

International Court of Justice

Advisory Opinion Proceedings

On

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

Palestine

Oral Pleading

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The Peace Palace, The Hague

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Introductory Statement

**H.E. Dr. Nasser Al-Kidwa, Head of Delegation,
Ambassador and Permanent Observer of Palestine to the United Nations**

Mr. President, Members of the Court,

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

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

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

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

5. There is also, of course, a correlation between the route of the Wall and Israel’s longstanding illegal policies and practices with regard to Jerusalem. East Jerusalem is occupied territory. The international community has never recognized Israel’s illegal annexation of East Jerusalem. The route of the Wall will clearly entrench this annexation. It will compound the humanitarian hardships being faced by the Palestinian inhabitants of the city. Moreover, it will isolate the city from the rest of the Palestinian population, obstructing their access to the city and its Holy Places.

6. We are here because the United Nations has a permanent responsibility – legally, politically and morally – for the question of Palestine until it is resolved in all its aspects. The

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

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

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

9. Over the years, in light of the Council’s inaction, the General Assembly has tried to discharge its own responsibilities in line with General Assembly resolution 377 (V) of 1950. Four of its ten emergency special sessions have been on Palestine and the Middle East situation. In reaction to the last veto, the tenth emergency special session was resumed to consider the situation. Like the Security Council, the Assembly conducted a serious debate on the issue and two draft resolutions were submitted. One requested the International Court of Justice to issue an advisory opinion on the Wall. After intensive consultation and negotiations, the members of the EU introduced a draft resolution, with the understanding that the co-sponsors of the original two drafts would not insist on a vote on those drafts. The EU co-sponsored draft resolution was adopted by an overwhelming majority, on 21 October 2003, as resolution ES-10/13.

10. Three specific elements of that resolution should be highlighted: First, it demanded “*that Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law*”. Second, it requested the Secretary-General to report on compliance. And, third, it expressly stated that upon receipt of the first report “*further actions should be considered, if necessary, within the United Nations system.*” The wording of that third element reflected a compromise on the means of following-up the issue, including the possibility of a request for an advisory opinion from this Court on the legal consequences in case of non-compliance. The phrase could not have meant anything other

than a reference to the Court, and, regardless of the claim made in one Written Statement¹ of a different understanding, it is indisputable that the idea for requesting an advisory opinion was widely discussed and debated.

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

Mr. President, Members of the Court,

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

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

Mr. President, Members of the Court,

14. There has been no shortage of peace initiatives on the Middle East and the Israeli-Palestinian conflict. Yet, since the adoption of Security Council resolution 242 (1967) and throughout every one of the subsequent initiatives, Israel has simultaneously been engaged in the intensive colonization of our land. It has transferred 400,000 illegal settlers to the Occupied Palestinian Territory, including East Jerusalem. It is continuously attempting to change the status, physical character, nature and demographic composition of that territory, most recently through its construction of the Wall. Since the signing in 1993 of the Declaration of Principles

¹ Written Statement of the United Kingdom and Northern Ireland

² A/ES-10/248

between the Government of Israel and the Palestine Liberation Organization, Israel not only continued its illegal settlement activities and expansion but actually doubled the number of its settlers in the Occupied Palestinian Territory, including East Jerusalem. Doubled. How can it be expected that the Palestinian people would continue to believe that peace was eminent under such circumstances?

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

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

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

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

Mr. President, Members of the Court,

³ Written Statement of the United Kingdom and Northern Ireland

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

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

20. The suicide bombings have led to the death of 438 Israelis in Israel. 490 Israelis, mostly soldiers and settlers, have also been killed by other kinds of violence. In contrast, since September 2000 and as of 18 February 2004, the Israeli occupying forces have directly killed, including many by extrajudicial execution, a total of 2,770 Palestinian civilians, including children, women and men. Of those killed, more than 1,200 Palestinians have been killed by the Israeli occupying forces in the Gaza Strip, even though Israel has built another kind of wall surrounding the Gaza Strip. The question that must be asked is: how then will this Wall being built by Israel solve the security problem? If anything, its route and the illegal measures entailed in its construction ensure that it will actually exacerbate the security situation. It is more than obvious that when you deprive an entire people of their rights, expropriate their land and property and wall them into enclaves and ghettos, you are not solving the security problem but creating an untenable situation that will combust.

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

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

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

continued confiscation and colonization of the Palestinian land lead to peace and security for both peoples? It cannot.

24. The colonization by Israel of the Palestinian land under its occupation and the attempts to change its legal status are not new phenomena. What is new is the magnitude of Israel's attempt to change the legal status and to effect the *de facto* annexation of large parts of the Occupied Territory by means of the Wall. The Wall will be the culmination of all previous illegal measures and practices carried out by Israel since 1967 towards this end. It will destroy the hopes of the Palestinian people for the realization of their inalienable rights, including the right to self-determination, and destroy their faith in the rule of international law and the international community's ability to uphold it in the face of such grievous violations. It will destroy the hopes of the international community for implementation of the Road Map and the "two-State" solution of Israel and Palestine, living side by side within secure and recognized boundaries. Such a lamentable outcome must be avoided at all costs.

Mr. President, Members of the Court,

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

Mr. President, Members of the Court,

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

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

Factual Presentation

Ms. Stephanie Koury, Negotiations Support Unit, and Professor Jarat Chopra, Professor of International Law, Brown University

Ms. Koury:

Mr. President, Members of the Court

27. This factual presentation is in two parts. I will describe the nature and route of the Wall. Then I will outline its effects at the local, regional and national levels. This presentation is primarily based on reports included in the United Nations dossier before you.

I. The Nature and Route of the Wall

*Slide 1: Cross Section of the Wall Complex*⁵

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

*Slide 2: Section of the Wall Complex*⁶

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

*Slide 3: Concrete Sections of the Wall*⁷

30. In some places, the Wall is made of concrete and is 8 meters high, as shown here in Occupied East Jerusalem. In Qalqilya, the concrete Wall is lined with watch towers approximately 300 meters apart.

