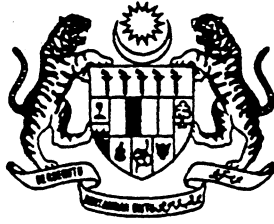


Cour internationale de Justice
Enregistré au Greffe le :

International Court of Justice
Filed in the Registry on : 30 JAN. 2004/39



INTERNATIONAL COURT OF JUSTICE

**LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL
IN THE OCCUPIED PALESTINIAN TERRITORY
(REQUEST FOR ADVISORY OPINION)**

**WRITTEN STATEMENT
OF MALAYSIA**

30 JANUARY 2004



INTERNATIONAL COURT OF JUSTICE

**LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL
IN THE OCCUPIED PALESTINIAN TERRITORY
(REQUEST FOR ADVISORY OPINION)**

**WRITTEN STATEMENT
OF MALAYSIA**

30 JANUARY 2004

TABLE OF CONTENTS

Introduction	1
I. There are no compelling reasons not to exercise the advisory jurisdiction .3	
A. The General Assembly has competence to request an advisory opinion	3
B. The General Assembly has a special duty to deal with the Israeli-Palestinian issue	5
C. The Palestinian territory has a special status and the General Assembly has a special responsibility	8
D. The competencies of the General Assembly and the Security Council do not clash with respect to the Israeli-Palestinian issue	9
E. The Role of the Tenth Emergency Special Session of the General Assembly	11
F. There is no need for the consent of an interested State	15
II. The Principles and Rules of International Law Raised by the Advisory Opinion.....	19
A. The legal status of the territory precludes Israel from constructing the Wall within it.....	19
1. It is not a "disputed territory"	20
2. It is not Israeli territory	22
3. It is Palestinian territory.....	24
4. It is a territory under military occupation	25
5. It is a territory under international supervision	29
B. The Wall constitutes a <i>de facto</i> separation line violating the obligation to respect the 1949 Armistice Line ("Green Line").....	33
C. The Wall infringes the territorial integrity of Palestine.....	41
D. The Wall infringes the right to self-determination of the Palestinian People	43
E. The Wall infringes the enjoyment of human rights.....	44
F. The Wall violates principles and rules of international humanitarian law	47
G. The Wall infringes upon the obligation to abstain from unilateral measures undermining a solution of the conflict	50
H. Self-defence and combating terrorism cannot serve as legal grounds for the construction of the Wall in Occupied Palestinian Territory	52
III. Submissions.....	55
ANNEXES	57
List of documents provided to the Registrar	61

Introduction

1. The General Assembly and the overwhelming majority of States consider that the construction of the Wall by Israel in the Occupied Palestinian Territory (hereinafter “OPT”) is illegal. The Court is requested to render an advisory opinion upon the legal consequences of this conduct of the Occupying Power. The answer of the Court to the question submitted to it will have a practical and significant effect on present and future action of the General Assembly with respect to the OPT.

2. The terms of the request made by the General Assembly in Resolution ES-10/14 adopted on 8 December 2003 are as follows:

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

3. Malaysia is co-sponsor of the draft resolution requesting this advisory opinion. In doing so, it reaffirms its recognition of the high function of the International Court of Justice as the principal judicial organ of the United Nations, its respect for international law and its support for a just, comprehensive and lasting settlement of the conflict in the Middle East. As stated by Malaysia on behalf of the Non-Aligned Movement at the General Assembly, “an advisory opinion from the International Court of Justice would provide an independent and impartial pronouncement on the legal consequences arising from the construction of the wall by Israel”.¹

4. As the Court stated: “The jurisdiction of the Court under Article 96 of the Charter and Article 65 of the Statute, to give advisory opinions on legal questions,

¹ Statement of Mr. Rastam, 8 December 2003, A/ES-10/PV.23, p. 12.

enables United Nations entities to seek guidance from the Court in order to conduct their activities in accordance with law”.² And that is exactly what the international community is looking for in this long-standing issue.

5. In the present written statement, Malaysia reiterates its support for the request for an advisory opinion and addresses some of the relevant legal questions arising from the question submitted to the Court. The fact that this statement will focus on certain particular issues does not mean that Malaysia does not attach importance to other relevant points, which will certainly be developed in other statements, particularly in that submitted by Palestine.

6. The statement is divided into three main sections. The first refers to the competence of the General Assembly to request an advisory opinion and the reasons for the Court to exercise its jurisdiction in this regard. The second section addresses the substance of the request, dealing with some of the important legal questions that it raises. The last section of this statement concludes with the submissions.

² *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 188, paragraph 31.

I. There are no compelling reasons not to exercise the advisory jurisdiction

7. In this section, it will be shown that the General Assembly has competence to request the present advisory opinion, since it clearly raises a legal question falling within the scope of its powers and functions. Likewise, the section addresses the absence of compelling reasons that would lead the Court not to exercise its advisory jurisdiction.

A. The General Assembly has competence to request an advisory opinion

8. The competence of the General Assembly to request an advisory opinion of the International Court of Justice is derived directly from Article 96 (1) of the UN Charter, which reads as follows:

“The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.”

9. Both the reference to the General Assembly as one of the two named principal organs of the United Nations and the phrase “any legal question” exemplify the broad competence of the Assembly to request advisory opinions. As to what constitutes a legal question, it is relevant to refer to the observations of the Court in earlier advisory opinions in which the Court indicated that questions “framed in terms of law and rais[ing] problems of international law..are by their very nature susceptible of a reply based on law...[and] appear...to be questions of a legal character.”³

³ See *Western Sahara, Advisory Opinion, ICJ Reports 1975*, p. 18, para. 15 and *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p. 233, para. 11.

10. The question in the present case submitted to the Court for advice is clearly a legal one, relating as it does to the “legal consequences” of the construction of the Wall and its compatibility with “the rules and principles of international law”. It follows from Article 102 (2) and (3) of the Rules of the Court that an advisory opinion may also be given on “a legal question actually pending between two or more states”.

11. The request currently under review is the fifteenth request made by the General Assembly out of a total of 25 requests for advisory opinions. Up to today, the Court has never declined to render an advisory opinion requested by the General Assembly.

12. The Charter of the United Nations does not stipulate that the decision to request an opinion from the International Court of Justice must be adopted by a two-thirds majority under Article 18 of the UN Charter or by consensus. Nor do the Rules of Procedure of the UN General Assembly.⁴ Until date, with the exception of the request regarding the *Reparation for Injuries Suffered in the Service of the United Nations*, which was adopted unanimously, all requests by the General Assembly for an advisory opinion have been adopted by a majority vote. The adoption of Resolution A/RES/ES-10/14 on 8 December 2003 was undoubtedly a legally valid decision, being adopted by a clear majority vote of 90 to 8, with 74 abstentions.⁵

13. As the Court stated in the Advisory Opinion *Legality of the Threat or Use of Nuclear Weapons*:

“...once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the

⁴ See Rules 69 and 88 of the Rules of Procedure of the UN General Assembly.

⁵ ES-10/PV.23, p. 20.

political history of the request, or to the distribution of votes in respect of the adopted resolution."⁶

14. According to Article 65 of the Statute of the ICJ, the Court “may give” (“*peut donner*”) an advisory opinion, thus indicating its discretion not to entertain such a request. However, on various occasions the Court emphasized that, in principle, requests for advisory opinions should not be refused, unless “compelling reasons would justify refusal of such a request”.⁷ In the present case, as will be explained below, there are instead urgent “compelling reasons” to comply with the request of the General Assembly.

B. The General Assembly has a special duty to deal with the Israeli-Palestinian issue

15. Few issues in international relations have given rise to such an intensive involvement on the part of the United Nations as the question of Palestine, and peace and security in the Middle East. In April 1947, the United Kingdom brought the matter before the General Assembly announcing its intention to terminate the Mandate of Palestine and leaving responsibility for an adequate solution to the United Nations. Thereupon, the General Assembly adopted its Resolution 181 (II) of 29 November 1947, known as the Plan of Partition, providing for an independent Arab State and an independent Jewish State, upon the basis of the findings of the United Nations Special Committee on Palestine (UNSCOP) and the Ad Hoc Committee on Palestine.⁸

⁶ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 237, para. 16.

⁷ See *Application for Review of judgment no. 333 of the UN Administrative Tribunal, Advisory Opinion, ICJ Reports 1987*, p. 31; *Western Sahara, Advisory Opinion, ICJ Reports 1975*, p. 21, para. 23; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 235, para. 14.

⁸ UNGA Res. 181 (II), 29 November 1947. This resolution was adopted by a vote of 33 to 10, with 10 abstentions.

16. This is not the place to record in detail the history of the involvement of the General Assembly with the Israeli-Palestinian issue. It might suffice to state that this involvement has been extensive and spans a period of more than 55 years. In this period, the General Assembly has adopted a large number of resolutions, convened special and special emergency sessions on Palestine and established various subsidiary organs, including the UN Conciliation Commission for Palestine,⁹ the UN Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA)¹⁰ and the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories.¹¹

17. The competence of the General Assembly to deal with the Israeli-Palestinian conflict arises from both its general functions and powers under the UN Charter and its specific shared responsibility for supervision of the administration of Palestine as a Mandated Territory under the League of Nations System.

18. The general functions of the General Assembly extend virtually to the whole scope of activity of the United Nations. Its most general function is provided for in Article 10 of the UN Charter, which reads as follows:

“The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided for in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.”

⁹ UNGA Res. 194 (III), 11 December 1948. See also A/RES/55/123 (2000) requesting the Commission (France, Turkey and USA) to continue its work.

¹⁰ UNGA Res. 302 (IV), 1949.

¹¹ UNGA Res. 2443 (XXIII), 19 December 1968.

19. Further general functions are stated in the subsequent Articles 11 to 17 of the UN Charter. In general terms, Malaysia notes that through the years the General Assembly has made a full and active use of its general competence in all fields within the purview of the purposes of the United Nations as stated in Article 1. There can be little doubt that the multifaceted Israeli-Palestinian dispute falls squarely within the scope of the General Assembly's general function to contribute to the maintenance of "international peace and security..." (Art. 1.1), "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" (Art. 1.2), "to achieve international co-operation in solving problems of an economic, social, cultural or humanitarian character and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" (Art. 1.3), and "to be a centre for harmonizing the actions of nations in the attainment of these common ends" (Art. 1.4).

20. As regards specific functions, the Court acknowledged that the General Assembly fulfils supervisory functions previously exercised by the League of Nations in the case of a Mandated Territory not placed under the United Nations Trusteeship System.¹² The General Assembly has assumed a wide range of duties with respect to the situation prevailing in territories having an international status and in the implementation of the right of peoples to self-determination. Among these are the OPT and the Palestinian people.

¹² *International Status of South-West Africa, Advisory Opinion, ICJ Reports 1950*, pp. 143-144.

