanization"[61]. This has been stated authoritatively in a number of declarations and reports.[62] It has been confirmed by several other sources. The European Union, sponsor of resolution ES/10-13, has declared that:

> "The European Union is particularly concerned by the route marked out for the Barrier in the Occupied West Bank. The envisaged departure of the Barrier from the "Green Line" could prejudge future negotiations and make the two-State solution physically impossible to implement. It would cause further humanitarian and economic hardship to the Palestinians. Thousands of Palestinians west of the fence are being cut off from essential services in the West Bank, Palestinians east of the fence will lose access to land and water resources. In this context the EU is alarmed by the designation of land between the Barrier and the "green line" as a

---

[61] See Chapter VI. As the Special Rapporteur of the Commission on Human Rights, Jean Ziegler, has stated: "Creating such 'Bantustans' would deprive a future Palestinian State of any coherent land base and international borders, and prevent the building of a Palestinian nation...". *See Commission on Human Rights,* Economic, Social and Cultural Rights, The Right to Food, *Report by the Special Rapporteur, Jean Ziegler, Addendum, Mission to the Occupied Palestinian Territories (E/CN.4/2004/10/Add.2), paras.18 and 19.*

[62] Report of the Secretary General and the Special Rapporteur on the right to food of the Commission of Human Rights, and the Special Rapporteur on the situation of Human Rights in the Palestinian occupied territories.

closed military zone. This is a de-facto change in the legal status of Palestinians living in this area which makes life for them even harder." [63]

8.5. The Special Rapporteur, John Dugard, further elaborates this violation of the right to self-determination:

> "The right to self-determination is closely linked to the notion of territorial sovereignty. A people can only exercise the right of self-determination within a territory. The amputation of Palestinian territory by the Wall seriously interferes with the right of self-determination of the Palestinian people as it substantially reduces the size of the self-determination unit (already small) within which that right is to be exercised."[64]

8.6. The United Nations General Assembly in its Resolution A/RES/ES-10/13 of 27 October 2003, after reaffirming the principle of the inadmissibility of the acquisition of territory by force, the principle of equal rights and self-determination of peoples, and relevant General Assembly resolutions, including resolution 181 (II) of 1947 , declares itself

> "Particularly concerned that the route marked out for the wall under construction by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, could prejudge future negotiations and make the two-State solution physically impossible to implement and would cause further humanitarian hardship to the Palestinians."

---

[63] Statement by the Permanent Representative of Italy to the United Nations on behalf of the European Union to the General Assembly of the United Nations on Illegal Israeli Action in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory (New York, 8 December, 2003).
[64] *Ibid.*, para.15

8.7. The United Nations has a special responsibility for the Occupied Palestinian Territory, including East Jerusalem. Over the years, it has constructed a complete legal regime applicable to it. The United Nations' competence and responsibility, and that of the General Assembly in particular, flows from the initial status of Palestine as a Mandate for which international responsibilities were assumed as a "sacred trust of civilization", not dependent on the continued existence of the League of Nations. After the termination of the Mandate, this responsibility of the General Assembly derives from the collective recognition of the right to self-determination and statehood of the Palestinian people, and continues until such time as this right is fully realized. The General Assembly has thus not forfeited its supervisory power over the Territory, including its particular responsibility to oversee any future international status agreement, to ensure its conformity with that right and to put the two-State solution into effect. There is, moreover, a duty incumbent on all States, "to promote, through joint and separate action, realization of the principle....and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle...". [65]

2. The international status of the territory as a mandated territory

8.8. The international status of Palestine initially derived from its status as a Mandate detached from the Turkish Empire and placed in 1922 under the League of Nations mandate system with Great Britain designated as the Mandatory Power. The Court, in its Advisory Opinions rendered in the South West Africa cases, recognized that the supervisory functions over the administration of the Mandate devolved upon the United Nations after the dissolution of the League.[66]

8.9. The competence of the General Assembly to exercise such supervisory functions was said to derive in part from its broad powers under Article 10 of the Charter. [67] This meant

---

[65] GA Resolution 2625 (XXV)

[66] *International Status of South West Africa , Advisory Opinion,* ICJ Reports 1950, p.128, 133.

[67] *Ibid.,* p.137; *Voting Procedure on Questions relating to Reports and Petitions*

that the General Assembly became invested with the rights, duties and obligations appurtenant to the supervisory powers of the League of Nations over the Mandate, which it exercised also by the establishment of institutional mechanisms to deal with the future of the Territory and the settlement of the Palestinian question, initially, the United Nations Special Committee on Palestine (UNSCOP). It meant, too, that it had the competence to authorize any change of status for the mandated areas, since the power of the League also included modification of the terms of the Mandate. This authority was asserted in its decision to deal with Palestine and to propose a settlement of the matter by means of the Partition Plan. The competence of the General Assembly to determine the status of Jerusalem may also be drawn in part from the combined effects of Articles 13, 14 and 28 of the Mandate[68].

Res. 181 (II) laid down the concept of a two-State solution, with a special international regime for the City of Jerusalem to be administered by the United Nations.

8.10. Resolution 181(II) constituted recognition by the international community of the right to statehood of the Arab Palestinians and meant that neither the international status of

---

concerning the Territory of south-West Africa,Advisory Opinion, ICJ Rep.1955, p.76; *Admissibility of Hearings of Petitioners by the Committee on South West Africa* , 1956, p.27-28. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion,* ICJ Rep.1971, p.16 at p.36

[68] Art.: 13. All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, while ensuring the requirements of public order and decorum, is assumed by the Mandatory, who shall be responsible solely to the League of Nations in all matters connected herewith.
Art. 14: A special commission shall be appointed by the Mandatory to study, define and determine the rights and claims in connection with the Holy Places and the rights and claims relating to the different religious communities in Palestine. The method of nomination, the composition and the functions of this Commission shall be submitted to the Council of the League for its approval, and the Commission shall not be appointed or enter upon its functions without the approval of the Council.
Art. 28: In the event of the termination of the mandate hereby conferred upon the Mandatory, the Council of the League of Nations shall make such arrangements as may be deemed necessary for safeguarding in perpetuity, under guarantee of the League, the rights secured by Articles 13 and 14,

the territory nor the primary responsibility of the General Assembly for the achievement of statehood came to an end with the termination of the Mandate.

General Assembly Resolution 273 (III), admitting Israel into the United Nations, noted in its preamble the declaration by the State of Israel that it "unreservedly accepts the obligations of the United Nations Charter...". It further stated: "Recalling its resolutions of 29 November 1947 and 11 December 1948 and taking note of the declarations and explanations made by the representative of the Government of Israel before the Ad hoc Committee in respect of the implementation of the said resolutions..."

8.11. It can be argued, therefore, that Israel's admission to the United Nations was conditioned on its acceptance of Resolutions 181(II) and 194(III) which placed on it an obligation to abide by their terms, including recognition of the right to statehood of the Arab Palestinians, and to cooperate with the United Nations in their implementation.

8.12. Resolution 181(II) has become the foundation of the establishment of a Palestinian State, thus the basis of legitimacy not only of the Israeli State but also of the Palestinian State which was declared by the Palestine National Council at its 19th Extraordinary Session in Algiers on 15 November 1988.

3. The international status of the territory following from the right to self-determination

a. The right to Self-determination in international law

8.13. Once the Mandate was terminated, the international status of the Occupied Palestinian Territory, including East Jerusalem, as well as the competence and responsibility of the United Nations for the Territory, came to be determined by reference to the right to self-determination.

8.14. The principle of self-determination of peoples enshrined in Articles 1(2), 55 and 56 of the Charter has been recognized by a number of important declarations adopted by the

General Assembly, in particular resolutions 1514(XV) and 2626(XXV). The principle has also been confirmed by the International Court of Justice in its *Namibia* opinion. [69]

In the *East Timor* case, the Court said that "Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable."70 This *erga omnes* character means that the right to self-determination entails a corresponding duty on the part of all States, as stated in Resolution 2625 : "to promote, through joint and separate action, realization of the principle....and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle..."

b. The competence and responsibility of the General Assembly in the realization of the right to Self-Determination and the legal effects of its Resolutions

8.15. The pronouncements of the General Assembly concerning the international status of the Occupied Palestinian Territory, including East Jerusalem, the right to self-determination of the Palestinian people and the determination of the illegality of the construction of the Wall in breach of this status and right undoubtedly produce definitive legal effects and provide the basis for United Nations action.

