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**BEFORE THE
INTERNATIONAL COURT OF JUSTICE**

**Request by the United Nations General Assembly for an
Advisory Opinion on what the legal consequences are
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**

**WRITTEN STATEMENT
SUBMITTED BY
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA
30 JANUARY 2004**

I. INTRODUCTION

1. By decision ES-10/14 of 8 December 2003 the General Assembly requested on an urgent basis, pursuant to Article 96 of the Charter of the United Nations and in accordance with General Assembly Resolution A/RES/ES-10/14 of 8 December 2003, an Advisory Opinion from the International Court of Justice on the legal consequences arising from the construction of the Separation 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.

2. Upon receiving this request, the Court decided that the United Nations and its Member States are likely to be able to furnish information on the question submitted to the Court. By its Order of 19 December 2003 the Court fixed 30 January 2004 as the time limit within which written statements may be submitted to the Court, in accordance with Article 66, paragraph 2, of the Statute of the Court. The present statement will examine the legal consequences arising from the construction of the Separation Wall on which an Advisory Opinion is requested.

3. The core issue in this case is for the Court to determine the legality or not of the Separation Wall.

4. The South African Government feels itself compelled to submit a statement to the Court on this serious matter. The unfolding humanitarian catastrophe in the Occupied Palestinian Territory is of grave concern to the Government of South Africa, as is the worsening security situation in Israel. Actions, such as the construction of the Separation Wall, that further fuel the cycle of violence and counter-violence must stop. We are convinced that the solution for the Palestinian/Israeli conflict is a negotiated settlement that would result in a two-state solution. That is, a sovereign state of Israel and a sovereign state of Palestine with East Jerusalem as its capital. However, the continued construction of a Separation Wall is a pretext to occupy more land and makes a negotiated settlement even harder to achieve. The Separation Wall will make this two-state solution to the Israeli-Palestinian conflict physically impossible to implement and gravely threaten any prospects for a just and peaceful settlement and a lasting peace. The Separation Wall is indeed undermining stability in the Middle East and jeopardizing any attempt to reach a peaceful settlement for this long and bitter conflict.

II. FACTUAL BACKGROUND

5. The South African Government endorses and accepts the exposé of the facts pertaining to the construction of the Separation Wall in the Occupied Palestinian Territory, including in and around East Jerusalem as set out in the Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/13 dated 24 November 2003 as well as the Report of the Special Rapporteur of the Commission on Human Rights, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission Resolution 1993/2 A on the question of the violation of human rights in the Occupied Arab Territories, including Palestine. (A/ES-10/248). This statement is based on the facts presented in the abovementioned Reports, which are also before the Court.

III. JURISDICTION OF THE COURT

The Court has Jurisdiction to give the requested Advisory Opinion

6. The Court has jurisdiction to give the Advisory Opinion requested by the General Assembly, as Article 65, paragraph 1, of the Statute of the International Court of Justice authorizes the Court to give an Advisory Opinion at the request of whatever body that may be authorised to make such a request. UNGA is authorized by Article 96 of the Charter to make such a request.

7. The United Nations General Assembly in its Resolution ES-10/14 dated 8 December 2003 in accordance with Article 96 of the Charter requested the International Court of Justice pursuant to Article 65 of the Statute of the Court, to urgently render an Advisory Opinion on the following question:

“What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international

law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly Resolutions?"

8. The Secretary-General of the United Nations, in his letter dated 8 December 2003, transmitted the Resolution to the Court, requesting an Advisory Opinion.

There is no compelling reason for the Court to decline to give an Advisory Opinion

9. The Court has on several occasions stated that, although its power to give Advisory Opinions under Article 65 of its Statute is discretionary, only compelling reasons would justify refusal of such a request. It is our contention that this request presents the Court with no such reasons.