C. The Palestinian territory has a special status and the General Assembly has a special responsibility

21. Palestine was a Mandate of the League of Nations which has still not been officially terminated.¹³ Palestine neither became independent nor was placed under the trusteeship system of the United Nations at the time of the dissolution of the League of Nations. As explained above, the General Assembly has been involved in the question of Palestine from the very beginning. The United Kingdom, the Mandatory Power, unilaterally decided to put an end to its function by 15 May 1948. From that date, and even before, the General Assembly has never ceased fulfilling its supervisory functions, either during its regular sessions or in special sessions. Indeed, as stated above, special sessions were convened on the question of Palestine as early as 1946 and 1947. The function of international supervision of Mandates vested in the Council of the League of Nations was assumed by the General Assembly, as was recognised by the Court in its advisory opinion on the *International Status of South-West Africa*.¹⁴

22. It is also well known that the General Assembly has played the major role in UN policies for the implementation of the right to self-determination. It is patently clear that the Palestinian people have not been able to fully exercise their right to self-determination because of the continuing military occupation of their territory by Israel. The General Assembly is duly concerned with the implementation of the right of peoples to self-determination in all cases of colonial rule, foreign domination or alien occupation. In working with this issue, it has supervisory powers to assess this right in particular situations and to determine whether measures taken by administering or occupying powers would jeopardise the exercise of this right. Indeed, the action of the General Assembly in this field has led to the creation of most of the newly independent States which are now members of the United Nations. In fact, many of the advisory opinions

¹³ See paragraph 47 below.

¹⁴ *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950, p. 137.*

rendered by the Court to the General Assembly are related to problems arising with regard to territories for which the General Assembly exercised supervisory functions.¹⁵

23. For these reasons, the General Assembly has full competence to request an advisory opinion that will help it to carry out its duties in regard to supervising the situation in a territory which still has international status and to implementing the right of peoples to self-determination.

D. The competencies of the General Assembly and the Security Council do not clash with respect to the Israeli-Palestinian issue

24. While the Charter vests the Security Council with the primary responsibility for the maintenance of peace and security, it is widely acknowledged that this responsibility is not exclusive. The wide-ranging functions and powers of the General Assembly can certainly also include matters relating to peace and security. This follows clearly from the text of Articles 10, 11 (2), 14 and 35 of the UN Charter.

25. In general terms, the relationship between the General Assembly and the Security Council is governed by Articles 12 and 14 of the UN Charter. Article 12 (1) of the Charter provides:

“While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”

¹⁵ *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128; *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa, Advisory Opinion, I.C.J. Reports 1955*, p. 67; *Admissibility of Hearings of Petitioners by the Committee on South-West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12.

26. In the practice of the two political organs this paragraph 1 of Article 12 has been more flexibly interpreted than *prima facie* might be assumed from its wording. In fact, the General Assembly has not only frequently included a “dispute” or “situation” on its agenda for consideration when the same issue was simultaneously being addressed by the Council, but the Assembly has also not shied away from making recommendations on issues with which the Security Council itself was also actively dealing. Examples abound and include the *apartheid* policies of South Africa, the question of Namibia, various situations in the Middle East, the Western Sahara and Kosovo.

27. Often the General Assembly has dealt with such issues from a broader political, humanitarian, social and economic perspective, while the Security Council has tended to focus on the security aspects only. The long list of resolutions simultaneously adopted by the General Assembly and the Security Council on the Palestine question provide further incontrovertible evidence of this. It was, therefore, correctly concluded in an authoritative Commentary of the Charter that “the GA has managed to assume considerable powers of discretion, which are only marginally restricted by Art. 12 (1).”¹⁶

28. A special case with respect to the particular relationship between the General Assembly and the Security Council is provided by the *Uniting for Peace* Resolution, adopted by the General Assembly in 1950 at the time of the Korean crisis.¹⁷ Under the terms of this resolution the General Assembly conferred upon itself the power to recommend collective measures if the Security Council:

“...because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression”.

¹⁶ Hailbronner/Klein, “Article 12”, in B. Simma (ed.), *The Charter of the United Nations. A Commentary*, 2nd ed., Vol. I, 2002, p. 293.

¹⁷ GA Res. 377 A (V), 3 November 1950.

29. Obviously, in the case of a veto by one or more permanent members, the Security Council will not be in a position to exercise “in respect of any dispute or situation the functions assigned to it” in the Charter in terms of Article 12 (1). Consequently, the terms of the *Uniting for Peace* Resolution vest the General Assembly with the authority to recommend collective measures. In the case of finding a breach of peace or act of aggression, the Assembly can even recommend military action.

E. The Role of the Tenth Emergency Special Session of the General Assembly

30. Article 20 of the UN Charter provides for the possibility that the General Assembly can meet for a special session “as occasion may require”. Such special sessions can be requested by the Security Council or a majority of the members of the United Nations. In addition, the *Uniting for Peace* Resolution introduced the concept of “special emergency sessions”, to be convened if requested by “any nine” members of the Security Council or a majority of the members of the United Nations.¹⁸

31. So far, the General Assembly has been convened in 27 special sessions and ten emergency special sessions. Among the special sessions, the first two in 1947 and 1948 dealt with the question of Palestine.¹⁹ As many as six out of the

¹⁸ The *Uniting for Peace* Resolution requires a majority of “any seven” members of the Security Council. However, as a result of the 1963 amendment of the Charter (entry into force in 1965), the word “seven” in Articles 23 and 27, which relate to the composition and decision-making of the Security Council, should be read as “nine”.

¹⁹ The first special session was convened upon the request of the United Kingdom and supported by a majority of the members, see *UNYB 1946-47*, p. 276; the second by the Security Council, upon the request of the United States, by a vote of 9 to 0, with 2 abstentions. SC Resolution 44 (1948) of 1 April 1948, adopted at 277th meeting (9-0-2) requesting the Secretary-General, in accordance with Article 20 of the United Nations Charter, to convene a special session of the General Assembly to consider further the future government of Palestine. 1st special session, Palestine, A/310 (GAOR, 1st spec. sess. [Suppl. No. not indicated on vol.] (47.I.11), 28 April-15

ten emergency special sessions held so far have addressed problems in the Middle East.²⁰ The first in 1956 dealt with the Suez Canal crisis; the second in 1958 with Israel, Lebanon and Jordan; the fifth in 1967 with the Six Day-War; the seventh from 1980 to 1982 with Palestine; the ninth in 1982 with the Golan Heights; and the tenth from 1997 to date with occupied East Jerusalem and the rest of the OPT, including the construction by Israel of the Wall in mainly Palestinian territory.

32. The decision by Israel in 1997 to build a new settlement in *Jabal Abu Ghneim* to the south of occupied East Jerusalem led to the convening of the tenth emergency special session of the General Assembly, following a veto of a draft resolution sponsored by France, Portugal, Sweden and the United Kingdom in the Security Council. Subsequently, upon the request of Qatar and with the support of approximately 100 member States, the tenth emergency special session was convened for the first time on 24-25 April 1997. On 25 April 1997, the Assembly adopted resolution A/ES-10/2 by a vote of 134 to 3, with 11 abstentions, reiterating established UN positions regarding Jerusalem and Israeli settlements; calling for the cessation of all forms of assistance and support for unlawful Israeli activities in the OPT, including Jerusalem; calling for the taking of measures to ensure respect by Israel, the Occupying Power, of the Fourth Geneva Convention and establishing a monitoring system through the Secretary-General of the United Nations.²¹ The Assembly expressed the conviction that:

“...the repeated violation by Israel, the occupying Power, of international law and its failure to comply with relevant Security Council and General Assembly resolutions and the agreements reached between the parties undermine the Middle East peace process and constitute a threat to peace and security”.

May 1947 and 2nd special session, A/555 (GAOR, 2nd spec. sess., Suppl. No. 2), 16 April-14 May 1948, see *UNYB 1947-48*, p. 257.

²⁰ 7th Emergency special session on Palestine, A/ES-7/14 + Add.1 + Add.1/Corr.1 (GAOR, 7th emer. spec. sess., Suppl. No. 1); 9th emergency special session on the Occupied Arab territories, A/ES-9/7 (GAOR, 9th emer. spec. sess., Suppl. No. 1); 10th emergency special session on the Occupied East Jerusalem and the rest of the Occupied Palestinian Territory, A/ES-10/5, A/ES-10/L.1 + Add.1, A/ES-10/L.2/ Rev.1, A/ES-10/L.3 + Add.1, A/ES-10/L.4/ Rev.1+ Rev.1/Add.1, A/ES-10/L.5/ Rev.1, A/ES-10/L.6, A/58/ES-10/L.13, A/58/ES-10/L.16 [Add.1], A/58/ES-10/L.17 [Add.1], A/RES/ES-10/2-11.

²¹ For a report see *UNYB 1997*, p. 394.

33. With various intervals the tenth emergency special session has been repeatedly reconvened, the latest occasion being the session on 8 December 2003 which led to the adoption of resolution A/ES-10/14 whereby the General Assembly decided to request the International Court of Justice to give an urgent advisory opinion on the construction of the Wall being built by Israel in the OPT. The antecedent of this request is the resolution A/ES-10/13, based on a draft submitted by the European Union, the acceding and associated countries and the EFTA countries members of the European Economic Area, adopted by 144 votes to 4 (Israel, Marshall Islands, Micronesia and the United States of America) with 12 abstentions.²² By this resolution, the General Assembly demanded Israel to stop and reverse the construction of the Wall in OPT, considered this construction in contradiction to relevant provisions of international law and requested the Secretary-General to report on compliance with the resolution.

34. Resolution ES-10/14 requesting the advisory opinion was adopted by this emergency special session due to the facts that the questions submitted to the Court relate to the construction of the Wall in the OPT and that the Security Council failed to adopt a resolution on this issue, as a result of the veto by one permanent member at its 4842nd Meeting of 14 October 2003.²³ The construction of the Wall is certainly a question related to international peace and security, but it also embraces other fields of activity of the United Nations. The Security Council does not have exclusive competence to deal with the situation in the OPT. It shares its responsibility with the General Assembly. The long-standing practice of the Organisation of adopting resolutions on the question by both organs is unambiguous evidence of this. There is no “conflict of powers” at all. The Security Council has not taken the stance that the General Assembly was encroaching upon its competence by adopting resolutions ES-10/13 and ES-10/14.

²² Adopted on 21 October 2003, see A/ES-10/PV.22.

²³ See S/PV.4842, 14 October 2003, p. 2.

35. The fact that the resolution requesting the Court for an advisory opinion was adopted by an emergency special session of the General Assembly is not a matter of discussion before the Court. It is a procedural matter for which the General Assembly exercises the *Kompetenz-Kompetenz* rule. In this regard, it may be relevant to quote the legal opinion of the Legal Counsel of the United Nations on the convening of an emergency special session:

“In the ultimate analysis, it is for the General Assembly to interpret authoritatively its own resolutions and, in this case, to decide whether a request for an emergency special session meets the requirements of resolution 377 A (V). This has in fact been answered in the present case in the affirmative by the concurrence of a majority of Members in the request for the convening of the seventh emergency special session.”²⁴

36. Obviously, there is only one General Assembly. The fact that the organ requesting an advisory opinion adopted the relevant resolution on an issue falling under its competence in a special or in an ordinary session is irrelevant to the jurisdiction of the Court, provided that the resolution was validly adopted, which is the case in respect of GA Resolution ES-10/14. As the Court itself formulated this position in its 1971 *Namibia* advisory opinion:

“A resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ’s rule of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted”.²⁵

37. Finally, it may be noted that no member State decided against participating either in the session or in an ensuing vote by using the argument that it considered the 10th emergency special session to be null and void. Only one member State raised hypothetical considerations regarding the validity of this session. Although making reservations with regard to the validity of convening

²⁴ UN Secretariat, Office of Legal Affairs, 21 July 1980, *UNJYB 1980*, pp. 187-188.

²⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971*, p. 22, para. 20.

the emergency special session, this State nonetheless participated in the vote.²⁶ This conduct may be seen as contradictory. It would normally be expected that a member State which holds the view that the General Assembly is acting *ultra vires* would not participate in a vote considered by it as null and void and thus incapable of producing a valid resolution.

F. There is no need for the consent of an interested State

38. Israel has expressed its opposition to the request of the present advisory opinion. It is not the first time that a State particularly concerned by the question submitted to the Court has voiced its opposition and it is well established that such opposition does not preclude the Court from complying with the request for an advisory opinion.²⁷

39. The Court has consistently pronounced that “the absence of an interested State’s consent to the exercise of the Court’s advisory jurisdiction does not concern the competence of the Court but the propriety of its exercise”.²⁸ In order to examine the impact of a possible lack of consent by Israel to the exercise by the Court of its advisory jurisdiction, it is essential to clarify the intention of the request made by the General Assembly.

²⁶ A/ES-10/PV.23, pp. 11-12 and 21

²⁷ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 232, paragraph 11; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 177; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 12; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12; *Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151; *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128; *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa, Advisory Opinion : I.C.J. Reports 1955*, p. 67; *Admissibility of Hearings of Petitioners by the Committee on South-West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23.

²⁸ *Western Sahara, advisory opinion, I.C.J. Reports 1975*, p. 20, paragraph 21.

40. In the present request for an advisory opinion, the Court faces a similar situation to that of the procedures concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa)* notwithstanding Security Council Resolution 276 (1970) and the *Western Sahara* advisory opinions. The opposition of South Africa in the former and of Spain in the latter did not preclude the Court from exercising its advisory jurisdiction. The Court clearly distinguished situations in which territories are under international supervision from those in which this is not the case such as in the *Status of Eastern Carelia*, in which the Permanent Court of International Justice decided to decline to give an answer.²⁹ In particular, the Court stressed in the *Western Sahara* advisory opinion:

“In that case, one of the States concerned was neither a party to the Statute of the Permanent Court nor, at the time, a Member of the League of Nations, and lack of competence of the League to deal with a dispute involving non-member States which refused its intervention was a decisive reason for the Court’s declining to give an answer. In the present case, Spain is a Member of the United Nations and has accepted the provisions of the Charter and Statute; it has in general given its consent to the exercise by the Court of its advisory jurisdiction. It has not objected, and could not validly object, to the General Assembly’s exercise of its powers to deal with the decolonization of a non-self-governing territory and to seek an opinion on questions relevant to the exercise of those powers”.³⁰

41. Moreover, at issue in *Eastern Carelia* was a dispute regarding the interpretation of a bilateral treaty between Finland and Soviet Russia with regard to the status of an autonomous region within the Soviet Russian Federation. The situation before the Court in the present instance concerns the legal consequences of the construction of a Wall by the Occupying Power in an occupied territory over which the United Nations has supervisory functions. In *Western Sahara*, it must be recalled that Spain was the recognised Administering Power of a non

²⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971*, pp. 23-24, paragraphs 30-31; *Western Sahara, I.C.J. Reports 1975*, p. 23-25, paragraphs 28-32.

self-governing territory at the time the request was made by the General Assembly. This fact did not prevent the Court from exercising its advisory jurisdiction; mainly because the General Assembly was exercising its powers and functions with regard to the process of decolonization. In the present situation, Israel is merely the Occupying Power of a territory over which it possesses no legal title either of sovereignty or of international administration.

42. The relevant elements that must lead the Court to comply with the request for an advisory opinion despite the opposition of an interested State are the following:

1. It is a question concerning the proper exercise by the General Assembly of its function of supervision with regard to the Palestinian territory;
2. The General Assembly is not bringing before the Court, by the means of a request for an advisory opinion, a dispute or legal controversy, in order, at a later date, to exercise its function in regard to the peaceful settlement of disputes between two States;
3. The object of the request is not to solve a territorial dispute between two parties;
4. The answer of the Court will help the General Assembly and the United Nations in general to perform its functions in accordance with the Charter and general international law.

43. The fact that the General Assembly and the Security Council have determined that Israel is the Occupying Power of the OPT, that the Fourth Geneva Convention of 1949 is applicable, that the General Assembly has declared the construction of the Wall as illegal, and that Israel does not agree with these findings is not a decisive or compelling reason for not rendering an advisory opinion. The situation is similar to that which the Court faced with regard to the opposition of South Africa in the *Namibia (South-West Africa)* advisory opinion of 1971 in which the Court stated:

³⁰ *Ibid.*, p. 24, paragraph 31.

“The fact that, in the course of its reasoning, and in order to answer the question submitted to it, the Court may have to pronounce on legal issues upon which radically divergent views exist between South Africa and the United Nations, does not convert the present case into a dispute nor bring it within the compass of Articles 82 and 83 of the Rules of Court. A similar position existed in the three previous advisory proceedings concerning South West Africa: in none of them did South Africa claim that there was a dispute, nor did the Court feel it necessary to apply the Rules of Court concerning “a legal question actually pending between two or more States”. Differences of views among States on legal issues have existed in practically every advisory proceeding; if all were agreed, the need to resort to the Court for advice would not arise”.³¹

³¹ *I.C.J. Reports 1971*, pp. 23-24, paragraph 30.

II. The Principles and Rules of International Law Raised by the Advisory Opinion

44. This section addresses the relevant principles and rules of international law applicable to the question raised by the General Assembly request for an advisory opinion and shows that the Israeli construction and maintenance of the Wall constitute a violation of the obligations embodied in those principles and rules.

A. The legal status of the territory precludes Israel from constructing the Wall within it

45. The legal classification of the territory in which most of the Wall is constructed as OPT has been consistently made by the General Assembly and by the Security Council on many occasions.³² Undoubtedly, this qualification extends to the West Bank, including East Jerusalem, where Israel is constructing the Wall.

46. One of the reasons invoked by Israel to justify the construction of the Wall well beyond the 1949 Armistice Line ("Green Line") is that the West Bank constitutes a "disputed territory".³³ In this section, Malaysia will show that, contrary to this view, three elements characterise the territory from the legal point of view:

- It is Palestinian territory
- It is occupied territory

³² See the resolutions mentioned *supra*, paragraph 86.

³³ See the statements of the representatives of Israel before the Security Council and the General Assembly, respectively of 14 October 2003 (S/PV.4841, p. 11) and 8 December 2003 (A/ES-10/PV.23, p. 6). See also "Israel's Security Fence", Ministry of Defense, in: <http://www.seamzone.mod.gov.il/Pages/ENG/questions.htm>. See also point 5 of Annex I of the Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13 (A/ES-10/248, p. 8).

- It is a territory under international supervision

1. It is not a "disputed territory"

47. According to Israel, "There was never a recognized and legitimate sovereign in the West Bank. The legal status of these areas remains that of disputed territory".³⁴ It is not the intention here to discuss whether it is true that there was "never" a sovereign over the West Bank (it is an undisputable fact the Ottoman Empire had sovereignty over Palestine before the establishment of Mandate "A" of the League of Nations). Moreover, the sole fact that a territory was not - or is no more - under the sovereignty of a particular State, does not transform it into a "disputed" one. Non self-governing territories, trust territories or territories under Mandate were not, or are not, "disputed territories" just because they were or are not under the sovereignty of a State.

48. The point here is that the OPT is not a "disputed territory", as in cases of boundary or other territorial disputes between two States. Israel had never been in possession of the West Bank before 1967. Neither had it claimed it as Israeli territory before that year. Indeed, even after 1967, the only concrete sovereignty claim made by Israel with regard to a part of the West Bank has been over East Jerusalem. This claim was firmly rejected by the international community, and the Security Council qualified it as "null and void".³⁵ Up till now, Israel still invokes the argument that there was no sovereign over the West Bank and that it is a "disputed territory", but has not advanced any concrete claim of sovereignty.

49. In order to determine whether the OPT is "disputed territory", it is not particularly helpful to chiefly analyse the existence of a "dispute" in general. It could certainly be said that there are "radically different views" between Israel

³⁴ Ibid.

³⁵ Security Council Resolution 252 of 21 May 1968; Security Council resolution 267 of 3 July 1969; Security Council Resolution 298 of 25 September 1971; Security Council Resolution 476 of

and the United Nations on the legal status of the OPT, to use the wording of the Court in the context of the claims made by South Africa with regard to Namibia in the quotation above. But this divergence of views has nothing to do with a dispute over territorial title. The question here is whether the construction of the Wall in the OPT by Israel can be justified, as Israel contends, because it is a "disputed territory".

50. As a Chamber of the Court decided in a territorial dispute, "the existence of a dispute over [a territory] can, in the present proceedings, be deduced from the fact of its being the subject of specific and argued claims. The Chamber is entitled to conclude that, where there is an absence of such claims, there is no real dispute".³⁶

51. In the situation under scrutiny, Israel has not made any "specific and argued claims" at all. At the time of this procedure, it is unknown whether Israel claims its actual sovereignty over the West Bank, or part of it, or whether it simply claims the right to "receive" part of the West Bank in "exchange" for the end of its occupation. If the latter speculation were true, then it would be a political claim, not a legal one.

52. To make a claim over a territory over which the claiming State acknowledges that it does not have actual sovereignty is not a legal claim and hence the territory is not a "disputed" one from a legal point of view.

53. Moreover, we are not dealing here with minor or limited boundary disputes in which two neighbouring States claim the same portion of border zones. The qualification of Israel of "disputed territory" refers to the whole West Bank. As will be addressed below, the recognised and legitimate sovereign of this

30 June 1980; the Security Council Resolution 478 (1980) of 20 August 1980 is of particular relevance.

³⁶ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, *Judgement, I.C.J. Reports 1992*, p. 555, para. 326.

territory is the Palestinian people. The Israeli qualification of the OPT as "disputed territory" is in itself a violation of the right to self-determination, since it implies that the Occupying Power is denying the spatial foundation over which the Palestinian people must exercise their right to self-determination.

54. Finally, even if the OPT were a "disputed territory", still Israel's construction of the Wall would be similarly unlawful. As the Court has consistently stated, parties to a territorial dispute should avoid taking unilateral action that might aggravate or extend the dispute.³⁷

2. It is not Israeli territory

55. Israel confines its justification, from the territorial perspective, to maintaining that the OPT is a "disputed territory". It has never argued that the construction of the Wall is performed on Israeli territory.