*Slide 4: Gate Installed Along the Wall*⁸

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

⁵ Cross Section of the Wall Complex, Document 1, Palestine's Written Statement, Volume 1, Maps and Graphics.

⁶ Photograph 1, Palestine's Written Statement

⁷ Photographs 15 and 4, Palestine's Written Statement

⁸ Photograph 14, Palestine's Written Statement

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

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

33. If completed, the total length of the Wall will be between 700 and 800 km. Some 56.5% of the West Bank will be enclosed inside the Wall.

Slide 6: The Wall in Occupied East Jerusalem

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

Slide 7: The Wall and Settlement Expansion around Qalqilya

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

Slide 8: The Wall and Israeli Settlements Expansion

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

II. The Effects of the Wall

Mr. President, Members of the Court,

37. I would now like to draw your attention to the effects of the Wall at the local, regional and national levels.

Slide 9: Local Impacts of the Wall: Focus Jayyus

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

39. Jayyus is a village of approximately 3,000 people, the majority of whom depend on farming. Approximately 2/3 of the village land is now situated to the west of the Wall, separating villagers from their land and water wells. Consequently, farmers are no longer investing in their land. The picture on the right is a view from Jayyus of its land on the other side of the Wall.

Slide 10: Regional Impacts of the Wall: Focus Qalqilya Area

40. At the regional level, the Wall has also had a serious impact. For instance, due to the complete enclosure of Qalqilya by the Wall and a gate, some 1/3 of the shops have closed and unemployment rates have increased. The impact on the villages dependent upon Qalqilya has also been severe. People's access to basic services has declined dramatically. For example, a UN hospital in Qalqilya has experienced a 40% decrease in caseloads since the enclosure of Qalqilya and surrounding areas. Both Qalqilya and the neighboring villages are separated from almost all of their agricultural land in what is considered part of the "Breadbasket" of the West Bank. Because of these conditions, Palestinians are leaving the area.

Slide 11: The Wall and Gate Closures⁹

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

Slide 12: National Impacts of the Wall

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

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

⁹ Photographs 21 and 22, Palestine's Written Statement

Slide 13: The Closed Zone and Permit System

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

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

Considerations of Jurisdiction and Admissibility

Professor James Crawford SC, FBA

Whewell Professor of International Law, University of Cambridge

Mr. President, Members of the Court,

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

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

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

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

A. General Objections against Jurisdiction and Admissibility

50. I turn to the general objections.

(1) Israel's *Ultra Vires* objection

51. First, Israel objects that:

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

52. There is an initial and simple answer to this. The General Assembly's request for this opinion was made in a validly adopted resolution. In the *Namibia* Case, you stated:

“A resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ’s rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted.”¹⁰

I stress that this is not a matter of fundamental competence but of internal procedure, to use the distinction you drew in *Use of Nuclear Weapons*.¹¹

53. But if it is necessary to go beyond this, the answer is still quite clear. Ambassador Al-Kidwa has outlined the circumstances surrounding the General Assembly’s request. In the light of what he has said, nothing in the Uniting for Peace resolution prevented the adoption of this request. The request does not of course require the Court to take “action” within the meaning of Article 11 (2) of the Charter, nor did it involve such “action” by the General Assembly. No question concerning the Charter distribution of authority between the General Assembly and the Security Council is raised. Again, I quote your words:

“The Court considers that the kind of action referred to in Article 11, paragraph 2, is coercive or enforcement action... The word ‘action’ must mean such action as is solely within the province of the Security Council.”¹²

Requesting this advisory opinion is not solely within the province of the Security Council. It is as simple as that.¹³

54. I turn to the other general objections. The starting point here is that the Court “should not, in principle, refuse to give an advisory opinion.” As you recalled in *Threat or Use of Nuclear Weapons*:

“In accordance with the jurisprudence of the Court, only ‘compelling reasons’ could lead it to such a refusal... There has been no refusal, based on the discretionary power of the Court, to act upon a request for advisory opinion in the history of the present Court...”¹⁴

55. This position applies even more powerfully to the General Assembly, which the Charter expressly authorizes to request “an advisory opinion on *any* legal question.”¹⁵ And there can be no doubt that the question asked of the Court is a legal question, as you have consistently defined that term.¹⁶

(2) The politicization objection

¹⁰ ICJ Reports 1971, p.22 (para.20).

¹¹ ICJ Reports 1996 at p.82 (para.29). See also *Expenses Opinion* ICJ Reports 1962, p.168

¹² ICJ Reports 1962, p.164.

¹³ See also *Use of Nuclear Weapons*, p.233, para.12.

¹⁴ ICJ Reports 1996 at p.235 (para.14).

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

¹⁶ E.g., *Western Sahara*, ICJ Reports 1975 p.18 (para.15), cited in *Threat or Use of Nuclear Weapons*, ICJ Reports 1996 p.233-4 (para.13).

56. Then it is objected that the request “politicizes the Court” and that the Court should be faithful to its judicial character by refusing to hear the request.¹⁷ But as you said in *Threat or Use of Nuclear Weapons*:

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

57. Indeed, as you noted in *WHO Regional Headquarters*:

“in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable to the matter under debate...”¹⁹

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

58. Then it is objected that the General Assembly has already made up its mind and so you should remain silent. According to one statement:

“An opinion by the Court would provide no guidance to the General Assembly, as that body has already pronounced itself on the issue.”²⁰

But the General Assembly had already pronounced itself on the underlying issue in earlier cases – in Namibia, both the General Assembly and the Security Council had done so. Here as there you are asked to look at the legal consequences of a given situation in the light of certain resolutions; here as there you need to look at the legal position underlying those resolutions.

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

(4) Usefulness of the Advisory Opinion

60. Then it is said that an opinion is not useful. According to one statement:

¹⁷ Italian Written Statement, p.4.

¹⁸ ICJ Reports 1996 p.234 (para.13).

¹⁹ ICJ Reports 1980, p.87 (para.33).

²⁰ Germany, Written Statement, p.8

²¹ *Western Sahara*, P.21 (para.23).