IV. STATEMENT OF LAW

General

10. At the outset, the Government of the Republic of South Africa wishes to state clearly that the legal consequences of the construction of the Separation Wall being build by Israel are inter-related and cannot be considered in isolation from one another. It is also not the intention of the Government of the Republic of South Africa to address all legal consequences that flow from the illegal actions by Israel, but only to highlight the most serious legal consequences resulting from the breaches of international law that the construction of the Separation Wall presents.

11. In general and before addressing specific legal consequences, it is our conviction that in considering the case before it, the Court will inevitably have to take into account the fact that the Court is faced with a situation where a Member State of the United Nations has systematically over many years rejected the decisions and Resolutions of the General Assembly and the Security Council. Israel has a deplorable track record of systematically refusing to comply with the Resolutions of the General Assembly and the Security Council relating to its illegal actions against Palestine. Such conduct creates an irrefutable impression that there is a serious lack of good faith on the part of that State. The obligation to act in good faith, being a general principle of law, is also part of international law (*Certain Norwegian Loans*,

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Judgement, ICJ Reports 1957, p 53). The lack of adherence to this principle of international law should in itself have legal consequences. It is our contention that this lack of adherence to United Nations Resolutions and decisions, constitutes a serious disregard for, and is in fact in conflict with, the legal obligation to act in good faith in accordance with the principles of International law. In this regard the words of Judge Lauterpacht in the case on *Voting Procedures on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, are pertinent and the Court may wish to take note thereof where he addressed the question of non-adherence to recommendations of the United Nations. These comments are even more pertinent when it comes to United Nations Resolutions where he states that ... "in doing so it [such a state] acts at its peril when a point is reached when the cumulative effect of the persistent disregard of the articulate opinion of the Organization is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter." The judge then continued that such a state "which consistently sets itself above the solemnly and repeatedly expressed judgement of the Organization, in particularly in proportion as that judgement approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to the consequences legitimately following as a legal sanction" (*Voting Procedures on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion*, ICJ Reports 1955, p 67 at p 120). These words are even more relevant in light of the fact that in terms of Article 25 of the Charter of the United Nations the Security Council has the power to take binding decisions, which Member States are under a legal obligation to obey. (Article 25 of the Charter of the United Nations of 1945; Malanczuk, P. *Akehurst's Modern Introduction to International Law*, 1989, p 374). Israel has consistently been in violation of this basic international legal obligation and duty. It is against this background that some of the legal consequences arising from the construction of the Separation Wall will now be addressed.

Illegality of the Separation Wall: de facto annexation of parts of the Palestine Occupied Territory, including East Jerusalem

12. It is an undisputed fact that the construction of the Separation Wall in the Occupied Palestinian Territory, including in and around East Jerusalem, clearly and in some instances substantially, departs from the Armistice Line of 1949, the so-called Green Line. The Separation Wall, on its current and projected route, incorporates substantial areas of the Occupied Palestinian Territory, especially the West Bank and East Jerusalem, into Israeli territory. Furthermore, the construction has involved the confiscation and destruction of Palestinian land and resources and has a devastating influence on the lives of thousands of civilians (an aspect which will be dealt with separately in this statement). These facts are confirmed by the Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/13 (A/ES-10/248 dated 3 December 2003), as well as the Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied since 1967 and submitted in accordance with the Human Rights Commission Resolution 1993/1/A (E/CN.4/2004/6 dated 8 September 2003).

13. The construction of the Separation Wall is clearly illegal. It does not only violate Security Council Resolution 242 of 1967 resulting from the 1967 war, but also numerous other Security Council Resolutions in which it was determined that all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian Occupied Territories, including Jerusalem or any part thereof, have no legal validity (Security Council Resolution 464 (1980) as well as 478 (1980), 298 (1971), 271 (1969), 267 (1969), 252 (1968) and 237 (1967)). The Security Council has also decided, with specific reference to Jerusalem, that all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section are totally invalid (Security Council Resolution 298, (1971)). Also, as if in a refrain, the Security Council has called on many occasions for the cessation and reversal of all acts which have resulted in the aggravation of the situation and which have negatively influenced the peace process, which the construction of the Separation Wall clearly

does. The construction of the Separation Wall is clearly in breach of these Security Council Resolutions and therefore illegal in terms of international law. (See also paragraph 1 above).