56. The reason for Israel's ambiguity with regard to the status of the OPT is very simple. Israel is incapable of providing evidence to support, or even invoking, any legal argument at all to justify its hypothetical sovereignty over all or parts of the OPT.

57. The territory has never been under the sovereignty of the State of Israel. Furthermore, as stated above, Israel never claimed that the West Bank was Israeli territory before 1967. After that year its position became unclear. Although contending to have rights to this territory, its legislation distinguishes between the State of Israel and what it calls "Judea and Samaria" (the West Bank, with the exception of the illegally annexed areas forming part of the municipality of Jerusalem). Israel has never received a mandate or a trust to administer the territory on behalf of the international community. At any rate, Israel does not

have any legal title – neither as sovereign nor as administrator - over the OPT. Military force is the only basis for its presence there. As a matter of course, armed force cannot replace the legal right of the Palestinian people to their territory, nor modify the status of a territory under international supervision.

58. As Judge Jessup pointed out only few months before 1967: "It is a commonplace that international law does not recognize military conquest as a source of title".³⁸ The Declaration of Principles of International Law embodied in GA Resolution 2625 (XXV) affirms: "No territorial acquisition resulting from the threat or use of force shall be recognized as legal". In addition, the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations emphasises that "Neither acquisition of territory resulting from the threat or use of force nor any occupation of territory resulting from the threat or use of force in contravention of international law will be recognized as legal acquisition or occupation."³⁹ Security Council Resolution 242 (1967), explicitly referring to the situation created by the 1967 Six Day-War, strongly emphasized "the inadmissibility of the acquisition of territory by war". This notion of "inadmissibility" applies to any claim to territorial sovereignty change as a result of the use of force, without any need to previously determine the identity of the aggressor or the victim.

59. Even assuming that the argument of Israel that there was no recognised and legitimate sovereign over the territory were admissible, this would not lead to the conclusion that Israel has title over it and that, consequently, it is entitled to construct the Wall. On the contrary, such a contention would constitute a further reason not to act over this territory as a sovereign or to consider it as a "disputed" one. These territories having been under international supervision, they are not a variety of *terra nullius* open to occupation. As it will be explained below, only the

³⁷ See *Frontier Dispute, Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 11; *Land and Maritime Boundary Dispute between Cameroon and Nigeria (Cameroon c. Nigeria), Provisional Measures, order of 15 March 1996, I.C.J. Reports 1996*, p. 23, paragraph 42.

³⁸ *South-West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 418.

competent international organs have the capacity to determine or modify the status of such territory.

60. Security considerations, conquest or prolonged occupation cannot constitute bases for any Israeli title. As the Court stated with respect to similar arguments developed by South Africa regarding Namibia, "[t]hese claims of title, [...] apart from other considerations are inadmissible in regard to a mandatory territory".⁴⁰

61. Consequently, the OPT in which the Wall is being constructed is neither disputed nor Israeli territory.

3. It is Palestinian territory

62. The expression "Palestinian territory" consistently employed in the above-mentioned resolutions is not a mere geographic description. It means that this territory belongs to the Palestinian people.

63. In contemporary international law, not only States, but also peoples - entitled to self-determination - are holders of territorial sovereignty. What typifies sovereignty over territory is the right to dispose of it. Undoubtedly, the only subject entitled to the right to dispose of the territory in question is the Palestinian people. This right is not affected by the fact that the people concerned cannot freely exercise their sovereignty until the time of the effective establishment of Palestine as independent State. To have a right is one thing, to be in a position to exercise it is another.

64. Striking evidence of the capacity of the Palestinian people to determine the fate of that territory is that constituted by the process of negotiations between

³⁹ General Assembly Resolution 42/22, adopted on 18 November 1987.

⁴⁰ *ICJ Reports 1971*, p. 43, para. 83.

Israel and the PLO, as the legitimate representative of the Palestinian people, beginning with the "Oslo agreements". Through this process, Israel itself has agreed to negotiate with the representatives of the Palestinian people the final status of the territory, and eventually the exchange of territories in a permanent settlement of the conflict.

65. The international community recognises the right of the Palestinian people to have its independent State.⁴¹ A State without territory is not conceivable. The OPT has consistently been recognised by the international community as the space on which the Palestinian people are entitled to exercise their right to self-determination. To contend that a people entitled to self-determination do not have a concrete territory is tantamount to denying them the possibility of the exercise of that right, if not the existence of the right itself. This does not mean that in some situations the boundaries of new States might not be completely delimited, or even disputed. Yet in such cases, the bulk of the spatial domain of these States is easily identified. Some boundary disputes the Court dealt with in the past, such as *Burkina Faso/Mali*, *Botswana/Namibia*, or the recent *Cameroon v. Nigeria* case, are telling examples.

4. It is a territory under military occupation

66. Israel denies the qualification of the territory as being under military occupation because Article 2, paragraph 2, of the Fourth Geneva Convention of 12 August 1949 refers to the "territory of a High Contracting Party" and, according to Israel, neither Jordan nor Egypt had sovereign title over the West Bank or the Gaza Strip respectively.

67. In order to establish whether the situation existing after the Six Day-War of 1967 is one of military occupation or not, a correct interpretation of relevant

⁴¹ See notably Resolutions 1397 (2002) and 1515 (2003) of the Security Council, and 43/177 of the General Assembly.

conventional and customary law is required. Article 42 of the Hague Regulations annexed to the Hague Convention II of 1899 and reaffirmed in the Regulations annexed to the Hague Convention IV of 1907 on the Laws and Customs of War on Land provides as follows:

"Un territoire est considéré comme occupé lorsqu'il se trouve placé de fait sous l'autorité de l'armée ennemie.

L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer".⁴²

68. For its part, Article 2 of the Fourth Geneva Convention of 1949 affirms:

"In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply 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."⁴³

69. These definitions reflect the state of customary law on the issue. A good faith interpretation of the terms of these treaties in their context and in the light of their object and purpose leads to the rejection of Israel's allegations. In fact, the relevant provision in order to determine the existence of military occupation and the applicability of the Fourth Geneva Convention is the first paragraph of its Article 2 and not the second one. Even discussing Israel's interpretation, it must be recalled that International Humanitarian Law does not deal with the question of which party to the conflict is right or wrong in matters of sovereignty. The same may be said of the main rule of *ius ad bellum* (or *contra bellum*) - Article 2, paragraph 4 of the Charter of the United Nations or the corresponding customary

⁴² DE MARTENS, *N.R.G.T.*, 2nd series, Vol. 26, p. 974, for the 2nd Hague Convention of 1899, and *ibid.*, 3rd series, Vol. 3, p. 499 for the 4th Hague Convention of 1907. Translation: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

rule. The contention of Israel that the Fourth Geneva Convention is inapplicable because the territory it took control from the 1967 war was not a "territory of a High Contracting Party" is not only wrong in law, it is also extremely dangerous for both the integrity of International Humanitarian Law and for the maintenance of international peace and security.

70. Indeed, if one follows Israel's line of thinking, it would be enough for a State to claim that a territory under the control of another State is in reality its own territory in order to deny any violation of the prohibition of the use of force "against the territorial integrity" of other States and also the rules of *ius in bello* related to military occupation. As Oscar Schachter rightly pointed out: "the expression 'territorial integrity' in Article 2 (4) refers to the State which actually exercises authority over the territory, irrespective of disputes as to the legality of that authority".⁴⁴

71. Moreover, according to the Israeli view, territories under a legal status other than sovereignty, such as trust territories or mandates, would not be covered by the 1949 Fourth Geneva Convention, since they are not territories "of a High Contracting Party".

72. The correct interpretation of the term "territory of a High Contracting Party" of the Fourth Geneva Convention is rather that it refers to any territory under a Contracting Party's jurisdiction (sovereignty or administration) or under its control. Indeed, "under jurisdiction or control" is the wording employed in more recent international agreements, to avoid any discussion with regard to legal title or status over a territory for which a State bears international responsibility.⁴⁵

⁴³ Convention Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, *United Nations Treaty Series*, vol. 75 (1950), N° 973, pp. 287-417.

⁴⁴ Oscar Schachter, "International Law in Theory and Practice. General Course in Public International Law". *R.C.A.D.I.*, 1982-V, T. 178, p. 143.

⁴⁵ I.e. the Treaty banning nuclear weapons tests in the atmosphere, in outer space and under water of 5 August 1963 (article I, UNTS, vol. 480, n°6964, p. 45), the Comprehensive Nuclear-Test-Ban Treaty of 24 September 1996 (article 1, paragraph 1, 35 ILM (1996), p. 1444), Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and to their

As the Court declared with regard to responsibility: "Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States".⁴⁶

73. Thus, the real test in order to establish whether a territory is under military occupation is twofold:

- 1) Were there hostilities? If the answer is positive:
 - 2) Was the party having overall control of the territory at the close of the hostilities in possession of that territory before the outbreak of the hostilities?
- If the answer is negative, then there is a military occupation.

74. Without any doubt, there were hostilities in June 1967, after which Israel became in control over a territory that had not previously been in its possession. Hence, the West Bank, including East Jerusalem, as well as the Gaza Strip, are under military occupation.

75. The continuous presence of Israel in the OPT is not based on any legal title. It constitutes mere military occupation as a result of the use of force.

76. The fact that Israel has recognised some powers to the Palestinian Authority by the "Oslo agreements", and those that followed it, does not modify the situation of military occupation. The Occupying Power has retained control over defence, foreign relations and all other powers not transferred to the Palestinian Council.⁴⁷ Indeed, since August 2001 and especially March/April 2002 the Occupying Power has not even respected the competencies conferred to the Palestinian Authority through those agreements. Neither has it respected its

destruction of 13 January 1993 (art.1, paragraph 2, 32 ILM (1993), p. 804), Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction of 3-4 December 1997 (article 5, paragraph 1, 36 ILM (1997), p. 1511) .

⁴⁶ *I.C.J. Reports 1971*, p. 54, paragraph 118.

⁴⁷ See in particular article VIII, article VI paragraph 2, article IX, paragraph 2, article XIII of the Declaration of Principles on Interim Self-Government Arrangements, Washington D.C., 13 September 1993, and Article VII (5) of the Agreed Minutes to this Declaration.

commitments regarding withdrawing of troops, redeploying its armed forces in those areas of the OPT from which it had previously withdrawn.

77. Thus, it is an uncontroversial fact that Israel is in overall control of the OPT. The mere fact of being able to construct the Wall in Palestinian territory is clear evidence of this control.

78. The evident weakness of Israel's legal arguments, if not its lack of any legal argument at all, has led Israel to indefinitely prolong the present situation of occupation. The protracted period of military occupation cannot be used as a means for creating rights for the Occupying Power. Military occupation is not *per se* a legal title of administration. It is a *de facto* regime. The situation of occupation will only end with the liberation of the whole territory, through the exercise of the Palestinian people's right to self-determination, normally by means of an agreement between Palestine and Israel settling all the territorial issues. The only possibility of a unilateral end of the military occupation by the Occupying Power is by its complete and unconditional withdrawal from the whole territory. The military occupation by a foreign power of a territory having an international status and over which a people has the right to self-determination cannot continue. Israeli military occupation is illegal and must end.