“there is a striking degree of consensus among those most closely involved in promoting the peace process in the Middle East that an advisory opinion on the question sought would be of no assistance and would be likely to be unhelpful.”²²

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

62. Furthermore, the Court gives an advisory opinion to the organ which asks for it, not to some group of States. You made this point in the *Peace Treaties* Opinion,²³ and have repeated it frequently since.²⁴ And, as you said in *Threat or Use of Nuclear Weapons*:

“it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.”²⁵

B. Specific Arguments related to the Occupied Palestinian Territory: The Case for Admissibility

Mr. President, Members of the Court,

63. I now move to consider three more specific issues. Each of these, although they have been cited against your answering the request, properly understood *support* your doing so.

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

64. The first of these issues is that of consent. Australia objects that:

“The effect of the request is to bring key elements of the Israeli-Palestinian conflict before the Court for determination without the consent of Israel.”

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

66. As you said in *Western Sahara*:

“In the present case, Spain is a Member of the United Nations and has accepted the provisions of the Charter and Statute; it has thereby in general given its consent to the exercise by the Court of its advisory jurisdiction.”²⁶

²² United Kingdom, Written Statement, para.3.23.

²³ ICJ Reports 1950, p.71.

²⁴ See the cases referred to in *Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p.235 (para.14).

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

Moreover, Israel cannot object, any more than could Spain, to the exercise by the General Assembly of its competence in the field of self-determination. It cannot object to the General Assembly dealing with the situation of Palestine. These competences were exercised even before Israel came into existence, notably in the passage of the Partition Resolution, GA Resolution 181 (II).

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

68. Rather the Wall is an attempt by Israel to impose a unilateral settlement in relation to a multilateral conflict and to do so in violation of fundamental obligations, obligations *erga omnes*. These relate to humanitarian law and human rights law, including self-determination. The people of Palestine have an unfulfilled right to self-determination. Israel cannot veto or negate the interest of the General Assembly in having a legal answer to the question asked. Indeed that interest, the General Assembly’s longstanding and legitimate institutional role, is a compelling reason for answering the question – as it was in *Western Sahara*.

(6) The issue of fact-finding

69. Then it is objected that the request is inadmissible because there is insufficient evidence before the Court to enable it to make the findings of fact required to answer the request. According to Israel:

“the Court has received no evidence from Israel bearing on the substantive question, and evidence received from others, including the United Nations Secretariat, cannot be regarded as authoritative or reliable.”²⁸

70. But in all of the opinions it has given the Court has used the information publicly available, including that provided by those appearing before it. It is true that in *Eastern Carelia* the Permanent Court gave as a subsidiary reason for not answering the question an issue of fact – the intention of Russia in making a declaration during the negotiation of a bilateral treaty.²⁹ The position is quite different here. This is not a matter within Israel’s domestic jurisdiction and not a matter as to which it has a sovereign privilege to act.

²⁶ ICJ Reports 1975, p.24 (para.30).

²⁷ ICJ Reports 1975, p.25 (para.34).

²⁸ Israel Written Statement, para.6.15.

²⁹ PCJII Series B No. 5, p.28 (1923)

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

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

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

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

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

(7) Prejudicing the Road Map and future status negotiations

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

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

76. Now formulated in these terms this is not an objection to your giving any opinion whatever. It is a cautionary note as to the permanent status issues. In this moderate formulation (certain written statements were more extreme), it goes to the content of the Opinion, not the

³⁰ PCIJ Series B No. 14, p.46 (1927).

³¹ United States, Written Statement, para.4.4.

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

“It has also been submitted that a reply from the Court in this case might adversely affect disarmament negotiations... The Court is aware that, no matter what might be its conclusions in any opinion it might give, they... would present an additional element in the negotiations on the matter. Beyond that, the effect of the opinion is a matter of appreciation. The Court has heard contrary positions advanced and there are no evident criteria by which it can prefer one assessment to another. That being so, the Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.”³²

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

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

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

Conclusion

Mr. President, Members of the Court,

80. The principle of self-determination, one of the constitutive principles of the United Nations Charter, has not done well out of bilateral contentious cases. Recall *South West Africa* in 1996.³³ Recall, if I may say so, *East Timor*.³⁴ Self-determination is above all a multilateral norm, and disputes about self-determination are multilateral disputes. Moreover they are disputes as to which the General Assembly has always played a significant role. Contrast the five advisory opinions you have given on such issues – four on Namibia, one on Western Sahara.

³² ICJ Reports 1996, p.237 (para.17).

³³ ICJ Reports 1966 p.6

³⁴ ICJ Reports 1995 p.90

They became key parts of the legal perspective for the resolutions of these disputes; in Western Sahara this is still true. Recall above all Namibia – the *Status* opinion of 1950,³⁵ the *Legal Consequences* opinion of 1971.³⁶ The successful outcome of that longstanding dispute owes much to the Court's judicial role. With respect, it is submitted that you should continue to perform that role today.

Mr. President, Members of the Court,

81. Thank you for your careful attention. After the break, Mr. President, it is up to you, the next speaker is Professor Abi-Saab, before or after the break.

³⁵ ICJ Reports 1950 p.128

³⁶ ICJ Reports 1971 p.16.

Applicable Law

Professor Georges Abi-Saab

Honorary Professor of International Law, Graduate Institute of International Law, Geneva

Mr. President, Members of the Court,

82. It is my privilege and pleasure to stand before you again today, on behalf of Palestine, to address the issue of applicable law to the Occupied Palestinian Territory.

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

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

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

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

87. By contrast, the Geneva Conventions – instructed by the experiences of the Second World War – in Article 2 common to the four Conventions, state in paragraph 1:

“...the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”

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

89. That is exactly what happened in 1967. In the course of an armed conflict between several States, Israel invaded and occupied militarily, *inter alia*, the West Bank and Gaza, formerly part of the British mandated territory of Palestine, which had never before been under Israeli jurisdiction or administration. In other words, an armed conflict as provided for in Article

2, paragraph 1 of the Geneva Convention, brought about a situation falling under Article 42 of the Hague Regulations. A typical case of belligerent occupation.