8.16. Over the years the General Assembly has established its competence to determine the status of non-self-governing territories, as well as to determine, through a process of collective recognition, the peoples entitled to exercise their right to self-determination and the legitimacy of their representatives. Its resolutions have entailed a host of legal consequences. In its past practice in relation to Non-Self-Governing territories, the General Assembly asserted its competence on numerous occasions to make such binding

---

[69] *Namibia,op.cit.*, p.31.
[70] *East Timor (Portugal v. Australia), I.C.J. Reports 1995*, p. 90, at p. 102

determinations concerning the status of territories, *inter alia* in the cases of Alaska and Hawaii, Puerto Rico, Portuguese overseas territories, Southern Rhodesia and Namibia, in order to state the rights and obligations which these territories had under the Charter and general international law. This came to be an accepted part of United Nations practice, and over the years the General Assembly has been responsible for overseeing the realization of the right to self-determination by numerous former colonies and mandated territories.

8.17. The International Court of Justice has dealt with the question of General Assembly determinations in its consideration of the legal validity and effects of General Assembly resolution 2145 (XXI) by which the Assembly declared the Mandate for South West Africa revoked on the basis that South Africa had failed to fulfil its obligations under it and that consequently, South Africa had no other right to administer the territory. In its Advisory Opinion, the Court pointed to a whole number of legal consequences which flow from General Assembly declaratory resolutions and from determinations which the Court has referred to as having "operative design".[71] Thus the Court, replying to the objection that the Assembly had made pronouncements which, not being a judicial organ, it was not competent to make, stated: "To deny to a political organ of the United Nations ... the right to act, on the argument that it lacks competence to render what is described as a judicial decision, would not only be inconsistent but would amount to a complete denial of the remedies available against fundamental breaches of an international undertaking"[72] Replying to the objection that this latter pronouncement of the Assembly was a decision on a transfer of territory, the Court stated that this was "not a finding on facts, but the formulation of a legal situation". According to the Court, therefore, the General Assembly did not decide on a transfer of territory but was only declaring the legal situation resulting from the revocation of the mandate. "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

---

[71] *Nambia,op.cit.*, p.50.

[72] *Ibid.* p.49.

make determinations or have operative design". [73] The Court pointed out that the General Assembly had recourse, in that case, to the Security Council, not because it did not have the necessary legal powers to terminate the Mandate, but because it had no means of execution to ensure the withdrawal of South Africa.

8.18. The Court also maintained that "a binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence...This decision entails a legal consequence, namely that of putting an end to an illegal situation and was opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law." [74]

8.19. Even in relation to those resolutions recognized as being recommendations, Judge Sir Hersh Lauterpacht, in his Separate Opinion on *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa,* strongly denied that they have no legal effect whatsoever, for he stated that these recommendations must be given "due consideration in good faith". Judge Lauterpacht continued:

> "an Administering State (substitute for that Occupying State) which constantly sets itself above the solemnly and repeatedly expressed judgement of the Organization, in particular as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction". [75.]

---

[73] *Ibid.*, p.50

[74] *Namibia,* pp.52,56

75 Separate Opinion of Judge Lauterpacht, *Advisory Opinion on Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa,* ICJ Rep.1955, pp.118-119.

c. The right to Self-Determination of the Palestinian People

8.20. The United Nations has over the years affirmed, in a series of resolutions, a corpus of rules that would act as a legal framework for any negotiated settlement and for the achievement of statehood by the Palestinians. These rules remain the principled point of departure for any resolution of the issue, including the question of legality of the construction of the Wall.

8.21. The right of the Palestinian people to self-determination, referred to in the preamble of Resolution ES 10/14, constitutes a basic assumption of the question put to the Court by the General Assembly. The General Assembly has upheld and reaffirmed on innumerable occasions the inalienable right to self-determination of the Palestinian peoples, including their right to statehood.

General Assembly Resolution 2535B (XXIV) first stated that the causes of the Palestinian problem "has arisen from the denial of their inalienable rights under the Charter of the United Nations and the Universal Declaration of Human Rights...". Shortly after this, the General Assembly issued Resolution 2672 C (XXV). This resolution recognized unambiguously, the right of the Palestinian people to self-determination. In this resolution, the General Asembly stated :

> "Bearing in mind the principle of equal rights and self-determination of peoples enshrined in Articles 1 and 55 of the Charter and more recently reaffirmed in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.
>
> 1. *Recognizes* that the people of Palestine are entitled to equal rights and self-determination, in accordance with the Charter of the United Nations;
> 2. Declares that full respect for the inalienable rights of the people of Palestine is an indispensable element in the establishment of a just and lasting peace in the Middle East."

8.22. Numerous other General Assembly resolutions followed. Some of those resolutions affirmed this right, while others called for the need to provide the Palestinian People with the support necessary to ensure the actual implementation of this right. General Assembly Resolution 3236 (XXIX) is significant in this respect by its strong reaffirmation of the inalienable rights of the Palestinians:

> "*Expressing its grave concern* that the Palestinian people has been prevented from enjoying its inalienable rights, in particular its right to self-determination,
>
> *Guided* by the purposes and principles of the Charter,
>
> *Recalling* its relevant resolutions which affirm the right of the Palestinian people to self-determination,
>
> 1. *Reaffirms* the inalienable rights of the Palestinian people in Palestine, including:
>
> a) The right to self-determination without external interference;
>
> b) The right to national independence and sovereignty;
>
> 2. *Reaffirms* also the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted, and calls for their return;
>
> 3. *Emphasizes* that full respect for the realization of these inalienable rights of the Palestinian people are indispensable for the solution of the Question of Palestine;
>
> 4. *Recognizes* that the Palestinian people is a principal party in the establishment of a just and durable peace in the Middle East;

5. *Further recognize* the right of the Palestinian people to regain its rights by all means in accordance with the purposes and principles of the Charter of the United Nations;

6. *Appeals* to all States and international organizations to extend their support to the Palestinian people in its struggle to restore its rights, in accordance with the Charter;

7. *Requests* the Secretary-General to establish contacts with the Palestine Liberation Organization on all matters concerning the question of Palestine;"

8.23. As for the content of the right, this has been recognized as the right of the Palestinian people to freely determine their internal status and, in regard to their external status, their right to statehood. The two-State solution is thus in conformity with this right.

d. The right of the Palestinian People to Permanent Sovereignty over Natural Resources

8.24. The principle of permanent sovereignty over natural resources is an essential element of sovereignty and of the right to self-determination, recognized in the landmark Resolution 1803 (XVIII) of 1963. It is now found in a number of instruments, not least the two Human Rights Covenants. The term "permanent" means that the right is inalienable and, thus, reflects the peremptory nature of the norm.

8.25. The principle of Permanent Sovereignty over natural resources has come today to constitute the key principle of both international economic law and international environmental law, thus blending together with the promotion of sustainable development.

8.26. The General Assembly has applied the principle of permanent sovereignty over natural resources to peoples and territories under occupation, foreign domination or apartheid. On 15 December, 1972, it affirmed the principle for the first time in respect of the population of the territories occupied by Israel.[76] Since then, a series of resolutions have been adopted dealing specifically with permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, over their natural resources which later came to embrace its national wealth and economic activities, including land and water.[77]

8.27. In the latest series of such resolutions, Resolution 58/229 adopted on 23 December 2003 entitled Permanent sovereignty of the Palestinian people in the occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources, the General Assembly:

> *"Reaffirming* the principle of the permanent sovereignty of peoples under foreign occupation over their natural resources,
>
> *Guided* by the principles of the Charter of the United Nations, affirming the inadmissibility of the acquisition of territory by force, and recalling relevant Security Council resolutions, including resolutions 242 (1967) of 22 November 1967, 465 (1980) of 1 March 1980 and 497 (1981) of 17 December 1981,
>
> *Reaffirming* the applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967,
>
> *Expressing its concern* at the exploitation by Israel, the occupying Power, of the natural resources of the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967,

---

[76] GA Resolution 3005(XXVII).
[77] See e.g. GA Res.3336 (1974), 32/161 (1977), 51/190 (1996), 54/230 (1999)56/204 (2001).

Expressing its concern also at the extensive destruction by Israel, the occupying Power, of agricultural land and orchards in the Occupied Palestinian Territory during the recent period, including the uprooting of a vast number of olive trees,

Aware of the detrimental impact of the Israeli settlements on Palestinian and other Arab natural resources, especially the confiscation of land and the forced diversion of water resources, and of the dire economic and social consequences in this regard,

Aware also of the detrimental impact on Palestinian natural resources of the wall being constructed by Israel inside the Occupied Palestinian Territory, including in and around East Jerusalem, and of its grave effect on the economic and social conditions of the Palestinian people,

...