5. It is a territory under international supervision

79. The OPT is also a territory under international supervision, that is a territory the status of which has been determined by international law. This category applies to non self-governing territories, trust territories and former mandates. The United Nations has special responsibilities over such territories and member States have the obligation to co-operate with the Organisation in the accomplishment of its duties.

80. The West Bank, including East Jerusalem, and the Gaza Strip, were part of the territory under Mandate "A" of the League of Nations. Resolution 181 (II) of the General Assembly did not include them in the territory to be granted to the Jewish State. The West Bank and the Gaza Strip formed part of the territory originally acknowledged to belong to the Arab State, with the exception of the special internationalised status for the whole Jerusalem area. As is well known, only one of these States was created after the unilateral withdrawal of the mandatory Power. Until the other envisaged State is created, the situation of the remaining territory under mandate remains of international concern. This territory has neither become *terra nullius* nor can the General Assembly abandon its functions and powers over it.

81. Territories under international supervision are subordinated to the decisions of the competent international organs dealing with them. Any attempt by a State, including administering powers - either *de iure* or *de facto* ones - at unilaterally modifying the status of these territories has consistently been rejected by the competent organs of the United Nations, including the International Court of Justice.⁴⁸ Similarly, measures adopted by administering or occupying Powers aimed at preventing the exercise by the concerned people of their right to self-determination, or at rendering the realisation of the right more difficult, has also been considered as illegal.

82. In this regard, resolutions of the General Assembly related to these questions cannot be seen as mere recommendations. Given its function as the main supervisory organ of the United Nations with regard not only to non self-governing territories and trust territories but also former mandates whose international status has not come to an end, resolutions of the General Assembly have an obligatory character when dealing with questions touching these territories within the competence of that organ. As the Court has stated:

"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 design".⁴⁹

83. This is also the case for relevant General Assembly resolutions dealing with the Palestinian question, since they relate to a territory over which it performs supervisory functions, given its internationally delineated status.

84. The same conclusion can be reached with regard to relevant Security Council resolutions. When falling within the competence of the Organisation in matters related to the status of the territories under international supervision, such resolutions have a mandatory character by virtue of Article 25, irrespective of whether they were adopted under Chapter VII or not, as the Court also confirmed in 1971.⁵⁰

85. Hence, member States are bound by the determinations made by the General Assembly and the Security Council regarding the territorial status or other related matters in Palestine. This refers in particular to the characterisation of the situation as OPT, the applicability of the Fourth Geneva Convention, the illegality of the settlements established by Israel, and the unlawfulness of the annexation of East Jerusalem, among others.

86. The following resolutions are of particular relevance in these fields: Security Council resolution 242 of 22 November 1967, Security Council resolution 259 of 27 September 1968; Security Council resolution 267 of 3 July 1969; Security Council resolution 271 of 15 September 1969; Security Council Resolution 298 of 25 September 1971; Security Council resolution 446 of 22 March 1979; Security Council resolution 452 of 20 July 1979; Security Council

⁴⁸ See in particular, but not exclusively, the abundant practice of different organs of the United Nations with regard to the attempts made by South Africa to modify the status of Namibia (South-West Africa).

⁴⁹ *I.C.J. Reports 1971*, p. 50, para. 105.

resolution 465 of 1 March 1980, Security Council resolution 468 of 8 May 1980; Security Council 469 of 20 May 1980; Security Council resolution 471 of 5 June 1980; Security Council resolution 476 of 30 June 1980; Security Council resolution 478 of 20 August 1980; Security Council resolution 484 of 19 December 1980; Security Council resolution 592 of 8 December 1986; Security Council resolution 605 of 22 December 1987; Security Council resolution 607 of 5 January 1988; Security Council resolution 636 of 6 July 1989; Security Council resolution 672 of 12 October 1990; Security Council resolution 904 of 18 March 1994; Security Council resolution 1322 of 7 October 2000; Security Council resolution 1435 of 24 September 2002; General Assembly resolution 2546 (XXIV) of 11 December 1969; Resolution 32/5 of 28 October 1977, General Assembly resolution 46/47 of 9 December 1991; General Assembly resolution 46/76 of 11 December 1991; General Assembly resolution 51/134 of 20 February 1997; General Assembly resolution 52/66 of 10 December 1997; General Assembly resolution 55/130 of 8 December 2000; General Assembly resolution 55/131 of 8 December 2000; General Assembly resolution 55/132 of 8 December 2000; General Assembly resolution 55/133 of 8 December 2000; General Assembly resolution 55/209 of 20 December 2000; General Assembly resolution 56/60 of 20 November 2001; General Assembly resolution 56/61 of 20 November 2001; General Assembly resolution 56/62 of 20 November 2001; General Assembly resolution 56/204 of 21 December 2001; General Assembly resolution ES-10/10 of 7 May 2002; General Assembly resolution ES-10/11 of 5 August 2002; General Assembly resolution 57/110 of 3 December 2002; 57/125 of 11 December 2002; General Assembly resolution 57/126 of 11 December 2002; 57/127 of 11 December 2002; General Assembly resolution 57/188 of 18 December 2002; 57/198 of 18 December 2002; General Assembly resolution 57/269 of 20 December 2002; General Assembly resolution ES-10/13 of 21 October 2003.

⁵⁰ *I.C.J. Reports 1971*, p. 52-53, para. 114.

87. The international supervision of this territory will only cease with the establishment of an effective independent Palestinian State, that is, when the final status of the whole territory of the League of Nations Mandate will be completed.

B. The Wall constitutes a *de facto* separation line violating the obligation to respect the 1949 Armistice Line ("Green Line")

88. Israel calls the Wall a "security fence". It formally contends that its sole purpose is "to provide security", that it "is not a border" and does not have a permanent character. It also argues that the "fence" does not follow the 1949 Armistice Line (the Green Line) because the latter is not a boundary.⁵¹ In fact, the construction and maintenance of the Wall aims at the establishment of a new *de facto* border.

89. As a matter of course, the Wall does not and cannot constitute a boundary, since a boundary requires the agreement of both neighbours. No State can unilaterally determine a territorial boundary. Strictly speaking, a boundary is a separation line between two States or other entities having an international character (such as trust territories or mandates), established by agreement or by other legal title. The Court, as well as arbitral tribunals, refers to these boundaries when it invokes the principle of stability of boundaries.⁵² In its general, broader sense, any separation line, no matter the nature of the territories it divides, is sometimes also called a boundary. Separation lines other than boundary lines are, for instance, armistice lines, or provisional lines defining the limits of jurisdiction of the relevant parties, pending a final decision between them as to boundaries.

⁵¹ See *Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13*, United Nations, Doc. A/ES-10/248, 24 November 2003, p. 8, paragraph 5.

⁵² See *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion*, P.C.I.J. Series B N°12, p. 20; *Temple of Preah Vihear, Merits, Judgment*, I.C.J. Reports 1962, p. 34; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment*, I.C.J. Reports 1994, p. 37, par. 72-73; *Egypt-Israel Arbitral Tribunal, Award in Boundary Dispute Concerning the Taba Area*, 27 I.L.M. (1988), pp. 1489-1490.

90. By the construction of the Wall, the Israeli Government is physically and unilaterally demarcating what has not been the object of agreement with the other interested party. Even more seriously, it is doing so within the territory of the other party. Moreover, such extreme physical demarcation like the Wall being constructed by Israel follows very few models of boundaries around the world.

91. Even if Israel itself does not claim that the Wall is a boundary, this construction establishes a separation line. It is clear that the situation on the ground will be radically different from one side of the Wall to the other. The same freedom of movement for persons within Israel is applied to the areas of Palestinian territory between the Green Line and the location of the Wall, whereas persons in the West Bank east of the Wall require an authorisation to cross to the other side. Like boundaries or other separation lines, one of the main functions of the Wall is to materially limit the free movement of people on one side of the Wall to the other.

92. Israel itself acknowledges the reality of the Wall as being a new separation line. In its attempt at justifying the legality of the Wall, the official web site of the Israeli's Ministry of Foreign Affairs states: "Only a small number of Palestinian villages will be included on the western, *or Israeli, side of the security fence*."⁵³

93. This act of unilateral demarcation by Israel has been followed by the passing of legislation that is typically designed for frontier zones. The "Order Concerning Security Directives (Judea and Samaria) (number 378), 1970 Declaration Concerning the Closure of Area Number s/2/03 (Seam Area)" adopted by the "commander of the IDF forces in the Judea and Samaria region" on 2 October 2003 makes clear that Israelis can enter the so-called "seam area",

⁵³ Emphasis added. "Israel Diplomatic Network. The Anti-Terrorist Fence. Concept and Guidelines: A Line of Defense, not a Border". Available at: <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45392&MissionID=4518>

whereas other people, including Palestinians residing in the area, will require a permit. According to Article 3.a of this Declaration, "No person will enter the seam area and no one will remain there", whereas Article 4.a. states that "Article 3 of the declaration will not be applicable for: a. An Israeli, b. A person given a permit by me or by someone authorized by me to enter the seam area and to remain there".⁵⁴

94. Indeed, a simple reading of any map depicting the line followed by the Wall clearly shows that the main goal of this construction is to incorporate, into the territory of Israel, the major colonies settled by Israel in occupied Palestinian territory, in order to constitute a single territorial unit.⁵⁵

95. The figures mentioned by the report of the Secretary-General Kofi Annan are illustrative:

"Based on the route on the official map, including depth barriers and East Jerusalem, approximately 975 square kilometers, or 16.6 per cent of the entire West Bank, will lie between the Barrier and the Green Line. This area is home to approximately 17,000 Palestinians in the West Bank and 220,000 in East Jerusalem. If the full route is completed, another 160,000 Palestinians will live in enclaves, areas where the Barrier almost completely encircles communities and tracts of land. The planned route incorporates nearly 320,000 settlers, including approximately 178,000 in occupied East Jerusalem".⁵⁶

96. Israel argues that since the "Green Line" is an armistice line, it does not represent a boundary line. This is true. The Occupying Power does not seem to realise that a position coherent with this assertion would lead to the affirmation that territories west of the Green Line would have to be considered as "disputed

[7&LanguageID=0&StatusID=0&DocumentID=-1](#), visited on 24 January 2004 (A certified copy of this document has been provided to the Registrar).

⁵⁴ Israeli Defense Forces, Order Concerning Security Directives (Judea and Samaria) (number 378), 1970, Declaration Concerning the Closure of Area Number s/2/03 (Seam Area), available on <http://domino.un.org/UNISPAL.NSF/0/c6114997e0ba34c885256ddc0077146a?OpenDocument> (A certified copy of this document has been provided to the Registrar).

⁵⁵ See Annexes 1 and 2 to this Written Statement.

territories". Palestine has even stronger arguments than Israel to invoke this qualification, since the Green Line runs further east to the boundary between the Jewish and the Arab States established by GA Resolution 181 (II). The Palestinian people and its legitimate authorities have nevertheless adopted a more moderate and reasonable position: they only claim as a territorial unit for their State, the occupied territories after the 1967 war, that is, the Gaza strip and the West Bank, including East Jerusalem.