90. These are clear texts that dispose clearly of the matter. But Israel contests this conclusion on the basis of the second paragraph of Article 2 of the Fourth Geneva Convention, which provides:

“The Convention shall also apply” – so this is a second case – “to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”

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

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

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

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

95. I shall not go into the specific arguments of Israel relating to the non-incorporation of the Hague Rules and the Fourth Geneva Convention in its municipal law, nor on the alleged application *de facto* of only the humanitarian components of the Fourth Geneva Convention. After all, are there any non-humanitarian components in the Geneva Conventions? Even the procedural aspects provide guarantees for the observance of the substantive protective rules. And can one apply only *de facto* instruments and rules by which one is legally bound? Indeed, this august Court itself has found that both the Hague Regulations and the Geneva Conventions have passed into general international law³⁷ and even characterize them as being intransgressable not to use *jus cogens*. As such, they are universally binding, regardless of the conventional limitations that may be attached to them as treaties.

³⁷ *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, para.79.

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

Mr. President, Members of the Court,

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

98. I need not recapitulate here all the resolutions of the General Assembly and the Security Council, or of the Conference of the Contracting Parties to the Fourth Geneva Convention or the declarations of the International Committee of the Red Cross, the latest being on the 18th of this month - and the ICRC is the institutional guardian of the Conventions – or of different States or groups of States. All of these declarations assert the applicability *de jure* of the Fourth Geneva Convention to the Occupied Palestinian Territory.³⁸

99. I would like simply in this respect to make a short remark on the status and role of General Assembly and Security Council resolutions which are specifically referred to in the question put to the Court.

100. The Israeli statement in these proceedings, in an attempt to undermine the basic role of the General Assembly, which has just been described by Professor Crawford declares:

“Resolution ES-10/13, which purports to determine illegality, cannot properly be relied upon as an authoritative determination of legality. It is not binding.”³⁹

101. The Statement contrasts that resolution with Security Council resolution 276 (1970)⁴⁰, which was referred to in the request for advisory opinion in the *Namibia* case⁴¹. However, in that very advisory opinion on Namibia, the Court has said:

“...it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative designs.”⁴²

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

³⁸ Palestine, Written Statement, para.387-392.

³⁹ Israel, Written Statement, p.116 (para.9.9).

⁴⁰ *ibid*, para.9.10.

⁴¹ ICJ Reports 1971

⁴² *ibid*, p.50 (para.105).

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

104. Of particular significance to the question put to the Court are the resolutions of the General Assembly and the Security Council relating to settlements and the annexation of East Jerusalem and its surroundings. These resolutions, particularly several resolutions of the Security Council, adopted unanimously with the positive vote of the United States, determine the illegality of the settlements⁴³, and of the annexations of Jerusalem, characterizing this annexation as a flagrant violation of the Fourth Geneva Convention, that does not affect the continued applicability of that Convention to Jerusalem and the rest of the Occupied Palestinian Territory.⁴⁴ Resolution 478 goes even further and that “all legislative and administrative measures taken by Israel, the occupying Power, which have altered or purport to alter the status and character of the Holy City of Jerusalem...are null and void... and must be rescinded forthwith.”⁴⁵

Mr. President,

105. I turn now very briefly to the content of international humanitarian law in as much as it regulates belligerent occupation.

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

107. International humanitarian law takes cognizance of this *de facto* status, to which it attaches legal consequences or a regime. This legal regime is guided by two major principles: The first is that occupation is a *temporary* (or *transient*) state of affairs. It is an abnormal or emergency situation, and the law of occupation strikes a balance between, on the one hand, accommodating the military needs of the occupying Power in prosecuting the war and its war aims, and the other hand, protecting the rights, freedoms and welfare of the population of the occupied territory, as well as their normal way and train of life from being excessively disturbed and affected by the occupation, on the other hand.

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

109. The second governing principle of the law of occupation is that occupation, being a temporary, transient regime, cannot affect nor transfer sovereignty to the occupying Power. In

⁴³ See Palestine Written Statement, para.165-167.

⁴⁴ *ibid*, para.168, 361-364.

⁴⁵ S/RES/478 (1980)

this respect, the regime of occupation, operates to a large extent as an interim measure (*une mesure conservatoire*), by freezing the *status juris* of the occupied territory for as long as the occupation remains effective; so that it cannot be changed by any unilateral act or action on the part of the occupying Power.

110. The legal effects of this principle are reflected in Article 47 of the Fourth Geneva Convention that provides:

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

111. But the law of occupation goes further. It enjoins the occupying Power to leave things as they were before the occupation to the fullest extent possible; for example, “not [to] alter the status of public officials and judges” in Article 54 of the Geneva Convention. In the same vein, Article 43 of the Hague Regulations directs the occupying Power to “take all measures in his power to restore and to ensure, as far as possible, public order and safety” – and here is a clause I want to underline – *while respecting, unless absolutely* – not necessarily – *absolutely* – *prevented, the laws in force in the country*” (and the same about criminal laws in Article 64 of the same Convention).

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

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

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

115. These prohibited acts constitute, under the Geneva Conventions and Article 147 particularly of the Fourth Convention, as well as Article 85 of Protocol I and Article 8 of the

recent Rome Statute, grave breaches of international law which entail individual criminal responsibility.

Mr. President, Members of the Court,

116. It is by the standards of this legal regime that the legality of the Wall has to be assessed and the justifications provided by Israel for its construction have to be weighted.

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

118. Moreover, logically, how can one say that a State exercises self-defense against a territory under its own military occupation, that is under its effective control, and in which it has the authority and even the obligation to “ensure public order and safety” according to Article 45 of the Hague Regulations?

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

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

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

122. It is in this sense that the Declaration of the Contracting Parties to the Geneva Convention states in paragraph 5 that: “the Fourth Geneva Convention, which takes fully into account imperative military necessity, has to be respected in all circumstances”.⁴⁶

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

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

⁴⁶ UN Secretary-General Dossier, No. 67

125. As my colleague Professor Vaughan Lowe will explain, neither provision justifies the building of a Wall to protect civilians citizens of the occupying Power implanted in the Occupied Territory.