14. In terms of the United Nations Charter, as well as customary international law, the use of force in international relations against the territorial integrity or political independence of any state is illegal. It thus follows *a fortiori* that an aggressor cannot acquire territory by annexation or the acquisition of territory by force. (*Article 2(4) of the Charter of the United Nations*; Malanczuk, P. *Akehurst's Modern Introduction to International Law*, 1989, p 152). Furthermore, international law does not recognize the use of self-defence to settle disputes relating to territory, which in the present case, seems to be the motivation used to justify the illegal construction of the Separation Wall. Article 2(3) of the United Nations Charter requires member states to settle their disputes by peaceful means and this obligations applies as much to territorial disputes as to any other class of disputes. (Malanczuk, P. *Akehurst's Modern Introduction to International Law*, 1989, p 314).

15. The General Assembly Resolution on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations emphasised the legal principle that every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations (General Assembly Resolution 2625 (XXV) on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations dated 24 October 1970).

16. Furthermore, every State has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. No acquisition by another State resulting from the threat or use of force shall be recognized as legal (own emphasis). (General Assembly Resolution

2625 (XXV) on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations dated 24 October 1970).

17. The construction of the Separation Wall, due to its prohibitive cost and permanent structural features, constitute nothing less than the unilateral delimitation by Israel of the boundary between the State of Israel and the State of Palestine. Wherever this boundary deviates from the Green Line, which presently represents the actual boundary between Israel and Palestine, the *de facto* consequence is that that area will be annexed and incorporated within the territory of Israel. Security Council Resolution 242 of 1967 also underlines the principle of the inadmissibility of the acquisition of territory by means of force and instructed that the *status quo* with regard to the territorial integrity of the areas involved must be restored. Also, and as already indicated above, in terms of the Declaration referred to above, every State has the duty to refrain from the threat or use of force to violate the existing international lines of demarcation such as armistice lines, whether established pursuant to an agreement or which it is otherwise bound to respect as a means of solving territorial disputes and problems concerning frontiers of State. Israel clearly acts without good faith and in contravention of its international law obligations by constructing the Separation Wall.

18. Israel maintains that the Green Line was not confirmed as an international Boundary and that this is a matter still to be negotiated by the Parties. Thus, there seems to be the view that there will be room for "territorial adjustments" necessitated by "security considerations" (Gerson, *Israel, the West Bank and International Law*, 1978, p 76); McHugo, J. *Resolution 242: A legal reappraisal of the right-wing Israeli interpretation of the withdrawal phrase with reference to the conflict between Israel and the Palestinians*, 2002, *International and Comparative Law Quarterly*, vol. 51, p 851 on p 860). Scholars who support this view further argue that "(1) a state which has been victim of attack may be recognized as having a legitimate claim to border adjustments on grounds of military security; [and] (2) the Security Council would, in this case, approve of border modifications to the extent deemed necessary for security". Even these scholars hasten to add however, that "such changes could not be enforced by the state whose claim is admitted, but could only be effected in the

context of a freely negotiated settlement, and only to the extent compatible with a just and lasting peace." (Korman, *The Right of Conquest: Acquisition of Territory by Force in International Law and Practice*, 1996, pp 211 -212; McHugo, J. *Resolution 242: A legal reappraisal of the right-wing Israeli interpretation of the withdrawal phrase with reference to the conflict between Israel and the Palestinians*, 2002, *International and Comparative Law Quarterly*, vol. 51, p 861).