1. *Reaffirms* the inalienable rights of the Palestinian people and the population of the occupied Syrian Golan over their natural resources, including land and water;

2. *Calls upon* Israel, the occupying Power, not to exploit, cause loss or depletion of or endanger the natural resources in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan;

3. *Recognizes* the right of the Palestinian people to claim restitution as a result of any exploitation, loss or depletion of, or danger to, their natural resources, and expresses the hope that this issue will be dealt with in the framework of the final status negotiations between the Palestinian and Israeli sides;

It is significant that the vote was overwhelmingly in favour, thus reflecting the consensus of the members of the United Nations that the Wall is a direct encroachment on the inalienable right to permanent sovereignty over natural resources of the Palestinian people.

e. The Territory over which the right to Self-Determination of the Palestinian People may be exercised

8.28. As stated above, the right to self-determination can only be exercised over a territory, hence the affirmation of the right to self-determination of the Palestinian people means the affirmation of the self-determination unit in determined boundaries. This has been recognized by both the General Assembly and Security Council as the Territory beyond the Armistice Lines of 1949 corresponding to the Territory occupied by Israel since 1967, i.e. the West Bank, including East Jerusalem, and the Gaza Strip.

8.29. The confines of the State of Palestine have been confirmed by the United Nations. In 1988, the General Assembly responded to the decision of the Palestine National Council of 15 November 1988 by adopting General Assembly resolution 43/177. This Resolution acknowledged the proclamation of an independent State of Palestine, considered to be in line with Resolution 181 (II) "*and in exercise of the inalienable rights of the Palestinian people...*"; it decided that, effective as of 15 December 1988, the designation "Palestine" should be used in place of the designation "Palestine Liberation Organizaton" in the United Nations system, without prejudice to the observer status of the PLO.

8.30. The function of Resolution 43/177 was to recognize and affirm the intrinsic legality of a situation considered to be in conformity with GA Res 181 and other resolutions recognizing the right to self-determination of the Palestinian people, including the right to a State of its own. Indeed, only the Israeli occupation has prevented the State of Palestine from exercising authority over this territory.

8.31. The Security Council has supported the General Assembly's findings concerning the international status of the Territory. It asserted its competence in respect of Palestine as early as 1948 when, acting under Chapter VII of the Charter, it adopted Resolution 54 (1948) and determined that the situation in Palestine constituted a threat to the peace under Article 39. Acting on the basis of Article 40, it called for a cease-fire, declaring that failure

to comply with the resolution by the parties concerned "would demonstrate the existence of a breach of the peace within the meaning of Article 39 of the Charter, requiring immediate consideration by the Security Council with a view to such further action under Chapter VII" as it may decide. The resolution indicates that the terms of the resolution in relation to the maintenance of the truce would remain in force "until a peaceful adjustment of the future situation of Palestine is reached".

8.32. Resolution 242 (1967), confirmed by Resolution 338, calls for withdrawal of Israel from *all* Occupied Territories. It has reaffirmed a well-known principle of international law, namely the inadmissibility of the acquisition of territory by force which is the corollary of the fundamental Charter principle prohibiting the threat or use of force. It has determined that all legislative and administrative measures and actions taken by Israel altering the status of Jerusalem or the occupied territories, are null and void. [78]

8.33. The Security Council has repeatedly undertaken to seek further action in the event of Israel's non-compliance, although it has up to now failed to do so.[79] In its resolution 476 (1980), the Security Council "1. *Reaffirms* the overriding necessity for ending the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem".

8.34. There is, thus, a whole body of binding norms that the Council has either reaffirmed or established in regard to the obligation of Israel to respect the territorial integrity of the self-determination unit. This is confirmed by the Israeli-Palestinian agreements and by the fact that the State of Palestine is now recognized by a great number of States.

---

[78] e.g. Security Council Resolutions 242 (1967), 465, 476, 478, 484 (1980), 681 (1990). Many of these resolutions are recalled in recent ones, for e.g. Resolution 1322 (2000)
[79] See in particular Security Council Resolution 267 (1969.

f. The duties and responsibilities of the General Assembly and the Security Council in the peace process

8.35. The collective recognition of the right to self-determination of the Palestinian People has as its corollary the recognition of the competence and special responsibility for Palestine of the United Nations which continues until the inalienable right of the Palestinian People to self-determination and full statehood has been realized. It is on the basis of this responsibility that the UN has proceeded to outline the modalities of the realization of this right to statehood and that it assumed the competence to convene a series of conferences on the Middle East, and since 1991, to endorse the peace proposals that have been put forward since the Madrid Peace Conference in 1991.

8.36. Both the General Assembly and the Security Council have, thus, been intimately concerned with peace negotiations. In Resolution 55/55 of 1 December 2000, the General Assembly expressed *"its full support* for the ongoing peace process which began in Madrid and the Declaration of Principles on Interim Self-Government Arrangements of 1993, as well as the subsequent implementation agreements, including the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995 and the Sharm el-Sheikh Memorandum of 1999".

8.37. The Security Council, by its unanimous adoption of Resolution 1515, has also endorsed the Middle East Quartet's Road Map towards a permanent, two-State solution to the Israeli-Palestinian conflict, a goal which it stated had to be achieved, *inter alia* on the basis of Council Resolutions 242 (1967), 338 (1973) and 1397 (2002). Thus, the Security Council also confirmed this primary responsibility of the United Nations.

8.38. Over the years, therefore, the United Nations has affirmed in a series of resolutions:

1) The legitimate inalienable right of the Palestinian people to self-determination, including the right to national independence and sovereignty, i.e. the right to establish its own independent State.

2) The legitimacy of its representatives – the PLO – granted Permanent Observer Status in the General Assembly and other UN bodies.
3) In regard to Israel's occupation of the Palestinian Territory including East Jerusalem since 1967, the principle of the inadmissibility of the acquisition of territory by force and the application of the 1949 Geneva Conventions to the Territory.
4) The consequent invalidity of all legislative and administrative measures and actions taken by Israel purporting to alter the character and status of the Occupied Palestinian Territory, in particular, the so-called Basic Law on Jerusalem, the establishment of settlements, the destruction of homes and property, the confiscation of land, and the policy of deportations.
5) The inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted.
6) The necessity for any solution of the question of Palestine to fully respect for and implement these inalienable rights of the Palestinian people.

8.39. In various ways, the construction of the Wall infringes upon fundamental principles of international law, the Charter of the United Nations and relevant resolutions of the General Assembly and Security Council:

1. It violates the international status of Palestine as authoritatively determined by the United Nations.
2. It violates the right to self-determination of the Palestinian People, including the right to statehood.
3. It violates the right of the Palestinian people to permanent sovereignty over their natural resources.

4. The Wall – a violation of Art. 2 (4) of the Charter

8.40. It has been stated above on several occasions that the Wall amounts to a *de facto* annexation. This annexation is imposed on the Palestinian People through the use of

superior military force by Israel. As any other annexation brought about by the use of force, it is unlawful.

8.41. The principle that the acquisition of territory through the use of force is prohibited is a consequence of the prohibition of the use of force. In elaborating this principle, the General Assembly, in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations[80] formulates this rule as follows:

> "The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal."

That formulation makes no exception for a use of force in self-defence. The reason is that the annexation of territory, by definition, cannot constitute self-defence. It cannot be a means to repel an armed attack, it is a measure of a completely different nature.

8.42. This understanding of the rule is already the basis for the relevant holding of the Security Council in resolution 242 (1967)[81] where its emphasizes "the inadmissibility of the acquisition of territory by war" without addressing the question which of the parties to the conflict was the aggressor and which acted in self-defence. For the application of the rule prohibiting the acquisition of territory through the use of force, that question is irrelevant. In the same sense, numerous United Nations bodies have repeatedly confirmed the rule that the acquisition of territory through use of force is illegal.

8.43. Bearing all the elements of an annexation by the use of force, the Wall constitutes a violation of Art. 2 (4) of the Charter.

---

[80] Resolution 2625 (XXV).
[81] See above para. 5.21.