126. The argument that a similar barrier around Gaza has proved effective in reducing the attacks – while debatable, as Ambassador Al-Kidwa has mentioned in his introductory speech – still this argument, even if it were true, intentionally ignores the fact that the wall around Gaza had for purpose – for avowed purpose – to seal it off hermetically; and this is what Israel is emphatically denying being the purpose or the effect of the Wall in the West Bank. Why? Because if it admits that the purpose is for it to hermetically seal what is within the Wall, that will confirm all its flagrant features violative of international humanitarian law.

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

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

The Violations of International Law

Professor Vaughan Lowe

Chichele Professor of Public International Law, University of Oxford

Introduction

Mr. President, Members of the Court,

129. It is an honor for me to appear before you, and to have been entrusted with this part of Palestine's presentation.

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

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

132. The General Assembly determined in resolution ES-10/13 that the Wall is "in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law". That resolution, however, leaves open important questions. For example, in what respects, and under which rules of international law, is the Wall illegal? What must be done to restore the situation to legality? What are the duties of States in the meantime?

133. The request is for advice on the consequences of the Wall being built by Israel "as described in the report of the Secretary-General." That expressly directs the Court to the essential factual information it needs – the Secretary-General's report. Further information was provided in response to the Court's Order of 19 December, much of it in UN reports prepared by senior professional figures selected for their objectivity and fairness to gather facts on behalf of the international community.

134. Israel says that the facts of this case are too complex for the Court to manage. But the essential facts are clear and simple; and Israel has chosen not to contest them before the Court.

The Tasks

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

(a) first, that Israel has, in the Occupied Palestinian Territory, only the rights of an occupying Power, which are conferred and limited by international law, and that the construction and operation of the Wall does not fall within those rights;

(b) second, that Israel, as occupying Power, is legally bound to ensure the rights prescribed by international law for those persons lawfully resident in Palestine, and that the Wall violates those rights;

(c) and third, that the effect of the Wall is to change the status of the territory in a manner tantamount to annexation, in violation of international law.

The Basic Illegality of the Wall

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

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

138. The first - requisitioning of land - is governed by Article 52 of the 1907 Hague Regulations, which stipulates that “Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation.”

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

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

141. That breach is a serious matter. It is declared to be a ‘grave breach’ of international law by Article 85 of Additional Protocol I to the Geneva Conventions.

142. The logic is inescapable. The civilian settlements are unlawful. Therefore there is no right to divert the Wall from the Green Line in order to protect those unlawful settlements.

Therefore the confiscations of Palestinian land for the purpose violate international humanitarian law. The Wall, away from the Green Line, has been constructed, and Palestinian property has been taken, for a legally impermissible purpose; and that is sufficient to establish their illegality. There is no need to examine security concerns and arguments in depth in order to appraise the legality of these diversions.

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

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

The Wall Violates Palestinian Human Rights

145. The impact of the Wall upon the basic human rights of the men, women and children in the Occupied Palestinian Territory is graphically illustrated by the UN reports, and by the reports of B’Tselem, the Israeli human rights organization founded in 1989 by prominent academics, lawyers, journalists, and Knesset members.

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

147. The scale of those violations must be underscored. This is not a technical squabble over Israeli trespass on Palestinian land. Three of the UN reports within the last year (the Bertini,⁴⁷ Dugard⁴⁸ and Ziegler⁴⁹ reports) concluded that there is a humanitarian crisis – their words, not mine – in the Occupied Palestinian Territory, and one that is entirely man-made.

148. We had intended to take the Court to passages in those reports that epitomize conduct in clear violation of international humanitarian law and international human rights law. We understand, however, the Court’s desire to focus at this stage on law rather than facts; and last Wednesday the International Committee of the Red Cross issued a statement which captures

⁴⁷ Annex 14 to Palestine Written Statement, para.3.

⁴⁸ Annex 6 to Palestine Written Statement, para.41.

⁴⁹ Dossier No. 56 accompanying the UN Secretary-General’s submission, paras.8, 58.

the essences of what we, and the various UN and other reports, are trying to communicate and fixes it precisely in its legal context. It states the following:

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

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

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

The ICRC’s opinion is that the West Bank Barrier, in as far as its route deviates from the “Green Line” into occupied territory, is contrary to IHL. The problems affecting the Palestinian population in their daily lives clearly demonstrate that it runs counter to Israel’s obligation under IHL to ensure the humane treatment and well-being of the civilian population living under its occupation. The measures taken by the Israeli authorities linked to the construction of the Barrier in occupied territory go far beyond what is permissible for an occupying Power under IHL. These findings are based on the ICRC’s monitoring of the living conditions of the Palestinian population and on its analysis of the applicable IHL provisions. The Israeli authorities have been regularly informed about the ICRC’s humanitarian and legal concerns.

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

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

150. Palestine’s Written Statement identifies the main provisions of international humanitarian law and international human rights law that are applicable in this context. It identifies breaches of several provisions of the International Covenant on Civil and Political Rights, which Israel has ratified. They include Articles 12, on freedom of movement, and 17, on the right to family life. There are breaches of the International Covenant on Economic, Social and Cultural Rights, also ratified by Israel, including Articles 11 and 12, on the right to food and to medical care, and Article 13, on the right to education. There are also breaches of the

Convention on the Rights of the Child, again, ratified by Israel. Palestine attaches particular importance to this. Children constitute over half of the Palestinian population. The Written Statement identifies breaches of Articles 24 and 27, on the right to food and medical care, Article 28 on the right to education, and Article 16 on the right to family life.

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

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

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

154. Third, it is evident that the Wall, in so far as it departs from the Green Line and is built in Occupied Palestinian Territory, cannot be justified by appeals to Israel's security interests. Israel's legitimate interests can, as is explained in our Written Statement, be protected by building the Wall on Israel's own soil; and Israel has no legal right to take Palestinian land and destroy Palestinian property in order to protect unlawful settlements in the Occupied Palestinian Territory. Palestine accepts the right of every State to take protective measures. But those measures must be lawful. States cannot cast off all legal and moral constraints by merely calling on the name of 'security interests'.