19. It seems that the construction of the Separation Wall in the Occupied Territory, including in and around East Jerusalem, relies on the possibility that the Security Council will in all probability approve of border modifications to the extent deemed necessary for security if such modification will be compatible with a just and lasting peace. This assumption is also in line with the interpretation apparently given to Resolution 242 (1967) by Israel as far as the phrase "secure and recognized boundaries" is concerned as it appears in sub-paragraph (ii) of paragraph 1 of that said Resolution which states as follows:

"(ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or force." For Israel, boundaries will only be secure if the security concerns of Israel, regardless of those of Palestine, are met. Given the increasing expansion of illegal settlements, it is not believed that the construction of the Separation Wall represents a legitimate security measure, but rather an unlawful act of territorial annexation under the guise of a security measure. Furthermore, the acceleration of the construction of the Separation Wall, as well as the expansion of the illegal settlements on Palestinian land, is an act of annexation that is inconsistent with the obligations of Israel under the internationally accepted Road Map of the Quartet.

20. The present case is also a classic example where serious discrepancies exist between the clearly recognised international law violations and the facts on the ground. The international community will be faced with a *de facto* situation which will be very difficult to change. It is our contention that the construction of the Separation Wall is illegal, and regardless under which pretext it is being constructed, the practical consequence of the existing and planned Separation Wall is that it is being erected in Palestinian Occupied Territory including in and around East

Jerusalem. This action, although illegal in terms of international law, therefore represents the *de facto* annexation of parts of that territory. This must be viewed as one of the most serious consequences of the construction of the Separation Wall.

21. It is our contention that any delimitation of the boundaries must be negotiated between the two states on the basis of equality of both states and not as the present situation where Palestine will be confronted with a *fait-a-compli* in the form of the Separation Wall. The parties should be on an equal footing and each should respect the entitlement of the other under international law. This will be almost impossible in a situation where a Separation Wall of hundreds of kilometers have been constructed and is kept intact through the use of force.

22. Thus, a further consequence of the construction of the Separation Wall will be the reversal of the normal process of the practical aspect of the demarcation of boundaries which Brownlie aptly describes as follows: "Agreements as to the precise details of a frontier, enshrined in a written instrument, is often followed by the separate procedure of demarcation, that is, the marking, literally of the frontier on the ground by means of posts, stones pillars, and the like. A frontier may be legally definitive, for some purposes, and yet remain undemarcated. Frontiers which are "de facto", either because of the absence of demarcation or because of the presence of an unsettled territorial dispute may nevertheless be accepted as the legal limit of sovereignty for some purposes, for example those of civil or criminal jurisdiction, nationality law, and the prohibition of unpermitted intrusion with or without the use of arms "(Brownlie I. *Principles of Public International Law*, 1998, p 122). In the present instance the boundary will have been demarcated by means of the Separation Wall before the actual negotiations between the parties could take place and will prejudice any border demarcation negotiations to an untenable extent. The unilateral demarcation of the boundary is clearly in conflict with the provisions of the Declaration set out above, illegal and in conflict with the mentioned Security Council Resolution and with the principle of the self-determination of peoples.

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The self-determination of the Palestinian People

23. The Report of the Special Rapporteur of the Commission on Human Rights, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission Resolution 1993/2 A (E/CN.4/2004/6, 8 September 2003) concludes that the Wall violates two of the most fundamental principles of contemporary international law, namely the prohibition on the forcible acquisition of territory and the right to self-determination.

24. The right to self-determination and the concept of territory are intrinsically linked. The right to self-determination finds its roots in the Charter, specifically Article 1(2) and Article 55, and is confirmed by common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It has furthermore been confirmed in numerous Resolutions of the United Nations, most notably General Assembly Resolution 1514 (XV) on the Declaration on the Granting of Independence to Colonial Countries and Peoples and General Assembly Resolution 2625 (XXV) on the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.

25. As a basic principle of international law, it has been attributed with the status of *ius cogens* (Malanczuk, P. *Akehurst's Modern Introduction to International Law*, 1997, p327), while the International Court of Justice (ICJ) described self-determination as an obligation *erga omnes* (*East Timor Case (Portugal v Australia)* ICJ Reports 1995, p 90).

26. The right of the Palestinians as a people to self-determination is unquestionable and has been confirmed by General Assembly Resolution 3236 (XXIX) of 22 November 1974 which provides for:

“the inalienable rights of the Palestinian people, including:

- (a) the right to self-determination without external interference;
- (b) the right to national independence and sovereignty”.