IX. The Wall – a violation of International Humanitarian Law

1. Introduction

9.1. As pointed out above, the main sources of the international legal regime of occupation in times of armed conflict are found in the Hague Regulations on Land Warfare and in the Fourth Geneva Convention. These two instruments also reflect the current state of customary international law. But in recent debate, the question whether the Fourth Convention applies as a matter of treaty law has received considerable attention.

2. The applicability of the Fourth Geneva Convention

9.2. The territory where the wall is being built was occupied by Israel in 1967. Israel claims that the Fourth Convention could not apply to this occupation because at the relevant time, this territory did not belong, as a matter of law, to Jordan nor to any other party to the Geneva Conventions (argument of the "missing reversioner"). This is a misconstruction of the scope of application of the Fourth Convention. The Convention applies according to its art. 2 para. 1 in any case of an armed conflict between two or more High Contracting parties. In 1967, there was, indeed, such an armed conflict between, on the one hand, Israel, and, on the other hand, Jordan, Egypt and Syria, all four States being parties to the Geneva Conventions. Within the framework of this conflict, Israel occupied the territory of the West Bank including East Jerusalem, and also that of the Gaza Strip, both territories not belonging to Israel as it had established itself within the boundary lines drawn by the armistice agreements in 1949. There is no legal reason whatsoever to exempt those territories from the scope of application of the Fourth Convention in that conflict between various parties to the Geneva Conventions. The argument of the missing reversioner is simply irrelevant. Although put forward on several occasions by Israel, the argument has consistently been rejected by both the Security Council and the General

Assembly.[82] The application of the Fourth Convention once being established, the relevant provisions continue to be applicable according to art. 6 of the Convention.

9.3. In addition, however, there are two further legal considerations which require the application of the Convention. In 1988, Palestine acceded to the Conventions and to the Protocols Additional thereto.[83] At that time, a number of States raised objections to that accession arguing that Palestine was not a State. Be that as it may, when the Palestinian people was even recognized by Israel as a subject of international law through the conclusion of the Oslo Accords and the documents related thereto, the argument that Palestine does not have the international legal capacity required for becoming a party to the Geneva Conventions becomes untenable. It is considered to be a "power" within the meaning of common art. 60/59/139/155. That "power" is bound by the earlier declaration of accession and is also entitled to the legal benefits deriving from it.

But even if one does not accept that argument, the same result flows from an application of art. 2 para. 3 *in fine* of the Fourth Convention. Palestine is to be considered a power which "accepts and applies the provisions" of the Convention and according to the said part of art.2, is therefore bound by the Conventions, while all other High Contracting Parties are also bound in relation to that power.

For all these reasons, the Fourth Convention applies as a matter of treaty law in relation to the territory referred to as the Palestinian occupied territory. This was confirmed in no uncertain terms by the Conference of the High Contracting to the Fourth Geneva Convention, in its Declaration adopted in Geneva, 5 December 2001:[84]

---

[82] See, *inter alia,* the Security Council resolutions 446 (1979), 465 (1980) and 681 (1990); General Assembly resolutions ES-10/2, ES-10/3.

[83] For an account see F. Ouguergouz, La Palestine et les Convention de Genève du 12 août 1949 ou l'histoire d'une adhésion avortée, in : L. Boisson de Chazournes/V. Gowlland-Debbas (eds.), The International Legal System in Quest of Equity and Universality, Liber Amicorum Georges Abi-Saab, pp. 507 *et seq.*

[84] http://www.eda.admin.ch/eda/e/home/foreign/hupol/4gc/docum2.Par.0006.UpFile.pdf/mg_011205_4gcdeclarn_e.pd.

"The Participating High Contracting Parties reaffirmed the applicability of the Fourth Convention to the Occupied Palestinian Territories, including East Jerusalem. Furthermore, they reiterated the need for full respect for the provisions of the said Convention in that Territory."

9.4. As already pointed out, the rules of the Fourth Convention and of the Hague Regulations also apply as a matter of customary international law. Where there might be doubt in this respect in the case of particular rules, the question will be dealt with in more detail below.

3. Alleged justifications of measures taken by an occupying power

a. Military necessity and similar considerations

9.5. It is sometimes argued that security considerations justify the construction of the wall.[85] Whether and to what extent that argument holds true as a matter of fact is discussed elsewhere. As a matter of law, it has to be emphasized, however, that "security considerations" or "military necessity" do not constitute catch all justifications for any violation of international humanitarian law. Various rules of international humanitarian law recognize military necessity or similar concepts as a legal consideration limiting the scope of the humanitarian obligation. But the balance between military and humanitarian considerations is carefully struck in each of those provisions. It is, thus, in the interpretation of each of the relevant rules of international humanitarian law that the question whether military considerations might justify a measure taken by an occupying power has to be analysed in detail.

[85] Report of the Secretary General prepared pursuant to General Assembly Resolution ES-10/13, UN Doc. A/ES-10/248, annexe I.

b. The irrelevance of the argument of self-defence

9.6. Israel also argues[86] that the construction of the wall is justified as a measure of self-defence within the meaning of art. 51 of the Charter. That argument is flawed because it disregards the field of application of the notion of self-defence. It erroneously blurs the dividing line between *ius in bello* and *ius ad bellum*. International humanitarian law as part of the *ius in bello* applies equally to both sides of an international armed conflict, whether it be the aggressor or the victim of an aggression. Also the victim of an armed attack, which under the rules of the *ius ad bellum* is entitled to act in self-defence, is bound by the rules of international humanitarian law in doing so. Thus, the argument of self-defence cannot be used to justify any deviation from the applicable rules of international humanitarian law. Thus, where a violation of international humanitarian law is at stake, the argument of self-defence has no place, it is irrelevant.

4. The duty to ensure adequate living conditions for the population of the occupied territory

9.7. It is a general principle underlying a number of specific rules of the law of occupation that it is the responsibility of the occupying power to see to it that life in occupied territory continues as normally as possible. Various aspects of this general obligation are expressed in different provisions of the applicable law. Those are, *inter alia*, the duty of the occupying power to see to it that order and safety are maintained in the occupied territory (Hague Regulations art. 43). As to the relevant provisions of the Fourth Convention, art. 55 provides that the occupying power "has the duty of ensuring the food and medical supplies of the population". A corollary of this duty is that the obligation established by art. 59 that the occupying power shall agree to relief schemes if the territory is inadequately supplied. Art. 53, in addition, provides that the occupying power "has the duty of ensuring and maintaining ... the medical and hospital establishments and services, public health and energy in the occupied territory ...". Finally, according to art. 50, the occupying power "shall ... facilitate the proper working of all institutions devoted to the care and education of children".

---

[86] *Ibid.*

9.8. The construction of the wall systematically violates these rules. The wall renders normal life of the civilian population impossible in many areas where the wall cuts through the habitual living spaces of the Palestinian population. This means a complete disruption of the living conditions which is incompatible with the obligation of the occupying power to ensure order and safety (art. 43 Hague Regulations). That provision does not provide for any exception motivated by military reasons. The limitation of this obligation of the occupying power lies in that power's ability: It shall "take all steps in his power". Where the occupying power systematically takes steps to disrupt order and safety in the territory, this obligation is clearly violated.

9.9. The obligation underlying art. 55 and 59 is a duty to see to it that the alimentation of the population of an occupied territory is adequate. This implies not only a duty to furnish, if necessary, food supplies. That very norm is violated where the occupying power cuts off access to existing food supplies. Preventing the farmers which produce food for the population from doing just that is equivalent to cutting off access to food. As the wall in many places, and systematically so, prevents farmers from working on their agricultural land by restricting their freedom of movement, this is a violation of the fundamental obligation of the occupying power to ensure the alimentation of the civilian population.

9.10. The same argument holds true as to the duty of the occupying power to ensure access to medical supplies and medical or hospital establishments and services (art. 55 and 56 of the Fourth Convention). That obligation, too, is violated where persons needing such supplies or services are prevented from going to places where they are available. The restrictions on the freedom of movement which are the consequence of the construction of the wall have just that effect. They, thus, constitute a violation of arts. 55 and 56 of the Fourth Convention.

9.11. The duty of the occupying power to "facilitate the proper working of all institutions devoted to the care and education of children" (art. 50) is in the same way violated where the measure of an occupying power prevent children from getting to the places where

those institutions are situated. In many places, the wall prevents or will prevent children from getting access to their schools. Thus, art. 50 is violated, too.