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

156. Palestine respectfully suggests that the Court should advise the General Assembly that **Israel is obliged to ensure for the residents of the Occupied Palestinian Territory the**

rights to which they are entitled under international humanitarian law and international human rights law; that those rights include the rights listed in paragraphs C and D of chapter 12 of Palestine’s Written Statement; and that those rights have been violated by the construction and operation of the Wall.

The Wall Alters the Status of the Territory

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

158. It is a fundamental principle of international law that an occupying Power is not entitled to change the status of occupied territory. It is allowed to remain in territory that is not its own and to exercise limited powers there, because international law recognizes that in situations of armed conflict such action may be necessary in order to effectively protect the State. Those rights are essentially defensive, and they are temporary: occupying armies are expected to withdraw once the conflict that led to the occupation has ended. Occupying Powers have no right to treat the occupied territory as their own, or to decide its future.

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

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

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

161. No State can evade the prohibition by refraining from making a formal and explicit annexation or other change in status while tying up the territory and its residents in a mass of restrictive legislation and physical constraints. International law looks to the reality of situations, not to the artifice of forms. In the *Starrett* case⁵⁰, for example, it was held that property could be expropriated without a formal transfer of title, if the owner’s rights of enjoyment were seriously interfered with. And in the *Nottebohm* case⁵¹, this Court looked behind the formality of naturalization to determine the reality of a man’s line with the territory of his putative State.

162. The Wall is changing the status of the Occupied Palestinian Territory. It is, entirely foreseeably, causing demographic and other changes in the Occupied Palestinian Territory that will eliminate the possibility of the Palestinian people effectively exercising their

⁵⁰ *Starrett Housing Corp v. Iran* 4 Iran-USCTR 122 (1983)

⁵¹ ICJ Reports 1955, p.4

right to self-determination. This is tantamount to a *de facto* annexation of territory in violation of the fundamental prohibition on the acquisition of territory by force.

163. Israel maintains that the Wall, on which it is said to be spending around US\$ 2 billion - \$2,000 million, though some estimates are much higher – is temporary. That is difficult to believe. One might take a different view if the Israeli Government were to announce publicly, now, that it recognizes that all of the settlements – including settlements such as ‘Ariel’, ‘Ma’ale Adumin’ and the settlements in East Jerusalem – are in Occupied Palestinian Territory, and as such within the territory that is in principle the Palestinian State under the two-State vision of the Road Map. But far from saying that, it appears from recent reports that the Israeli Government is planning to relocate settlers withdrawn from Gaza in West Bank settlements, thus consolidating its hold on the West Bank.

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

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

166. Some think that Israel is content to rule the Occupied Palestinian Territory without formally annexing it, because annexation would make it difficult to deny citizenship, voting rights and equality before the law to those born in the territory. But whatever the reason, its status is plainly changed. A recent UN report hit the point exactly:

“the wall is manifestly intended to create facts on the ground. It may lack an act of annexation, as occurred in the case of East Jerusalem and the Golan Heights. But its effect is the same: annexation.”⁵²

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

⁵² Dugard 2003 (UN Doc. E/CN.4/2004/6, 8 September 2003, reproduced as Annex 6 to Palestine’s Written Statement), para.14.

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

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

170. Mr. President, Members of the Court: unless I may help you further, that concludes my part of this presentation. May I ask you now to call on my colleague, Professor Jean Salmon.

The Violation of the Right to Self-Determination, the Relationship to the Road Map and the Legal Consequences of the Construction of the Wall

Professor Jean Salmon

Professor Emeritus of l'Universite' libre de Bruxelles

171. Mr. President, distinguished Members of the Court, it is always a great honor to address this Court. For a jurist who started his career as a legal advisor at the UNRWA, I am deeply honored by the trust placed in me today by Palestine.

172. It falls to me to develop two aspects of the matter placed before the Court: on the one hand, certain tactics used to prevent the Court from replying to the request for an opinion and, on the other, the General Assembly's anticipation of an opinion on the legal aspects of the question.

- I. The tactics used to prevent the Court from responding to the General Assembly's request for an opinion

173. My colleague, Professor James Crawford, has already told the Court about all these tactical maneuvers. However, two particular aspects may be highlighted.

174. It is well known that some States would like the Court not to take a decision on the question posed by the General Assembly. In support of this wish, it is argued that the opinion requested would be worthless. As the General Assembly has already declared the Wall to be illegal, that is the last word on the subject. This overlooks the fact that certain States, and Israel in particular, have refused to acknowledge that the Assembly has any jurisdiction to express an authoritative legal opinion on the international validity of the Wall.

175. Of itself, this state of affairs warrants a ruling by the Court on the legality of the disputed construction before determining what conclusions flow from it. Haven't the States which have discussed the merits of this question in their written statements devoted the bulk of their arguments to the problem of illegality? The principal judicial organ of the United Nations must, with all its authority, set out the legal bases of the illegality so that it can no longer be disputed in the future.

176. Indeed, it is time that the Assembly, which has guided two-thirds of humanity to independence, receive from the Court the support it is calling for to help a territory, to which the right to self-determination was promised in 1920, to realize this right without its territorial basis being severed by a Wall.

177. One does not have to be a genius to understand that, in reality, the arguments relating the pointlessness of the opinion are aimed at preventing the Court from stating the law in order to allow Israel to calmly carry on dismembering Palestine, meanwhile claiming that it is not bound by any rule of law on this subject.

178. The same applies to the other argument used to gag the Court, the one which claims that its intervention would jeopardize the “Road Map”.