27. The right of the Palestinian people to self-determination to be attained on the basis of territorial sovereignty within the boundaries of an independent Palestinian state, has been reaffirmed by the United Nations on numerous occasions and forms the underlying principle of the two-state solution.

28. It is submitted, as was also determined by the Report of the Special Rapporteur of the Commission on Human Rights, on the situation on human rights in the Palestinian territories occupied by Israel since 1967, that the Separation Wall is intended to create facts on the ground. It has already been submitted that the construction of the Wall, even in the absence of a formal act of annexation as was the case with the illegal annexation of East Jerusalem by Israel, is nothing but *de facto* annexation. The illegality of this action *per se* has also already been argued. However, the linkage between territory, enshrined in the principle that a just and lasting solution to the Israeli-Palestinian situation must provide for two states within secure and recognised borders, and the right to Palestinian self-determination have the result that these annexation actions also violate the right of self-determination. The Special Rapporteur points out: "A people can only exercise the right of self-determination within a territory. The amputation of Palestinian territory 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" (paragraph 15).

29. The Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/13 (A/ES-10/248 dated 3 December 2003) starkly points out this result: based on the route of the official map, approximately 975 square kilometres, 16,6% of the entire West Bank, will be enclosed by the Wall, an area in which 237 000 Palestinians live. This attempt at *de facto* annexation of a substantial part of the self-determination territory of the Palestinians, is a clear violation of the right of the Palestinian people to self-determination.

Excessive, disproportionate and illegal use of the concept of self-defence by Israel

30. It is common cause that the United Nations Charter in Article 2(4) outlaws the

use of force by UN Member States in their international relations, the only exception to the Charter prohibition being contained in Article 51, which enshrines the inherent right of individual or collective self-defence if an armed attack occurs against a Member State, until the Security Council has taken measures to maintain international peace and security. Self-defence is therefore by its very nature a temporary right.

31. Israel has contended that the construction of the Separation Wall is consistent with Article 51 of the Charter, its inherent right to self-defence and Security Council Resolutions 1368 (2001) and 1373 (2001).

32. Article 51 does not define the content of the right to self-defence, leaving it open to interpretation (and abuse). In order to prevent a return to the pre-Charter situation where the use of force was considered legitimate and consequently undermining a pillar of the Charter and the system of collective security, and bearing in mind that Article 51 contains an exception to the prohibition on the use of force, the right to self-defence must be interpreted narrowly (Gray, C. *International Law and the Use of Force*, 2000, p 87). It is therefore not correct to argue that the "inherent" nature of the right to self-defence in Article 51 means that the pre-Charter customary right to self-defence has been preserved intact by Article 51, and the International Court of Justice's construction of this notion in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (1986) as a reference to customary international law should not be interpreted in this way (Dinstein, Y. *War, Aggression and Self-defence*, 2001, p 165). This narrow interpretation was what the International Court of Justice had in mind in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* when it stated: "Furthermore, the Court cannot lose sight of the fundamental right of every state to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake" (*ICJ Reports 1996*, p 226 on p 263).

33. It is clear that the Court had in mind that the inherent right to self-defence in terms of Article 51 only becomes available to a Member State in extreme circumstances, and therefore it has been authoritatively stated that Article 51 permits self-defence solely when an 'armed attack' occurs" (Dinstein, Y. *War, Aggression and Self-defence*, 2001, p 65). As regards the question of whether cross-border attacks

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by irregular forces can be interpreted as an armed attack justifying a claim of self-defence, the ICJ found in the *Nicaragua* case (ICJ Reports 1986 (Merits) 14) that acts by "armed bands, groups, irregulars or mercenaries" which carry out acts of armed force, may amount to armed attacks provided that it is of such a gravity that it amounts to an actual armed attack by regular forces, and that such forces must be sent by or act on behalf of a state. This is not the case in the Palestine conflict.