9.12. These provisions do not provide for any exception in case of military necessity or for reasons of security. The basic limitation of the duties of the occupying power just described is its ability to ensure those supplies. The limitation clause of art. 55 and 56 is "to the fullest extent of the means available to it". Art. 50 dealing with educational institutions, does not even contain a limitation clause of that kind. Thus, if the occupying power considers it necessary, for security reasons, to restrict the freedom of movement of the civilian population, it must provide for alternative means to ensure that this population has access to food, medical services and education.

5. The duty to respect private property in occupied territory

9.13. In a number of cases, private property of the Palestinian population was taken and destroyed by Israel because this was considered necessary to construct the wall as planned by the Israeli government.[87] This destruction of private property is a violation of art. 53 of the Fourth Convention. That provision prohibits "any destruction by the occupying power of real or personal property ... except where such destruction is rendered absolutely necessary by military operations". Property was destroyed, indeed, in cases where the exception clause just cited was not applied. That exception clause does not refer to security or military necessity in general. It only provides for those exceptions which are necessitated by actual military operations. But the destruction, in the case of the wall, is not necessitated by military operations of the Israel defence force. It is explained by a perceived need to stop single individual actions by actors which do not belong to a party to the conflict, which is a different matter. Therefore, the destruction of property which took place to facilitate building the wall is not covered by the exception clause of art. 53 and is, thus, unlawful.

---

[87] Report of the Secretary-General, A/ES-10/248, Annex 1.

Private property is also protected by art. 52 of the Hague Regulations. That provision, however, does not even mention destruction, it being implied that the destruction of property as a measure taken by the occupying power (as distinguished from measure during combat) is simply ruled out. As to measures of requisition, they are limited to those "for the necessities of the army of occupation". This includes, first of all, logistical needs. If one excepts the idea that it includes also security needs, those are limited to the needs of the *army* of occupation. This excludes taking into consideration purported security needs of an (unlawful!) civilian presence of the occupying power.

6. The duty not to expel the civilian population of the occupied territory

9.14. Art. 49 of the Fourth Convention stipulates:

> "Individual or mass forcible transfers, as well as deportations from occupied territory to the territory ...of any other country, occupied or not, are prohibited, regardless of their motive."

It has been shown above that it is the practical, if not the intended effect of the wall that the population of the areas cut off by that barrier move away because of the unbearable living conditions.[88]

9.15. The construction of the wall thus constitutes a forbidden forcible mass transfer within the meaning article 49 of the Fourth Convention.

7. The duty not to transfer the occupied power's population into occupied territory

9.16. The construction of the wall also violates art. 49 para. 6 of the Fourth Convention which prohibits the occupying power from deporting or transferring parts of its own

[88] See above paras. 6.6. – 6.8.

civilian population into the territory it occupies. In many instances the United Nations bodies have held the creation of Israeli settlements in the occupied territory to constitute a violation of this provision.[89] The establishment of those settlements, which imply moving parts of the civilian population to those settlements, constitutes a consistent policy of transferring population, adopted by Israeli governments. It is not at least a design to create population structures which enhance, according to the view of significant parts of the Israeli population, the chances of Israel living in "secure boundaries". Thus, the establishment of those settlements is a considered means of a security policy to the detriment of the original population of the occupied territory. This is exactly the type of measure art. 49 para. 6 of the Fourth Convention is designed to prevent.

9.17. The course of the wall already built and the plans which have been published make it crystal clear that the wall is not designed to protect the state of Israel in its 1967 boundaries, but to shield the settlements against what is perceived to be a threat from the Arab side. The purpose of the measure, thus, is to consolidate and petrify a situation which has been brought about by internationally unlawful acts, a result which, consequently, is unlawful. Actions designed to consolidate an unlawful situation are unlawful, too. This is an additional reason why the construction of the wall constitutes a violation of the Fourth Geneva Convention, namely its art. 49.

8. The duty not to change the status of an occupied territory

9.18. Art. 47 of the Fourth Convention expressly stipulates that the status of protected persons may not be affected by an annexation expressed by the occupying power or any similar attempt to change the status of the territory. This prohibition to use an attempted change of status as a means to reduce the protection of the population of the occupied territory is a rule of customary law which existed before the adoption of the text of the

[89] See in particular Security Council resolution 446 (1979).

1949 Conventions and was recognized by the United States Military Tribunal in Nuremberg in its judgement in the *Krupp Trial* Case.[90]

9.19. This prohibition is rendered illusionary or futile by the construction of the wall. The construction of the wall, with its effect of displacing or expelling the Palestinian population from the territories sealed off by the wall, not only constitutes *de facto* an annexation, it is worse than a formal annexation. A formal illegal act could be considered as null and void. But the Wall is a fact which it is futile to consider as null and void. Thus, it indeed deprives the population of the protection to which it is entitled according to the Fourth Convention. It is in this sense that the Security Council[91]

> "*Calls once more upon* Israel ... to desist from taking any action which would result in changing the legal status and geographical nature and materially affect the demographic composition of the Arab territories occupied since 1967, including Jerusalem, and, in particular, not to transfer parts of its own population into the occupied Arab territories;"

9.20. Thus, the wall is a measure which is designed to *de facto* deprive the civilian population of the Palestinian occupied territory of its protection ensured by art. 47 of the Fourth Convention. Therefore, the construction also constitutes a violation of that provision.

---

[90] Trials of War Criminals vol. X, 1949, pp. 130 et seq.
[91] Resolution 446 (1979).

X. The Wall – a violation of human rights law and standards

1. The applicability of the human rights law in a territory occupied during an international armed conflict

10.1. Whether international treaties relating to the protection of human rights apply in a given situation depends, first of all, on how their scope of application is defined by these instruments. It is sometimes claimed,[92] however, that the scope of application, as far as a situation of armed conflict is concerned, is limited by the application of the *lex specialis* rule, which, it is claimed, would require the exclusive application of international humanitarian law. But this thesis does not withstand a critical analysis. It is contradicted by the fact that human rights and international humanitarian law have always been seen as overlapping and complementary areas of international law which are not mutually exclusive. This becomes clear if one considers the recent development of both areas of the law. The International Conference on Human Rights held in Teheran in 1968 adopted, under the title "Respect for Human Rights in Armed Conflicts", Resolution XIII which is one of the most important events which triggered the further development of international humanitarian law and led to the adoption of the Protocols Additional to the Geneva Conventions in 1977. The following preambular paragraph clearly shows the complementarity of human rights and humanitarian law:

> "Considering .. that the widespread violence and brutality of our times, including massacres, summary executions, tortures, inhuman treatment of prisoners, killing of civilians in armed conflicts and the use of chemical and biological means of warfare, including napalm bombing, *erode human rights* and engender counter-brutality;"[93]

---

[92] See the position of Israel as reported by the Secretary-General, UN Doc. A/ES-10/248, Annex I.

[93] Emphasis added.

10.2. The resolution then goes on to point to the classical formulation which reflects the common and therefore complementary protective purpose of human rights and international humanitarian law which is the famous Martens clause contained in Hague Convention No. 3:

> "... the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience."

In our times, it is imperative to determine the content of these "laws of humanity" and the "dictates of public conscience" by reference to the law of human rights.

10.3. The General Assembly of the United Nations, by its Resolution 2444 (XXIII) of 19 December 1968, still under the heading of "Respect for Human Rights in Armed Conflicts", endorsed the resolution of Teheran Conference asking for a better implementation and the further development of the laws of armed conflict. The Report of the Secretary-General submitted pursuant to that resolution also carried the title "Human Rights in Armed Conflict".

10.4. Since then, the fact that the law of human rights and international humanitarian law are complementary and not mutually exclusive has been confirmed by many United Nations and international treaty bodies. A recent example is the General Comment on Article 2 CCPR under discussion in the Human Rights Committee:

> "9. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the

enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, including a national contingent of a State party assigned to an international peace-keeping or peace-enforcement operation."

10.5. Turning to the actual text of various human rights treaties, the principle of non-exclusivity of human rights and humanitarian law is also reflected in various treaty provisions. The CCPR, according to its article 4, applies "in time of public emergency which threatens the life of the nation", of which a war is a clear example. In this sense, the European Convention of Human Rights speaks of "war or *other* public emergency" which clearly implies that war is a public emergency in the sense of these human rights treaties.

10.6. A clear example of the cumulative effect of the international protection provided by human rights law and international humanitarian law is the Convention on the Rights of the Child. As part and parcel of this nearly universally ratified human rights treaty, it is provided:

"Article 38

1. States Parties undertake to respect and ensure respect for rules of international humanitarian law applicable to them in armed conflict which are relevant to the child."