179. This argument, under the guise of concerns associated with safeguarding the peace process and the search for a negotiated settlement of the question, in fact doubly jeopardizes the right to self-determination of the Palestinian people, on whose territory Israel is building a new Wall of shame. (1) It obscures the fact that the exercise of the right to self-determination of the Palestinian people throughout the Occupied Territory is in fact one of the very bases of the peace process and the Road Map. (2) It obscures the fact that it is the Wall that seriously infringes the obligations set out in the Road Map. In short, it is brandished to prevent the Court from making these two findings.

180. Let us take these two points one by one.

(1) The argument of the Road Map obscures the fact that the exercise of the right to self-determination of the Palestinian people throughout the Occupied Territory is in fact one of the very bases of the peace process and the Road Map

181. By resolution 1515 of 19 November 2003, the Security Council “calls 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”.

182. The vision of “two States living side by side” rests upon a legal foundation of which the first building block is General Assembly resolution 181 (II) of 1947, providing for the creation of two States on the territory of the former British Mandate for Palestine. It is also based on a series of binding Security Council resolutions to which it expressly refers, in particular resolution 242 (1967), stating that the acquisition of territory by force is inadmissible and providing for the withdrawal from territories occupied in the then-recent conflict, which resolution was confirmed by resolution 338 (1973) and 1397 (2002) of the same organ.

183. Thus was defined the geographical expanse in which the Palestinian people are to enjoy the right to self-determination. This area consists of the territories occupied by Israel since 1967, which were delimited by the demarcation line arising under the General Armistice Agreement between the Hashemite Kingdom of Jordan and Israel, signed at Rhodes on 3 April 1949, and its application. This is what is commonly referred to as the “Green Line”.

184. The peace process therefore is founded on two fundamental rights of the Palestinian people: the right of self-determination in the Palestinian territory occupied since 1967, including East Jerusalem; and the right to exercise that right through negotiations in which its consent is not vitiated by an accumulation of unlawful actions taken by the other party to restrict the exercise of that right.

185. The document referred to as the “Road Map” provides for the final phase of negotiations to be “two States, Israel and sovereign, independent, democratic and viable Palestine, living side-by-side in peace and security”. The process envisioned is that of direct negotiations to put an end to the conflict and define a “permanent status” in the final phase. That

permanent status was defined in agreements with Israel signed at Washington in 1993 and Taba in 1995 as follows: “Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest.”⁵³

186. Before it could be claimed that the present request for advisory opinion is an action by the General Assembly jeopardizing the peace process, it would be necessary to prove that a ruling by the Court on the unlawfulness of the Wall would be likely to be detrimental to that “permanent status”. This is acknowledged in the Written Statements of the United Kingdom⁵⁴ and the United States⁵⁵.

187. That however is not the case.

188. The 144 States which held that the Wall was a violation of international law based on that view on legal elements lying at the very heart of the Road Map: respect for the Palestinian people’s right to self-determination; respect for the status under international law of the Occupied Territory and for its territorial extent; respect for the international obligations deriving from that status in regard to the rights of the civilian population (humanitarian law and human rights).

189. A finding by the Court that the Wall violates these rights will not interfere either with the implementation of the Road Map or with “permanent status” issues. The Court is not being asked to rule on a frontier issue but to take steps to ensure respect for the status of a territory that was colonized (in the context of a mandate) and then occupied by a foreign Power. The people of that territory are entitled to have their rights protected against the construction of a Wall beyond the demarcation line separating them from the occupying Power.

190. If the Court should happen to allude to certain permanent status issues (relating to Jerusalem or the settlements for example) because of the way in which the Wall is constructed, it will do so in order to draw attention to pre-existing obligations under Security Council resolutions that are binding and cannot be derogated from under individual agreements. Subject to respect for such obligations, the two parties are free during the negotiations, on condition that their consent is not vitiated, to make any concession they deem appropriate in order to establish a final status of peace.

191. As a closing comment on this first point, it may be noted that the request to the Court for an opinion in no way impedes further negotiations, and that the Court, far from disrupting the peace process, will provide a framework for it through its rulings, by identifying the rights of the Palestinian people that cannot be violated by the construction of the Wall.

192. Advocating negotiations between the wolf and the lamb implies ensuring minimum protection for the lamb.

⁵³ Declaration of Principles on Interim Self-Government Arrangements, signed at Washington on 13 September 1993, Article V, RGDIP, 1994, p.264; Interim Agreement on the West Bank and the Gaza Strip, signed at Taba on 28 September 1995, A/51/889, S/1997/357.

⁵⁴ United Kingdom, Written Statement, para.3.21.

⁵⁵ United States of America, Written Statement, para.4.2.

193. I shall now turn to the second aspect of the Road Map argument.

(2) It obscures the fact that it is the Wall that seriously infringes the obligations set out in the Road Map

194. A very great majority of the States Members of the United Nations considered that the peace process was not jeopardized by the request for an opinion but rather by the Wall that is being constructed by Israel.

195. It should be borne in mind that the peace process is based, *inter alia*, on the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip signed in Taba on 28 September 1995⁵⁶, Article XI of which states that “1. The two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which will be preserved during the interim period” and Article XXXI of which stipulates that “7. Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations”.

196. These provisions are pivotal to the peace process. In addition, the Road Map contains a series of provisions that were rightly highlighted in the Written Statement of the French Republic. I shall cite some passages:

“Israel takes all necessary steps to help normalize Palestinian life” and “freezes all settlement activity”.

“GOI [the Government of Israel] takes no actions undermining trust, including deportations, ..., confiscation and/or demolition of Palestinian homes and property, as a ... measure ... to facilitate Israeli construction; destruction of Palestinian institutions and infrastructure”.

197. Instead of fulfilling those obligations, Israel, by its construction of the Wall, has turned its back on the right of the Palestinian people to self-determination and has at the same time sabotaged the Road Map. As Palestine’s Written Statement has shown:⁵⁷

(a) “To the extent that the Wall departs from the Green Line and is constructed in the Occupied Palestinian Territory, including in and around East Jerusalem, it severs the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination. To the same extent the Wall is also a violation of the legal principle prohibiting the acquisition of territory by the use of force;

(b) The route of the Wall is designed to change the demographic composition of the Occupied Palestinian Territory, including East Jerusalem, by reinforcing the colonial Israeli settlements in the Occupied Palestinian Territory and facilitating their extension – in disregard of the fact that these settlements are themselves illegal according to international law;

⁵⁶ A/51/889, S/1997/357

⁵⁷ Written Statement of Palestine, para.548.