34. Wide interpretations of the "inherent" right to self-defence has also given birth to the controversial doctrine of anticipatory self-defence, notably advanced by Israel with regard to its attack on the Osirak nuclear facility in Iraq in 1981 (which was condemned by the General Assembly as a premeditated and unprecedented act of aggression in General Assembly Resolution 36/27). This doctrine is, in practice, only invoked by states as a last resort and is consequently rarely used as a justification for the use of force. The lack of consistent state practice and the clear and unqualified opposition thereto expressed by Member States in the General Assembly negates any attempt to justify this doctrine as customary international law.

35. It has often been argued that another exception to the Charter's prohibition on the use of force is a right to use force in protection of nationals, of which the origin is a customary right predating the Charter. However, this right presupposes forcible intervention in another state with the aim of protecting or rescuing nationals and therefore does not find application in the present case.

36. All states agree that the ancient legal principles of necessity and proportionality forms part of, and have since the times of the just war doctrine, formed part of the core of the doctrine of self-defence (Gray, C. *International Law and the Use of Force*, 2000, p 105), and have also been analysed by the ICJ in the *Nicaragua* case and the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. The essential characteristic of these principles has been defined as follows: self-defence must not be retaliatory or punitive; the aim should be to halt and repel an attack and are dependent on the facts of a particular case. With regard to the present case, the construction of the Separation Wall by Israel and the consequences thereof for the Palestinian civilian population such as the severe restriction of movement, the isolation of civilians from their farmland, the destruction of crops, the

impairment of access to jobs and essential social services as described in the Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/13 (A/ES-10/248 dated 3 December 2003) are totally disproportionate and unnecessary bearing in mind that the focus of Israeli defence against attack is occasional and irregular attacks by lone operators.

37. The Separation Wall, as has been argued, also results in the *de facto* annexation of parts of Occupied Palestinian Territory. The illegality of this action, and its unnecessary and disproportionate nature, is clear from two precedents: "Necessity and proportionality are also crucial in the rejection by states of prolonged occupation of territory in the name of self-defence. Thus Israel's presence in Southern Lebanon from 1978 to 2000 and South Africa's occupation of a buffer zone in Angola from 1981 to 1988 were both claimed to be justified as self-defence and both repeatedly and universally condemned as not necessary or proportionate self-defence" (Gray, C. *International Law and the Use of Force*, 2000, p 108). The Security Council called on both Israel and South Africa to withdraw in respectively Security Council Resolutions 425 and 545.

38. Some commentators have, within the context of the principles of necessity and proportionality, attempted to advance a so-called "accumulation of events" or "pin-prick" theory of armed attack. This is done in cases such as the present in order to justify an otherwise disproportionate response to a series of attacks. It is submitted, however, that this theory does not enjoy any widespread support either in the practice or in the *opinio iuris* of states. Also, necessity and proportionality remain to be assessed on the basis of the facts of the specific case, and as indicated, in this case the impact of the construction of the Separation Wall remains out of all proportion to its objective, a factor that cannot be discounted by means of the invocation of this theory.

39. From the above it follows that the construction of the Separation Wall by Israel cannot be justified on the basis of the right to self-defence contained in Article 51 of the Charter. Article 51 is not applicable in the present case for the following reasons:

- the suicide bomb attacks perpetrated against Israel by lone Palestinian suicide bombers, though reprehensible and causing the deaths of many innocent civilians, do not meet the threshold set by international law to be defined as armed attacks justifying a response in terms of the right to self-defence contained in Article 51;
- Article 51 defines the right to self-defence as a temporary right, to be extinguished once the Security Council has taken appropriate measures. Despite Israeli assurances that it is a temporary security measure, the facts on the ground, as contained in the Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/13 and the very permanence of the Separation Wall suggest the opposite. Moreover, it is not a measure that is connected in any way to Security Council action, and is being erected in contravention of a clear demand by the United Nations for Israel "to stop and reverse the construction of the wall in the Occupied Palestinian Territory" (GA Resolution ES-10/13);
- In any case, justification of this measure on the basis of the right to self-defence contained in Article 51 is inappropriate, unsound and based upon the wrong assumption. The right to self-defence is triggered by an armed attack and consequently "implies resort to counter-force: it comes in reaction to the use of force by the other party" (Dinstein, Y. *War, Aggression and Self-defence*, 2001, p 167). Despite the unacceptable nature of actions taken in constructing the Separation Wall, like the requisitioning of land and the negative humanitarian and socio-economic impact it will have on the Palestinians, the construction of the Separation Wall does not amount to the use of counter-force, rendering any attempt to justify it on the basis of self-defence in terms of Article 51, inapplicable.