10.7. The argument of the general mutual exclusivity of human right law and humanitarian law has, thus, to be rejected. In order to determine the applicability of human rights treaties in times of armed conflict, it is necessary to turn more precisely to the interpretation of the provisions defining their scope of application.

10.8. According to art. 2 para. 1 CCPR, States Parties ensure the rights guaranteed by this treaty "to all individuals within its territory and subject to its jurisdiction". These conditions of the scope of application are not cumulative, they are alternative. This has been recognized by the General Comment of the Human Rights Committee just quoted ("This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory"). It has been confirmed in the Conclusions of the Human Rights Committee relating to the Palestinian Occupied Territories:[94]

> "The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law."

10.9. Similar provisions of other human rights instruments have been interpreted in the same way. The corresponding provision of the European Convention on Human Rights uses the same terminology. The relevant part of Art. 1 reads as follows:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined (in this Convention)".

Interpreting this provision in relation to a situation where the control excised by Turkish troops in Northern Cyprus was at stake, the European Court of Human rights held:[95]

> "62 ...the Court recalls that ... the concept of 'jurisdiction' under this provision is not restricted to national territory of the High Contracting Parties ... (T)he responsibility of the High contracting Parties can be involved because of acts of their

[94] CCPR/CO/78/ISR of 21/08/2003, para. 11.
[95] *Loizidou case, (Preliminary Objections)*, Judgement of 23 March 1995, ser. A No. 310.

authorities, whether performed within or outside national boundaries, which produce effects outside their territory ...

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of a military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms ser out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

63. In this connection the respondent Government have acknowledged that the applicant's loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops and by the establishment there or the "TRNC". Furthermore, it has not been disputed that the applicant was prevented by Turkish troops from gaining access to her property.

64. It follows that such acts are capable of falling within Turkish "jurisdiction" within the meaning of Article 1 of the Convention."

For the purposes of the present proceedings, it must be stressed that the concept of "jurisdiction" is not one of a "*de iure*" exercise of governmental powers, but one of mere *de facto* control. For in the case decided by the ECHR, Turkey did not claim to exercise *de iure* in Northern Cyprus, nor did it exercise such powers. There is the government of the "TRNC" which claims to exercise *de iure.* But the Court disregarded this claim and emphasised the *de facto* control exercised by Turkey as the basis for applying the Convention. In applying the Convention, the Court also considered explicitly ("whether lawful or unlawful") as irrelevant whether Turkey's presence in Northern Cyprus was lawful under the *ius ad bellum.*

In a recent case,[96] the Court denied that a foreign territory bombarded from the air was subject to the jurisdiction of the bombarding State. But the Court did not put into question its earlier holding in the *Loizidou case.*

10.10. As to the CCPR, the conclusion is clear: this treaty applies to the relationship of an occupying power and the population of an occupied territory as this population is "subject to its jurisdiction" within the meaning of article 2 para. 1 of the CCPR.

The same holds true for the Convention on the Rights of the Child. Its article 2 uses the very same terminology:

> "1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction ..."

10.11. The Covenant on Economic, Social and Cultural Rights contains no similar provision limiting its scope of application. There is nothing to suggest that the scope of application of this Covenant is limited to serving as a yardstick for measures taken by States Parties exclusively on their national territory. Quite to the contrary: Article 2 stresses the international of transboundary aspect of the obligations established by the CESCR. The realization of the rights shall be achieved

> "individually and through international assistance and cooperation".

This implies that States must not only promote those rights on their national territory, but are also bound to facilitate the enjoyment of these rights elsewhere in the world. It is only a

[96] *Banković case,* Judgement of 12 December 2000.

logical consequence of this perspective of the scope of the obligations established by the CESCR that they apply to the functions exercised by an occupying power in occupied territory.

10.12. It is in this sense that the Committee on Economic, Social and Cultural Rights has indeed construed the application of the CESCR. In its Concluding Observations adopted in 1998, the Committee states in relation to the territories occupied by Israel:[97]

> "The Committee is of the view that the State's obligations under the Covenant apply to all territories and populations under its effective control. The Committee therefore regrets that the State party was not prepared to provide adequate information in relation to the occupied territories."

Since then, the Committee has repeated reiterated this stance.[98]

2. *The question of the limitations of fundamental human rights – general considerations*

10.13. In a number of fora, it was claimed by Israel that measures it had taken were necessary to fight against acts considered as terrorism. If put forward on this level of generality, the claim tries to use the "fight against terrorism" as a catch all exception to the guarantees of human rights. This is just a misconception of the true content of the protection provided to the individual by human rights norms and of their limitations. This general claim has therefore repeatedly been rejected by UN bodies. These bodies emphasize that measures taken to fight terrorism must nevertheless respect all relevant

[97] UN Doc. E/C.12/1/Add. 27 of 4 December 1998.
[98] Doc. E/C.12/1/Add. 90 of 23 May 2003, para. 15; E/C.12/1/Add. 69 of 31 August 2001, para. 11.

norms of international law, in particular the relevant protections provided by the law of human rights, international humanitarian law and refugee law. In its resolution 1456 (2003),[99] the Security Council holds:

> "6. States must ensure that any measure to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law."

Resolutions of the General Assembly contain similar language:

> "The General Assembly
>
> ...
>
> 1. *Affirms* that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law;"[100]

10.14. This does not mean that human rights guarantees can never be limited for the sake of the security of a state or the fight against crime. All human rights guarantees are subject to some kind of limitation. But those limitations must respect the relevant limitation clauses contained in the respective provisions of the international instrument in question. No limitation is unlimited. Measures restricting the protection of human rights must in particular respect the principle of proportionality. This has to be assessed in relation to each of the guarantees alleged to be violated.

10.15. Before proceeding to this analysis of the relevant treaty provisions, it is necessary to briefly analyse another possible exception, namely the derogation of certain rights. Art. 4 CCPR provides for such derogations, but subject to strict limitations. Israel is of the

---

[99] Resolution dated 20 January 2003.

[100] Res. 57/219 of 18 December 2002; see the similar text in GA Res. 58/187 of 22 December 2003 and in Resolution 2003/28 of 25 April 2003 of the Commission on Human Rights.

opinion that the state of emergency proclaimed in May 1948 continues to exist and has so notified the Secretary-General of the United Nations[101] in an attempt to observe the procedural requirements of article 4 para. 3 CCPR. Whether such a sweeping reference to an earlier state of emergency satisfies the requirements established by article 4 CCPR is at least doubtful. But in any case, that derogation attempted by Israel only concern Article 9 CCPR, which is not relevant in the present context, as will be shown below. Thus, the derogation clause of article 4 CCPR does not provide any justification for the measures which are the object of the request submitted to the International Court of Justice in the present case.

10.16. There are no such derogation clauses in the CESCR and in the Convention on the Rights of the Child.

3. The Covenant on Civil and Political Rights: Articles 12, 13 and 26

a. Article 12

10.17. Art. 12 CCPR reads:

> Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

The Wall, and a number of equivalent measures taken by Israel, obviously constitute a restriction of the liberty of movement. A Palestinian affected by the wWall can no longer move where he or she wants to move. He or she is prevented from going to the places necessary for the requirements of conducting a decent life: from reaching his agricultural land in order to cultivate it, from going to his or her place of employment, from seeing members of his or her family, from addressing competent public authorities, from going to

[101] Notification of 3 October 1991, Source: United Nations Information Service.

school. In many places, he or she can only go into one permitted direction, where he or she does not want to go.

10.18. In order to be permissible, that infringement of the liberty of movement would have to be covered by the limitation clause of art. 12 para. 3. This is not the case.

First, a limitation must be "provided by law". This means that the limitation must, at least as a rule, have its basis in some kind of statute. An executive decision of the government is not sufficient for this purpose. But the construction of the Wall is a simple fact, based on various decisions of the Israeli Cabinet, the Ministerial Committee for Security Matters, the Prime Minister and the Minister of Defence. The decision has not taken the form of a decree or a similar regulatory instrument. Thus, the formal requirement of a permissible limitation is not fulfilled.

10.19. Furthermore, the limitation must be "necessary to protect national security, public order" etc.
The fist condition which must be fulfilled is that the measure must be taken to attain one of the purposes specifically listed, broad as these purposes may be. It has been demonstrated[102] that the true purpose of the wall is the petrification and consolidation of the unlawful establishment of Israeli settlements and the erosion of Palestinian living conditions in order to induce them to finally leave the territory cut off by the wall. This is, without any doubt, not one of the purpose which could justify a limitation of the liberty of movement within the meaning of art. 12 para. 3.