97. The fact that there does not exist an agreed boundary between Israel and Palestine does not mean that either one or the other entity are entitled to perform acts such as the construction of the Wall outside its territory. There exist a considerable number of boundaries around the world that are not completely delimited. The non-existence of concrete established boundaries does not mean that each side is free to perform acts in the territory of the other. Even if there is no established permanent boundary, armistice lines, *de facto* or *status quo* lines ought to be respected.

98. An armistice line is indeed a temporary separation line. The Occupying Power draws the wrong conclusion about the temporary character of an armistice line. Armistice lines must be respected until a final agreement is reached. Until that time, armistice lines fulfil functions akin to a border.

99. The 1949 Armistice Demarcation Line was adopted pursuant to Security Council Resolution 62 of 16 November 1948, that called upon the establishment of an armistice in all regions of Palestine, including "the delineation of permanent armistice demarcation lines beyond which the armed forces of the respective parties shall not move". By the General Armistice Agreement of 3 April 1949, the parties agreed that "no element of land, sea or air military or paramilitary forces of either party, including non-regular forces, shall commit any warlike or hostile

⁵⁶ *Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13, United Nations, Doc. A/ES-10/248, 24 November 2003, p. 3.*

act against the military or paramilitary forces of the other party, or against civilians in territory under the control of that party, or advance beyond or pass over for any purpose whatsoever the Armistice Demarcation Lines". Article VI provides that the Armistice Demarcation Lines "shall be subject to such rectifications as may be agreed upon by the Parties". Article XII, paragraph 2, of the same General Armistice Agreement stipulated that it "shall remain in force until a peaceful settlement between the Parties is achieved".⁵⁷

100. Nothing that happened after 1949, including the 1967 war, the Jordanian administrative disengagement of the West Bank of 31 July 1988, the peace negotiations between Israeli and Palestinian authorities and the Treaty of Peace between Israel and Jordan of 26 October 1994, has changed the 1949 Demarcation Line. The 1967 Six Day-War did not erase the Green Line. Simply, the territory beyond it became military occupied by Israel. The disengagement announcement of King Hussein of 31 July 1988 aimed at supporting the struggle of the Palestinian people to put an end to the occupation of the territory.⁵⁸ The Israeli-Jordanian Treaty of Peace of 1994, while stipulating the boundary between the Parties, clearly determined that this is done "without prejudice to the status of any territories that came under Israeli military government control in 1967".⁵⁹

101. In interpreting the principle of the prohibition of the threat or use of force, the Declaration of Principles of International Law embodied in GA Resolution 2625 (XXV) mentions the duty of States not to violate both existing "international boundaries" and "international lines of demarcation, such as armistice lines". The temporal character of armistice lines does not authorise one of the parties to go outside them to unilaterally erect a new separation line between the two territories separated by the armistice line. With the construction of the Wall, what Israel is

⁵⁷ *UNTS* 1949, vol. 42, n° 656,, pp. 304-320.

⁵⁸ See the entire text of the statement of King Hussein on http://www.kinghussein.gov.jo/speeches_letters.html.

⁵⁹ Article 3, paragraph 2. 34 *I.L.M.* (1995), p. 47.

doing is physically shifting the only existing separation line having been agreed upon: the 1949 Armistice Line.

102. Israel itself recognises that armistice lines functionally serve like boundaries. In the Israeli Ministry of Foreign Affairs website page on the "Israel's Security Fence", it is stated that:

"when Israel withdrew from southern Lebanon, in fulfilment of UN Security Council Resolution 425, the UN delineated the border between Israel and Lebanon. Israel moved its security fence, sometimes only a few meters, to comply with the new border".⁶⁰

103. It is not the purpose here to analyse the accuracy of this statement, but to show that Israel itself is referring to an armistice line, the one of 23 March 1949 separating Israel and Lebanon, as a "border". Furthermore, it refers to the "fence" existing between Israel and Lebanon as following the border.

104. In spite of the fact that Israel is officially invoking security reasons for the construction of the Wall and declaring that the Wall is a temporary measure, its Government is at the same time discussing plans for what it calls a "unilateral separation" or "Disengagement Plan", by way of withdrawal of Israeli armed forces from the remaining Palestinian enclaves created once the construction of the Wall will be completed. This is another piece of striking evidence of the intentions of Israel to establish the route followed by the Wall as a separation line or a *de facto* boundary.

105. Further evidence of this objective is found in the very recent statement of explanation of this plan by Israel's Prime Minister Ariel Sharon. The relevant part of this statement reads as follows:

"The "Disengagement Plan" will include the redeployment of IDF forces along new security lines and a change in the

⁶⁰ Emphasis in the original. Available at: <http://www.mfa.gov.il/mfa/go.asp?MFAH0o170>, visited on 13 January 2004 (A certified copy of this document has been provided to the Registrar).

deployment of settlements, which will reduce as much as possible the number of Israelis located in the heart of the Palestinian population. We will draw provisional security lines and the IDF will be deployed along them. Security will be provided by IDF deployment, the security fence and other physical obstacles. The "Disengagement Plan" will reduce friction between us and the Palestinians (...). This security line will not constitute the permanent border of the State of Israel, however, as long as implementation of the Roadmap is not resumed, the IDF will be deployed along that line. Settlements which will be relocated are those, which will not be included in the territory of the State of Israel in the framework of any possible future permanent agreement. At the same time, in the framework of the "Disengagement Plan", Israel will strengthen its control over those same areas in the Land of Israel which will constitute an inseparable part of the State of Israel in any future agreement (...). Israel will greatly accelerate the construction of the security fence (...). Obviously, through the "Disengagement Plan" the Palestinians will receive much less than they would have received through direct negotiations as set out in the Roadmap".⁶¹

106. From this statement clearly emerges the intention of Israel to decide unilaterally upon the separation line between it and the Palestinian people, as well as its will to annex part of the West Bank.

107. For the reasons stated above, a provisional separation line can be established by agreement, or by a decision of a competent international organ. In only one case can it be established unilaterally: if it is executed within its own territory. It must be recalled that the Berlin Wall, another odious symbol of past epochs, was constructed inside the territory of East Berlin. Constructions by the German Democratic Republic along the intra-German border, akin to the Israeli Wall, were also carried out in East German territory.

108. Indeed, there is no reason to discuss here whether the construction of the Wall is justified on the grounds of security. The question at issue is not whether

⁶¹ Prime Minister's Speech at the Herzliya Conference, 18 December 2003, text available at: <http://www.pmo.gov.il> (A certified copy of this document has been provided to the Registrar).

for security reasons Israel is compelled to unilaterally construct a Wall. If it were the case, it should be constructed on Israeli territory. The advisory opinion requested to the Court does not concern any such construction that could be undertaken inside Israel, but only the Wall that is being constructed by Israel in the OPT. Even if the intention were to construct the Wall along the exact path of the 1949 Armistice Line (the Green Line), it would require agreement between the two parties. In no case can Israel construct the Wall beyond the Green Line without the consent of the legitimate holder of the territory of the West Bank, the Palestinian people, through their legitimate authorities. A striking example of the need of agreement between the parties for the construction and maintenance of a structure of this kind can be found in the Palestinian-Israeli relationship themselves. Article XXIII, paragraph 3 of the Agreement on the Gaza Strip and the Jericho Area reads as follows:

"The Parties agreed that, as long as this Agreement is in force, the security fence erected by Israel around the Gaza Strip shall remain in place and that the line demarcated by the fence, as shown on attached map No. 1, shall be authoritative only for the purpose of this Agreement".⁶²

109. Hence, by constructing the Wall beyond the 1949 Armistice Line, Israel is unilaterally establishing a new separation line, violating its obligation to respect the former.

⁶² Israel-Palestine Liberation Organisation, Agreement On The Gaza Strip And The Jericho Area, May 4, 1994, article 23, paragraph 4, Annex, Article 4, paragraph 1 and attached maps, 33 *I.L.M.* (1994), pp. 622-720.

C. The Wall infringes the territorial integrity of Palestine

110. In contemporary international law States have the obligation to respect the territorial integrity not only of other States, but also of the countries of the peoples who have not been able to achieve statehood, i.e. who are under colonial rule or foreign occupation.

111. Numerous United Nations resolutions, both those having a general character and those referring to particular situations, insist upon the respect of the territorial integrity of the countries of the peoples entitled to self-determination.

112. Paragraph 4 of General Assembly Resolution 1514 (XV) declares that "All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected". Paragraph 6 of the same Resolution reads as follows: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a *country* is incompatible with the purposes and principles of the Charter of the United Nations".⁶³ Similarly, GA Resolution 2625 (XXV) proclaims: "Every State shall refrain from any action aimed at the partial or total disruption of the national unity of *any State or country*".⁶⁴

113. In the past, the United Nations took action to preserve the territorial integrity of different peoples. To quote only one example, Security Council Resolution 389 (1976) of 22 April 1976 in its first operative paragraph "*Calls upon* all States to respect the territorial integrity of East Timor, as well as the inalienable right of its people to self-determination". Particularly, the General Assembly reaffirmed "the inalienable right of the peoples of Namibia and Zimbabwe, of the Palestinian people and of all peoples under alien and colonial

⁶³ "Declaration on the Granting of Independence to Colonial Countries and Peoples". Emphasis added.

domination to self-determination, national independence, territorial integrity, and national unity and sovereignty without external interference".⁶⁵ General Assembly resolution 43/177 of 15 December 1988, for its part, "affirms the need to enable the Palestinian People to exercise their sovereignty over their territory occupied since 1967". General Assembly resolution 52/67 of 10 December 1997, affirms "the need to preserve the territorial integrity of all the Occupied Palestinian Territory".⁶⁶

114. Thus, Palestine, even if it has not fully achieved statehood and still being under foreign occupation, is entitled to the respect for its territorial integrity. Numerous United Nations resolutions recognise this right.⁶⁷ Moreover, from 1972 the General Assembly affirmed the right of the Palestinian people to permanent sovereignty over "national" or "natural" resources in the occupied territories.⁶⁸

115. The same can be said in Israeli-Palestinian conventional practice. In the Declaration of Principles on Interim Self-Government Arrangements signed in Washington DC on 13 September 1993, Israel and the PLO agreed to "view the

⁶⁴ Emphasis added.

⁶⁵ General Assembly Resolution 33/24 of 29 November 1978, Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights, amongst other.

⁶⁶ See also General Assembly Resolutions 53/56 of 3 December 1998, 54/79 of 22 February 2000, 55/133 of 8 December 2000 and 56/62 of 14 February 2002 ("Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including Jerusalem", stressing "the need to preserve the territorial integrity of all Occupied Palestinian Territory and to guarantee the freedom of movement of persons and goods within the Palestinian territory, including the removal of restrictions on movement into and from East Jerusalem, and the freedom of movement to and from the outside world".