- (c) By the creation of Palestinian enclaves, of discrimination against the Palestinian population vis-à-vis the Israeli settlers, and of unbearable economic conditions, the Wall is having the clear and foreseeable effect of the forced displacement of the Palestinian population into increasingly limited areas regarded as safe and livable for Palestinians. The Wall is intended to reduce and parcel out the territorial sphere over which the Palestinian people are entitled to exercise their right to self-determination. Such a policy aims at establishing non-contiguous Palestinian areas similar to Bantustans, prohibited by international law;
- (d) The Wall violates the right of the Palestinian people to permanent sovereignty over their natural resources in the Occupied Palestinian Territory, including East Jerusalem, and destroys the economic and social basis of the life of the Palestinian people”

In a word,

- (e) “The Wall endangers the feasibility of a viable State for the Palestinian people and consequently undermines future negotiations based on the ‘two-State’ principle.”

198. In conclusion, the brandishing of the Road Map is a tactic designed to stop the Court from stating the law, above all to the benefit of Israel, which will exploit this to continue committing its unlawful acts in Occupied Palestinian Territory with impunity.

199. I now come to the second part of my statement in which I will address the General Assembly’s legitimate anticipation of an opinion on the legal aspects of the question.

II. The General Assembly’s legitimate anticipation of an opinion on the legal aspects of the question

200. This legitimate anticipation was aptly described by the Court in the *Western Sahara* case: “Its [opinion] is requested in order to assist the General Assembly to determine its future decolonization policy”.⁵⁸

201. The Court is called upon to assist the General Assembly on how it should exercise its responsibility with respect to a territory with which it has concerned itself since 1947. What, therefore, is the General Assembly entitled to expect of an opinion of the Court?

202. First, that the Court will confirm the Assembly’s reliance, in its resolutions of 21 October 2003 and 8 December 2003, on various *principles of international law to condemn the construction of the Wall*.

203. Palestine’s Written Statement, for its part, listed in Chapter 12 the specific violations of international law resulting from the construction of the Wall. I will not repeat them now *in extenso*, so as not to take up too much of the Court’s time.

⁵⁸ ICJ Reports 1975, p.68 (para.161).

204. Secondly, the Assembly hopes that the Court's opinion will identify the *legal consequences arising from the grave violations of international law imputable to Israel*. The customary principles of international responsibility need to be applied. This is a subject with which the Court is familiar. Its jurisprudence has largely inspired the International Law Commission's articles on the consequences of responsibility. I will first address the consequences for the State of Israel before turning to the consequences for other States.

Legal Consequences for the State of Israel

205. As far as Israel is concerned, to begin with, the first consequence is the obligation of *cessation*.

206. Israel is bound to cease forthwith the commission of all unlawful international acts arising from the construction, planning and operation of the Wall in the Occupied Palestinian Territory, including East Jerusalem.

207. Israel is further required to refrain from any other action modifying, or seeking to modify, the legal status, institutional structure, geographical and historical character and the geographical composition of the Closed Zone or any area within that Zone, and from any action that may prejudice the rights of Palestinians or of the Palestinian people. In particular, Israel has an obligation to refrain from transferring any of its civilian population to such areas and from causing the displacement of Palestinians outside that Zone. Israel must apply, in that Zone, the obligations required of it by the Security Council resolutions.

208. The second consequence is the obligation of *restitution, that is to say the restoration of the status quo ante*.

209. For that purpose, Israel must dismantle forthwith all parts of the Wall in the Occupied Palestinian Territory that cross over the Green Line and must abolish the associated regime. Israel is bound, in particular, to withdraw all the administrative and legislative measures and practices adopted in connection with the construction, operation and planning of the Wall, including the expropriation of land and property within the area concerned. It must return all confiscated or requisitioned property to its owners. It must return their olive trees to them if possible.

210. Israel is bound to annul any restrictive measures imposed on the movement of persons and goods and on the activities of humanitarian organizations.

211. Furthermore, Israel has an obligation to undertake the immediate repatriation of any of its civilians who have settled in areas adjacent to the Wall and inside the Occupied Palestinian Territory since the beginning of the Wall's construction, and to dismantle any settlements established in such areas. In any event, it must ensure and facilitate the immediate return of the Palestinian civilians who have been forced to leave those areas, and must release any individuals who have been detained as a result of the Wall's construction and of the maintenance by Israel of the associated administrative regime.

212. In accordance with its obligations to make reparation, Israel is required to provide full compensation for the injury suffered by the individuals concerned and for all the material and personal damage sustained as a result of Israel's violation of its international obligations.

213. Finally, in accordance with its obligation, under international humanitarian law, to comply with and enforce the Fourth Geneva Convention, Israel also has criminal law obligations. It should seek out and bring before its courts persons suspected of having committed or ordered the commission of serious breaches of international humanitarian law; it should take the necessary steps to prevent any other breaches of international humanitarian law stemming from the construction, management and planning of the Wall.

Legal Consequences for States other than Israel

214. This is a classic case in the light of the opinion issued by the Court in the *Namibia* case. As a result of the serious breaches of international law by the State of Israel, other States are obliged:

- to cooperate with one another and with the United Nations and other competent international organizations, in order to put a stop to these violations;
- not to recognize the unlawful situations arising from these violations;
- not to assist in the maintenance of these situations.

215. If Israel persists in its refusal to apply the above-mentioned rules of international law and does not accept the consequences of its responsibility, the General Assembly is entitled to expect the Security Council to take the necessary coercive measures which, in the case of violations of mandatory legal rules, should not be amenable to the use of a veto by any member of the Council.

216. Mr. President, distinguished Members of the Court, this statement concludes the oral pleadings of Palestine; on behalf of all those who have taken the floor, I have the honor to thank the Court for its kind attention.