10.20. But in order to be justified under the terms of para. 3, the measure would have to be "necessary" for that purpose. This is not the case. Reliable reports, including from Israeli sources, suggest that the Wall is not able to provide protection against the alleged security concern. A measure [103] not even capable to achieve a certain purpose can never be necessary for attaining it.

---

[102] See above para. 6.4.
[103] See above para. 6.5.

10.21. Assuming, nevertheless, *arguendi causa,* that the measures taken are capable of reducing that risk, the test of "necessity" implies the question whether there are other measures also capable of reducing that risk, but constituting a lesser infringement of the liberty of movement. If there are such alternative measures constituting a lesser infringement, the measure actually taken is not "necessary". What is necessary can only be determined by reference to a particular purpose or goal. In this respect, it is quite clear that the legitimate purpose, if any, to be pursued by the restrictive measures can only be warding off a threat to Israel itself. As a consequence of the basic rule "*ex iniuria ius non oritur*", it cannot be a lawful and legitimate purpose to defend an unlawful situation. Therefore, the defence of the settlements which are unlawful under international law cannot constitute a legitimate purpose of national security which could justify a limitation of the rights guaranteed by art. 12 CCPR. Whether the wall is necessary to protect the settlements is therefore legally irrelevant. For the purpose of protecting the territory of the State of Israel, the Wall is an unnecessary infringement of the liberty of movement in the occupied territory. For that purpose, it would be enough to build a wall along the Israeli border, the so-called Green Line. Therefore, the construction of the Wall fails the test of being necessary for a legitimate purpose, which is the prerequisite for a lawful limitation within the meaning for art. 12 para. 3 CCPR.

10.22. Be that as it may, the measure taken by Israel fails anyway the test a limitation of fundamental rights has to pass: this is respect for the principle of proportionality. To deprive an entire population of its access to their lifelines[104] is excessive in relation to the to threats of individual actions which may be taken by suicide bombers, abominable as the results of some of those attacks have been. The Wall makes freedom of movement for a large part of the population of the occupied territories a completely illusory right. Thus, the measure destroys the very essence of the right, a result which is never justifiable in terms of a limitation.

10.23. The Wall constitutes a violation of art. 12 CCPR.

---

[104] See above para. 6.7.

b. Article 13

10.24. Art. 13 prohibits the expulsion of aliens, while Art. 12 para. 4 guarantees the right to enter one's own country. It was perhaps beyond the imagination of the drafters of the Covenant that a person might also be expelled from his or her own country. But the prohibition of such an expulsion has to be derived from a systematic interpretation of both provisions read together. As described above,[105] the Wall, by destroying the possibility to conduct a decent life in the areas cut off by the wall, has the practical effect of expelling people from those areas and finally to leave Palestine. That expulsion is not accompanied by the procedural guarantees required for any such measure according to Art. 13. It, thus, cannot be justified.

10.25. The Wall constitutes a violation of article 13 CCPR.

c. Article 26

10.26. Art. 26 prohibits, in a very comprehensive at, all forms of discrimination. The article also provides an illustrative list of forbidden criteria of distinction.

The wall is a measure clearly targeted against the Palestinian population. It is designed to separate areas of settlements on the basis of an ethnic criterion. It systematically restrict the freedom of movement, and thereby undermines the living conditions, of the Palestinian population, not of any other group. It is, thus, an instrument of discrimination based on the ground of "ethnic origin" within the meaning of Art. 26.

10.27. The Wall constitutes a violation of art. 26 CCPR.

---

[105] *Ibid.*

4. The Covenant on Economic, Social and Cultural Rights

10.28. The rights guaranteed by the CESCR are promotional in nature. The Parties "undertake to take steps ..., to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant ..." Thus, where the Covenant recognizes a right to work (article 6), this does not mean that each individual must have a judicially enforceable right against the state to get, or not to loose, an employment. The obligation imposed upon States by the Covenant is of a different nature: The State is obliged to take different political, legislative or other steps to promote full employment. But this positive of affirmative obligation to promote a goal (in the case of article 6: employment) has as a consequence also a negative duty, a prohibition. The promotional duty is violated where the State takes steps which make it impossible, for the persons affected, to attain the goal. In other words: the right to work is violated if a State prevent persons from exercising a gainful activity he or she would otherwise have. It is in this negative or prohibitive aspect that the construction of the wall violates a number of rights guaranteed in the CESCR. On the basis of this legal reasoning, the Committee on Economic, Social and Cultural Rights has repeatedly expressed its concern about the violations of these rights in the Palestinian occupied territories.[106]

10.29. More concretely, the construction of the wall violates the following rights:

The wall makes it impossible for many people to have access to their place of work.[107] Therefore, it violates the right to work (article 6).

The wall systematically separates families. Therefore, the duty of the State to accord the widest possible protection and assistance to the family (article 10) is violated.

---

[106] Concluding Observations of the Committee, UN Doc. E/C.12/1/Add.27 paras. 8 et seq., 69 paras. 11 et seq., 69 paras. 15 *et seq.*

[107] See above para. 6.8.

The wall makes it impossible for many people to exercise activities necessary to gain a livelihood, by separating them from the place where such activities are to be exercised, be dependant work or the cultivation of farmers' agricultural land.[108] Therefore, the right to an adequate standard of living (article 11) is violated.

The wall bars many people from access to medical treatment centers or hospitals.[109] Medical doctors cannot go to their patients. Therefore the right to the enjoyment of the highest attainable standard of physical and mental health (article 12) is violated.

The wall deprives children of access to their schools.[110] Therefore, the right to education (article 13) is violated.

5. The Convention on the Rights of the Child

10.31. The Convention on the Rights of the Child, in addition to addressing a number of issues specifically relevant for the situation of children (e.g. adoption, tutelage, separated parents), takes over a number of provisions of the two Covenants and reformulates them with a special emphasis on the needs and the special vulnerability of children. In respect of social rights, the provisions of the Convention are also of a promotional nature. The formulations used in article 4 of the Convention resemble those of article 2 CESCR, discussed above. Thus, what has been said above concerning the violation of certain rights also applies in the case of the Convention. The rights

- to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health (article 24 of the Convention);
- to a standard of living adequate for the child's physical, mental, spiritual, moral and social development (article 27);
- to education (article 28)

are thus violated.

---

[108] *Ibid.*
[109] *Ibid.*
[110] *Ibid.*

B. The Wall – legal consequences arising from the unlawful construction of the Wall

11.1. The legal consequences deriving from the fact that Israel violated a number of norms of international law are twofold. These violations trigger the international responsibility of the State of Israel and the criminal liability of the decision-makers.

1. The law of State responsibility – the obligations of the State of Israel

11.2. The violations committed by Israel constitute unlawful acts engaging the international responsibility of Israel towards Palestinian People, the victim of these unlawful acts.

11.3. The first legal consequence arising under the law of State responsibility is a duty to cease the act (article 30 ILC Draft Articles on the Responsibility of States). It is of particular importance that the Court clarifies this obligation as the construction of the Wall continues. That construction must cease immediately.

11.4. Furthermore, Israel is under a duty to make full reparation for the injury caused by this unlawful act (art. 31 ILC Draft). This reparation includes, first, restitution. There is, thus, a duty "to re-establish the situation which existed before the wrongful act was committed" (article 35 ILC Draft). This means that the Wall has to be torn down by Israel. It also means that the land used for the purpose of building the Wall must be given back to the PNA or to the original owners. That restitution in kind takes precedence over any payment of compensation.

11.5. The Wall itself is a fact based on a simple governmental decision.[111] But there are a number of regulatory acts related to the construction of the Wall, for instance Orders dated October 2nd 2003 establishing restrictions on the right to enter or leave, or to reside in, the so-called Seam-Zone between the Wall and the 1949 Armistice Line. As a form of restitution, such regulatory acts must be rescinded.

11.6. The existence of the Wall has, in addition, resulted in considerable financial losses suffered by Palestinians. It has been stated, *inter alia*, that Palestinian were prevented from using their property, including their agricultural land, that persons were barred from their places of work and were thus unable to earn money. Palestine is entitled to claim from Israel reparation of these financial damages suffered by its population.