⁶⁷ General Assembly resolution 52/67 of 10 December 1997 (69th Plenary meeting): "the need to preserve the territorial integrity of all the Occupied Palestinian Territory". General Assembly resolution 43/177 of 15 December 1988 "affirms the need to enable the Palestinian People to exercise their sovereignty over their territory occupied since 1967".

⁶⁸ From 1972 the General Assembly affirmed the right of the Palestinian people to permanent sovereignty over "national" resources in the occupied Arab territories (see e.g. GA Res. 3175 (XXVIII), 17 December 1973) and (from 1981) in the occupied Palestinian and Other Arab Territories (see e.g. A/RES/38/144, 19 December 1983). See also General Assembly resolution 57/269 of 20 December 2002.

West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved during the interim period".⁶⁹

116. The construction and maintenance of the Wall, since it separates parts of the Palestinian territory in the West Bank, clearly constitutes a violation by Israel of its obligation to respect the territorial integrity of Palestine.

D. The Wall infringes the right to self-determination of the Palestinian People

117. The right of peoples to self-determination is one of the "essential principles of contemporary international law".⁷⁰ It should be put on record that the Court has played a major role in the determination of the legal nature, scope and legal consequences of the right of peoples to self-determination through the exercise of its advisory jurisdiction.⁷¹

118. The United Nations and all its members have recognised the Palestinians as constituting a people who are thus entitled to political self-determination.⁷² Even Israel has recognised this. Article III of the 1993 Declaration of Principles affirms "the legitimate rights of the Palestinian people".⁷³ Israel no longer denies – although only formally for the time being - the right of the Palestinian people to have their own State.

119. In order to exercise their right to self-determination, peoples are recognised as having a territorial setting. The consistent practice of the United

⁶⁹ Article IV, reproduced in 32 *ILM* (1993), p. 1528.

⁷⁰ *East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995*, p. 102, paragraph 29.

⁷¹ See the *Namibia and Western Sahara* advisory opinions, resp. *ICJ Reports 1971*, pp. 31-32, paragraphs 52-53 and *ICJ Reports 1975*, pp. 31-33, paragraphs 54-59.

⁷² On 10 December 1969, the General Assembly recognized "the inalienable rights of the people of Palestine" (GA Res. 2535/B, XXIV). Other key GA resolutions include GA Res. 2672/C (XXV) and 3236 (XXIX).

Nations in this field shows that whenever a people exercises its right to self-determination, it has a defined territorial sphere for this exercise.

120. The consistently recognised territorial space for the exercise of the right to self-determination of the Palestinian people is the Gaza Strip and the West Bank, including East Jerusalem. Countless United Nations resolutions acknowledge this.⁷⁴ Even Israel did so through the adoption of the above-mentioned 1993 Declaration of Principles, which repeatedly refers to “the Palestinian People in the West Bank and the Gaza Strip”.⁷⁵ The Wall seriously infringes on the territorial integrity of Palestine which already constitute a very fragile and small entity within which the right to self-determination and sovereignty over natural resources are to be exercised. As Special Rapporteur John Dugard noted:

“The right to self-determination is closely linked to the notion of territorial sovereignty. A people can only exercise the right of self-determination within a territory. The amputation of Palestinian territory by the Wall seriously interferes with the right of self-determination of the Palestinian people as it substantially reduces the size of the self-determination unit (already small) within which that right is to be exercised.”⁷⁶

E. The Wall infringes the enjoyment of human rights

121. As in the case of the Fourth Geneva Convention, Israel takes the view that the two International Covenants on Human Rights do not apply in the OPT, since there is a situation of armed conflict in the area. Here one cannot but note that Israel adopts a very contradictory position in relation to its respect for international human rights law. On the one hand, when it has to comply with human rights provisions regarding the population of the Palestinian territory, it argues that these rules are not applicable since they are superseded by

⁷³ Art. III, reproduced in 32 *I.L.M.* (1993), p. 1528.

⁷⁴ See paragraph 86 and note 72.

⁷⁵ Notably Articles 1 and 3.

⁷⁶ UN Doc. E/CN.4/2004/6, 8 September 2003, p. 8, para. 15.

international humanitarian law. On the other hand, when under the obligation to apply humanitarian law, Israel denies the applicability of the Fourth Geneva Convention, despite having ratified it.

122. Malaysia does not share this view on the non-applicability of international human rights law. In this regard, Malaysia wishes to refer (among other documents) to the Concluding Observations of the Human Rights Committee that the applicability of international humanitarian law does not preclude the applicability of the Civil and Political Rights Covenant, including Article 4 which covers situations of public emergency which threaten the life of the nation.⁷⁷ Similarly, Article 2 (1) of this Covenant holds State parties accountable for the actions of their authorities outside their own territories but subject to their jurisdiction, including in occupied territories.

123. As the Court stated in its *Namibia* advisory opinion:

“By...occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of international obligation. It also remains accountable for any violations of the rights of the people of Namibia.”⁷⁸

124. Malaysia would also like to refer to the numerous reports of other UN organs and agencies, including those of the UN Secretary-General, the Commission on Human Rights and UNRWA, as well as to the reports of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the OPT.

⁷⁷ See Human Rights Committee, Consideration of reports submitted by State Parties under Article 40 of the Covenant. Israel, CCPR/CO/78/ISR, 21 August 2003. See also the General Comment no. 29 [72] on Article 4, adopted on 24 July 2001, CCPR/C/21/Rev. 1/Add.11: “During armed conflict whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5 paragraph 1, of the Covenant, to prevent the abuse of a State’s emergency powers” (para. 3, general Comment no. 29).

⁷⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971*, para. 118.

125. In his September 2003 report the Special Rapporteur recorded his grave concern regarding the construction of the Wall. He indicated that the construction of the Wall amounts to “a visible and clear act of territorial annexation” and results in “amputation of Palestinian territory”.⁷⁹

126. In this way, as was stated above, the Wall first of all seriously infringes on the right to self-determination, recorded in Article 1 of both Human Rights Covenants and identified by the International Court of Justice as a right of “the *erga omnes* character”.⁸⁰

127. Apart from infringing on the right to self-determination, the Wall is bound to have a deeply-seated impact on the enjoyment of the civil and political rights of the Palestinian people. Freedom of movement is becoming even more severely restricted than it already was.⁸¹ Many Palestinians will live in enclaves or are being forced to move out of their houses in the affected areas to what remains of Palestine.⁸² It is no exaggeration to fear for a new generation of refugees or internally displaced persons. Moreover, the already tenuous viability of an eventual Palestinian state is even further undermined.

128. Thirdly, the Wall also has a serious impact on economic, social and cultural human rights. Many Palestinians are ordered officially or otherwise *de facto* compelled to close their shops and enterprises. There is immense direct harm to property, natural resources such as fruit and olive trees and fertile land, endangering the right to food and access to freshwater resources. Furthermore, the Wall seriously restricts access to health and education facilities.⁸³

⁷⁹ UN Doc. E/CN.4/2004/6, 8 September 2003, p. 6, para. 6 and p. 8, para. 15.

⁸⁰ *East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995*, p. 102, paragraph 29.

⁸¹ See Art. 12, para. 1 of the International Covenant on Civil and Political Rights, 1966.

⁸² See Report of the Secretary-General of the United Nations, A/ES-10/248, 24 November 2003, para. 8.

⁸³ *Ibid.*, e.g., para. 24 and para. 27.

F. The Wall violates principles and rules of international humanitarian law

129. As the Occupying Power, Israel is under an international obligation to observe international humanitarian law, particularly but not exclusively those codified in the Fourth Geneva Convention to which Israel has been a party since 1952. As formulated by the Court in its Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*: “These rules indicate the normal conduct and behaviour expected of States.”⁸⁴

130. The Court also stated in this Advisory Opinion that a main part of international humanitarian law is of a non-derogatory nature:

“It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and “elementary considerations of humanity” as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*ICJ Reports 1949*, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.”⁸⁵

131. On various occasions both the General Assembly and the Security Council have affirmed the applicability of the Fourth Geneva Convention to the OPT.⁸⁶ Similarly, in 2001 the Conference of the High Contracting Parties to the Fourth Geneva Convention declared the Convention to be applicable.⁸⁷ In this way it endorsed the position held for long by the International Committee of the Red Cross.

⁸⁴ *ICJ Reports 1996*, p. 258, para. 82.

⁸⁵ *Ibid.*, p. 257, para. 79.

⁸⁶ See, e.g., A/RES/51/31 (1996), 52/65 (1997), 53/54 (1998), 54/77 (1999) and 55/131 (2000); S/RES/904 (1994) and 1322 (2000).

⁸⁷ Declaration of the Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, para. 3.

132. As reviewed above, it is a well-known fact that Israel considers the Fourth Geneva Convention to be not applicable to the OPT in view of the legal status of the territory before 1967. While no other High Contracting Party shares this view, it is relevant to note that Israel declared that it would implement the provisions of the Convention on a *de facto* basis. Malaysia joins the international community in demanding that Israel observes fully the Fourth Geneva Convention in all areas under occupation - Gaza Strip and the West Bank, including East Jerusalem.

133. Malaysia also does not share the view that, as a result of the Oslo Agreements, in parts of the OPT, especially the autonomous areas (also known as the “A-areas”), Israel no longer exercises jurisdiction and control. Under these agreements, the ultimate legal control over the OPT still rests with Israel as the Occupying Power. Here it is relevant to recall that Article 47 of the Fourth Geneva Convention provides that:

“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 a result of the occupation, into the institutions or government of the said territory, nor by any agreement concluded by 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.”

134. Malaysia endorses the findings of the UN Commission of Inquiry that the Israeli occupation regime still exists in all areas of the OPT and that hence international humanitarian law, including the Fourth Geneva Convention, is applicable without any restrictions.⁸⁸

135. The construction of the Wall is in various respects at odds with fundamental principles of international humanitarian law. First, by the construction and the seizure of land and property, a huge number of Palestinians will be severely affected and suffer as a result of the construction and the

⁸⁸ UN Doc. E/CN.4/2001/121, 16 March 2001.

accompanying uprooting of their living environment and daily life. This is in clear violation of Article 50 of The Hague Regulations (1907 Hague Convention IV) which stipulates:

“No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they can not be regarded as jointly and severally responsible.”⁸⁹

136. Second, the construction of the Wall is causing enormous destruction of property and natural resources. Article 46 of the Hague Regulations states that private property “must be respected”, while Article 55 provides that the occupying State “must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.”

137. In addition, under Article 53 of the Fourth Geneva Convention destruction of property is prohibited, unless absolutely necessary for military operations. Article 147 includes “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” among the grave breaches of the Convention.⁹⁰ Various other obligations under the Fourth Geneva Convention are at stake as well. These include Articles 23, 55 and 56 relating to free passage of medical equipment and materials and foodstuffs, access to medical and hospital establishments and services and maintaining public health and hygiene in an occupied territory.⁹¹

138. Even if one were to acknowledge the right of the Occupying Power to take security measures, Malaysia is firmly of the view that these have to meet the fundamental criteria of necessity, proportionality and observance of international humanitarian law. The scale and nature of the Wall as currently constructed and

⁸⁹ Regulations respecting the Laws and Customs of War on Land, annexed to The Hague Convention No. IV of 1907, adopted at the second The Hague Peace Conference in 1907.