2. The law of State responsibility – the rights and duties of third States

11.7. The norms which have been violated by Israel constitute *erga omnes*-obligations, which means that they are "owed to the international community as a whole" (article 48 (1)(b) ILC Draft). There is no doubt that the fundamental principles of Charter law, international humanitarian law and the law of human rights fall within this category of norms. Thus, other States may "take lawful measures" against Israel "to ensure the cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached" (article 54 ILC Draft), i.e. in the interest of Palestine and the Palestinians affected by the Wall.

11.8. In relation to international humanitarian law, this right even constitutes a duty according to common article 1 of the Conventions:

> "The High Contracting Parties undertake to respect *and to ensure respect* for the present Convention in all circumstances."

---

[111] See above para. 10.18.

Various United Nations bodies as well as the Conference of the Parties to the Fourth Convention have repeatedly called upon all States to use means at their disposal in order to make Israel desist from unlawful measures taken in relation to the occupied Palestinian territories, in particular from measures violating the Fourth Convention.[112]

11.9. In addition, most of the norms violated by Israel constitute peremptory norms of international law, *ius cogens*. This applies to the basic principles of the law of the United Nation, to international humanitarian Law, at least to its core rules, and to the law of human rights. Thus, Israel's violations have to be qualified as a "serious breach of an obligation arising under a peremptory norm of general international law" according to article 40 ILC Draft. The breach is serious because it involves, indeed, "a gross and systematic failure by the responsible State to fulfil the obligation" (Art. 40 para. 2). According to article 41, this qualification of the breach entails the following consequences:

- States shall cooperate to ensure the cessation of the construction;
- no State shall render assistance to that construction;
- no State shall recognize any situation created by or as a consequence of the construction.

11.10. The latter point is of particular importance as the construction has a dangerous potential of leading to a new *de facto* partition of the remainder of Palestine which may be followed by attempts to achieve a *de iure* recognition. States are under a duty to abstain from this type of recognition.

[112] See in particular the references quoted *supra* para. 9.2. and 9.3.

3. The responsibilities and duties of the United Nations and the Specialised Agencies

11.11. An appropriate reaction to the unlawful act committed by Israel, as now determined by the Court, squarely falls within ambit of the tasks and responsibilities of UN organs.

11.12. It has been pointed out above[113] that the General Assembly bears a particular responsibility in this respect in the light of its powers and functions as a successor of the supervisory organ of the mandates system and due to its special responsibility for the defence and promotion of the right of self-determination. As the Wall frustrates this very right, it is necessary for the General Assembly to take the measures required to redress this frustration.

11.13. As to the Security Council, it has dealt with the question of Palestine in the exercise of its powers under Ch. VII of the Charter since 1948. Regrettably, since that time, a situation as defined in Art. 39 of the Charter has not ceased to exist. Consequently, the Security Council is still discussing that question as a matter of Ch. VII. The construction has aggravated the situation. It is, thus, part of the duties and responsibilities of the Security Council according to Art. 24 of the Charter to take the measures necessary to restore peaceful condition in the area, a goal that cannot be reached it the Wall continued to exist and to be even extended.

11.14. All agencies of the United Nations system are under the duty to support, within their specific field of competences, the fulfilment of the functions of these political organs.

---

[113] See above Section VIII.

4. Personal criminal liability

11.15. As to personal criminal responsibility of persons who decided on the construction of the wall, two questions arise:

- Does the construction of the wall constitute a war crime which falls within the jurisdiction of the International Criminal Court?
- Does it constitute a grave breach of the Geneva Conventions, which would entail a duty of all States to prosecute the relevant decision-maker?

The answer to the first question is no. Neither Israel nor Palestine are parties to the statute of the ICC.

11.16. In relation to the second question, two issues have to be distinguished: the destruction of property in connection with the construction and the consolidation of the unlawful Israeli settlements as a violation of article 49 of the Fourth Convention.

11.17. "Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" constitutes a grave breach of the Fourth Convention (article 147). It has been shown above that there was, in connection with the construction of the wall, destruction of property[114] that was not justified by military necessity. It was conducted in violation of article 53 of the Fourth Convention,

[114] See above Section IX.

thus unlawfully. This destruction must also be qualified as "wanton". Consequently, these destructions constitute a grave breach of the Fourth Convention.

11.18. The transfer of the civilian population of the occupying power and, thus, the creation and consolidation of the Israeli settlements in the occupied Palestinian territories also constitutes a grave breach, although that transfer is not mentioned in the list of grave breaches contained in article 147 of the Fourth Convention. It has been declared, however, to constitute a grave breach by article 85 para. 4 (a) of Protocol I additional to the Geneva Conventions. Israel, however, is not a Party to the Protocol. In this respect, it must be noted, however, that article 8 (2)(b)(viii) of the Statute of the ICC lists as a war crime

> "The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies ..."

The list of war crimes found in article 8 has to be considered to be an expression of customary international law. The texts are taken from many different treaties, such as Hague Convention No. 3, the Protocols additional to the Geneva Conventions, the Hague Convention on the Protection of Cultural Property.[115] It seems impossible that all these treaties apply in a given conflict as a matter of treaty law. The list, thus, can only be explained if the rules referred to in it constitute customary international law. Thus, there is a customary law addition to the list of grave breaches contained in the Fourth Convention, namely the transfer of the occupying power's population into the occupied territory. The settlement policy and the construction of the Wall in order to consolidate this policy[116] are part and parcel of this grave breach.

---

[115] For details see *M. Bothe,* War Crimes, in: *A. Cassese/P. Gaeta/J.R.W.D. Jones* (eds.), The Rome Statute of the International Criminal Court: a Commentary, vol. 1, pp. 379 *et seq.*, 395 *et seq.*

[116] See above Section IX.

Thus, both the destruction of property effectuated for the purpose of building the wall and the construction itself constitute grave breaches of the Geneva Conventions. As to the duties which the Convention imposes on the Parties in relation to grave breaches, Art. 146 is clear: *All* Parties are under an obligation to prosecute an alleged offender or to extradite him or her to a Party willing to prosecute. This has been, *inter alia,* confirmed by the Conference of the High Contracting Parties to the Fourth Geneva Convention in its Declaration adopted on 5 December 2001:

> "They reaffirm the obligations of the High Contracting Parties under articles 146, 147 and 148 of the Fourth Convention with regard to penal sanctions, grave breaches and responsibilities of the High Contracting Parties."

C. Conclusions and submissions

It is respectfully submitted to the Court that the question put to it by the General Assembly should be addressed in the following way:

1. The construction of the wall constitutes an internationally wrongful act as it violates a number of fundamental rules and principles of international law, in particular:

a. the right of the Palestinian People to self-determination, including its right to statehood;
b. the inadmissibility of the acquisition of territory through the use of force;
c. the United Nations Charter and relevant resolutions of the General Assembly and the Security Council;
d. international humanitarian law, in particular the Fourth Geneva Convention;
e. the international law of human rights, in particular:
    - relevant provisions of the International Covenant on Civil and Political Rights;
    - relevant provisions of the International Covenant on Economic, Social and Cultural Rights; and
    - relevant provisions of the Convention of the Rights of the Child.

2. These wrongful acts engage the international responsibility of the State of Israel. Therefore, Israel is obliged to:

a. cease immediately the construction of the wall;
b. immediately rescind all legal and administrative measures taken for the purpose of constructing the wall;
c. as a form of restitution
    - demolish those parts of the wall which are already built;
    - restitute to the lawful Palestinian owners all land and other property taken in connection with the building of the wall.

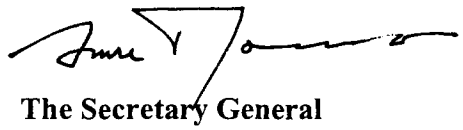
3. All measures taken by Israel in connection with building the wall are null and void. Therefore. all States are under a duty not to recognize any situation created by or as a consequence of its construction.

4. All States are under a duty to cooperate in order to induce Israel to comply with the obligations stated *sub* 2.

5. The competent organs of the United Nations and the United Nations system, in particular the General Assembly and the Security Council, have the duty to take the measures necessary to induce Israel to comply with the obligations stated *sub* 2 in order to implement the relevant resolutions adopted by the General Assembly and the Security Council since 1947.

6. The construction of the wall constitutes a grave breach of the Fourth Geneva Convention. Therefore, all States are under a duty to prosecute persons who bear the responsibility for this construction and measures relating thereto unless they extradite an alleged offender to a State willing to prosecute him or her.

Amre Moussa



The Secretary General

of the League of Arab States