⁹⁰ See also Art. 8 (2) (a) of the Rome Statute of the International Criminal Court on these grave breaches of the Geneva Conventions of 12 August 1949.

⁹¹ See also Articles 47, 49, 50 and 52 of the Fourth Geneva Convention.

scheduled to operate is not in accordance with such requirements and is hence in flagrant violation of international humanitarian law.

G. The Wall infringes upon the obligation to abstain from unilateral measures undermining a solution of the conflict

139. It is commonly admitted that negotiations must be conducted in good faith, with the intention of achieving an agreement. As the Court affirmed, the Parties "are under an obligation so to conduct themselves that the negotiations are meaningful".⁹² These meaningful negotiations cannot take place if one party imposes on the other a *de facto* situation that prefigures the outcome of the negotiations. It is irrelevant if that party argues that it can change this *de facto* situation in the future. The fact is that what is being discussed is modified in the sense that the party doing so wishes the modification to be part of the outcome of the negotiation. Pending negotiations on a particular issue, there is an obligation to respect the *status quo* with regard to that issue, unless the parties themselves agree to modify it by establishing a new *de facto* situation, until a final settlement is reached.

140. Irrespective of the arguments advanced by the Occupying Power, the construction of the Wall aggravates the existing conflict, since it encroaches upon Palestinian territory, while it is known that Israel nurtures the intention to annex part of this territory. It also hinders the daily lives of thousands of Palestinian citizens by violating their basic human rights, as explained above. Following the Manila Declaration for the Peaceful Settlement of Disputes:

"States parties to an international dispute, as well as other States, shall refrain from any action whatsoever which may aggravate the situation so as to endanger the maintenance of international peace and security and make more difficult or impede the peaceful settlement of the dispute, and shall act in

⁹² *North Continental Shelf cases*, ICJ Reports 1969, p. 47, paragraph 85, also quoted in *Gabcikovo-Nagymaros Project, Judgment*, I.C.J. Reports 1997, p. 78, paragraph 141.

this respect in accordance with the purposes and principles of the United Nations."⁹³

141. Some statements from relevant actors in the peace process explain the impact of the construction of the Wall on the negotiations and the possibilities of achieving a settlement of the conflict.

142. The Report of the Secretary-General mentioned above considers that "[i]n the midst of the road map process, when each party should be making good-faith confidence-building gestures, the Barrier's construction in the West Bank cannot, in this regard, be seen as anything but a deeply counterproductive act. The placing of most of the security structure on occupied Palestinian land could impair future negotiations".⁹⁴

143. In turn, Mr Roed-Larsen, Special Coordinator for the Middle East Peace Process and Personal Representative of the Secretary-General explained: "Despite the calls from all the members of the Quartet, the Government of Israel persists in building that structure. It makes the establishment of a viable Palestinian State more difficult, and it undermines any Palestinian prime minister's efforts to muster popular support."⁹⁵

144. The Quartet principals, in a statement after their meeting in New York on 26 September 2003, "note with great concern that actual and proposed route of Israel's West Bank fence, particularly as it results in the confiscation of Palestinian land, cuts off the movement of people and goods and undermines Palestinians' trust in the road map process, as it appears to prejudge final borders of a future Palestinian State".⁹⁶

⁹³ General Assembly Resolution 37/10, Annex, adopted on 15 November 1982.

⁹⁴ A/ES-10/248, 24 November 2003, p. 7.

⁹⁵ S/PV.4824.

⁹⁶ S/2003/951.

145. Thus, the construction of the Wall, by unilaterally modifying the separation line between Palestine and Israel and aggravating the conflict, constitutes a violation of the obligation to negotiate in good faith, and to abstain from unilateral measures undermining a solution of the conflict.

H. Self-defence and combating terrorism cannot serve as legal grounds for the construction of the Wall in Occupied Palestinian Territory

146. Malaysia has constantly opposed terrorism in all its forms and manifestations. It also takes the view that the fight against terrorism can only be effectively carried out through the respect of international law. Legally, Israel bases the construction of the Wall on its inherent right of self-defence as recognised in Article 51 of the Charter, as well as on the anti-terrorism Security Council Resolutions 1368 (2001) and 1373 (2001). However, the argument advanced by Israel according to which the construction of the Wall constitutes a measure of self-defence is not tenable.

147. Self-defence is a temporary forcible measure in response to an armed attack ("agression armée", in the French text of the Charter). In order to establish that Israel is legally justified in constructing the Wall in exercise of its right of individual self-defence, it has to be established that the terror attacks by Palestinians constitute an "armed attack" within the meaning of that expression in Article 51 of the Charter of the United Nations and as understood in customary law on the use of force.

148. While Malaysia does not want to belittle for a moment the horrifying nature of the terror attacks, they appear to call for security measures rather than for self-defence measures in terms of international law. Security and self-defence are two different legal notions. To adopt preventive measures against further

terror attacks concerns security, but not self-defence. Israel certainly has the right to adopt unilateral security measures to prevent such attacks, provided that they respect human rights and other relevant international rules and principles, but only within its territory.

149. Like other States, Israel is under an international obligation regarding the fight against international terrorism. However, these obligations do not imply the adoption of extraterritorial measures, even less the construction of a Wall in a territory that does not belong to it. This is the only possible plausible interpretation of Security Council Resolution 1373 (2001), which has been invoked by Israel to justify the construction of the Wall. Even assuming that the purpose of the Wall is to prevent terrorist attacks, this kind of construction must be made within Israel's own territory.

150. Even if assuming that Israel can justifiably call on an international right to self-defence, any use of force in alleged self-defence has to meet the criteria of necessity and proportionality, as the Court reaffirmed in its recent judgment in the *Iranian Oil Platforms* case while referring to its observations in the *Nicaragua* case.⁹⁷ Furthermore, it is widely acknowledged that a lawful exercise of the right to self-defence requires observance of the principles and rules of international humanitarian law. This has been recognised by the Court, especially in its Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*, where the Court stated: “States do not have unlimited freedom of choice of means in the weapons they use”.⁹⁸

151. The construction of the Wall challenges, in particular, the criterion of proportionality which restricts any measures (either security measures or in self-defence) to a necessary minimum as regards the means employed as well as the end pursued. In this way the test of proportionality is closely related to the criteria

⁹⁷ See ICJ judgment in *Case Concerning Oil Platforms (Islamic Republic Iran v. United States)*, 6 November 2003, para. 51.

of necessity and respect for international humanitarian law. As discussed above, the construction and operation of the Wall violates principles and rules of international humanitarian law and infringes upon the right of self-determination. To encircle and isolate the entire population of various villages, cut them off from their lands, places of work, schools and hospitals cannot meet any requirement of proportionality. Hence, even assuming that the argument of self-defence were relevant (*quod non*), "(...) it would be a curious law of self-defence that permitted the defender in the course of his defence to seize and keep the resources and territory of the attacker".⁹⁹

⁹⁸ *ICJ Reports 1996*, p. 257, para. 78.

⁹⁹ Jennings, R.Y., *The Acquisition of Territory in International Law*. Manchester, University Press, 1963, p. 55.

III. Submissions

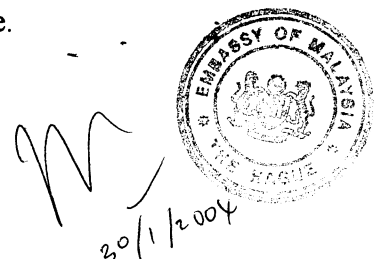
On the basis of the arguments set out above, Malaysia respectfully requests the Court to respond to the request of the General Assembly and to advise that:

- 1) The construction and maintenance of the Wall being built by Israel, the Occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, is illegal under general international law, since it constitutes a violation of the obligations embodied in the following customary and conventional rules:
 - a) The right of the Palestinian people to self-determination;
 - b) The respect of the territorial integrity of Palestine;
 - c) The obligations of the Occupying Power not to deprive people living in the occupied territory of protection and not to destruct property, under the Hague Convention IV of 1907, the Fourth Geneva Convention of 1949 and customary international law;
 - c) The human rights to freedom of movement, family life, work, education, healthcare and food;
 - d) The obligation not to adopt unilateral measures that may negatively affect ongoing negotiations and preclude their final outcome.

Consequently, as long as Israel continues to construct and maintain the Wall, it continues to infringe the aforesaid rules.

- 2) The construction and maintenance of the Wall being built by Israel, the Occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, constitutes a violation of the relevant Security Council and General Assembly resolutions mentioned in paragraph 86.
- 3) Israel, the Occupying Power responsible for the construction of the Wall, has the legal obligation to immediately cease the construction of the Wall and to dismantle the existing parts of it in the Occupied Palestinian Territory.

- 4) All States are under the obligation to recognise the illegality of the construction of the Wall and of its maintenance, and to refrain from any act implying recognition of the legality of, or lending support or assistance to, the construction and maintenance of the Wall.
- 5) The construction and maintenance of the Wall in Occupied Palestinian Territory does not affect in any way the sovereignty of the Palestinian people over the territory lying between the Green Line and the line followed by the Wall.
- 6) The construction and maintenance of the Wall in Occupied Palestinian Territory being illegal, it cannot constitute a basis for any claim of sovereignty or any territorial right on behalf of Israel with regard to the territories lying between the Armistice Line of 1949 (Green Line) and the Wall.
- 7) Israel is obliged to make reparation to the Palestinian Authority, as well as to the individual victims concerned, for all the internationally wrongful acts committed by the construction and maintenance of the Wall.
- 8) To the extent that the construction and maintenance of the Wall in Occupied Palestinian Territory constitute grave breaches of the Fourth Geneva Convention, individual criminal responsibility is involved and all States parties to the Convention, including Israel, are under the obligation to prosecute the individuals responsible for these breaches.
- 9) The parties concerned have the obligation to pursue the negotiations aiming at a peaceful solution of the conflict in good faith, and therefore abstaining from taking any unilateral measures, such as the construction and maintenance of the Wall in Palestinian Occupied Territory, that may harm the process of negotiations or prejudice its outcome.



ANNEXES

Table of Contents

1. United Nations Office for the Coordination of Humanitarian Affairs, Enclaves and Closed Areas between the Wall and the Green Line, 8 November 2003 (map).
2. B'tselem, Separation Barrier (map).

List of documents provided to the Registrar

1. Israeli Defense Force, *Order Regarding Security Directives (Judea and Samaria) (No. 378), 5730-1970, Declaration Concerning Closing an Area Number S/2/03 (Seam Zone)*.
2. Israel, Ministry of Foreign Affairs, "Saving Lives: Israel's Security Fence", November 2003.
3. Israel, Prime Minister's Office, Communications Department, Prime Minister's Speech at the Herzliya Conference, 18 December 2003.
4. Israel, Ministry of Foreign Affairs, "Israel Diplomatic Network. The Anti-Terrorist Fence. Concept and Guidelines: A Line of Defense, not a Border".