40. As regards the argument that the construction of the Separation Wall is being justified by Security Council Resolutions 1368 (2001) and 1373 (2001), adopted

within the context of the attacks of 11 September 2001 on the territory of the United States of America, it is submitted that the construction of the Separation Wall by Israel goes far beyond what was contemplated by these Resolutions.

41. These Resolutions, in general terms in the preambles, state that any act of international terrorism is to be regarded as a threat to international peace and security. Resolution 1373, adopted under Chapter VII of the Charter, then provides in the operative paragraphs *inter alia* a decision that Member States shall take the necessary steps to prevent the commission of terrorist acts (paragrah 2(b)).

42. It is submitted, however, that these provisions are couched in too general terms to justify a specific act like the construction of the Separation Wall, which *per se* violates principles of international law. In this regard it must be pointed out that the provision authorising Member States to take the necessary steps to prevent the commission of terrorist acts is part of a number of specified anti-terrorist measures, one (paragraph 2 (g)) which specifically aims at restraining the movement of terrorists or terrorist groups: "Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents..." It is not conceivable to interpret the general provision contained in paragraph 2(b) as usurping these specific measures for movement control of terrorists and terrorist groups and justify a measure which will, as made clear in the Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/13 (A/ES-10/248 dated 3 December 2003, seriously impair the movement of innocent civilians as well as their access to farmland, workplaces and essential social services. This derogates from the general legal principle *generalibus specialibus non derogat*.

43. Notwithstanding the right of Israel to protect its citizens against attacks and the serious concern for the prevention of terrorist attacks internationally, it should be noted that the philosophy behind the international fight against terrorism remains that this should be done within the boundaries of international law. For example Article 19 of the widely ratified International Convention for the Suppression of Terrorist Bombings states that: "nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law..".

44. It is therefore submitted, also within the context of the other arguments raised, that the general provisions of the two Security Council Resolutions should be read as subordinate to its specific provisions, especially paragraph 2(g) of Resolution 1373 and that nothing in these Resolutions excludes the applicability of international law to the Occupied Palestinian Territory, including in and around East Jerusalem or authorises actions in contravention of international law.

Humanitarian Law

45. It is trite law that international humanitarian law applies from the commencement of any conflict, which in the case of the Palestinian /Israeli conflict, finds applicability since the 1967 war, until a general peace agreement has been reached. Therefore in the case of the Occupied Palestinian Territory, Israel, as the Occupying Power, is bound to comply with the Hague Regulations of 1907 and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949, which together establish the legal regime of belligerent occupation. These Conventions are accepted to be customary international law and are thus binding on all states, including Israel, who is a High Contracting Party of the four Geneva Conventions of 1949. According to Article 27 of the Vienna Convention on the Law of Treaties of 1969, a party may not invoke the provisions of its internal law as justification for its failure to perform its obligations under a treaty. If a new law or modification to existing law is needed to carry out the obligations imposed by a treaty, the state concerned should ensure that this is done by the time the treaty enters into force. In international law therefore, a state cannot plead that it is waiting for its parliament to legislate. This in effect means that the Israeli Government's argument that although it has ratified the Four Geneva Conventions it has not yet incorporated them into domestic legislation and therefore is not bound to enforce them, is in light of the provisions of the 1969 Convention on the Law of Treaties, which are customary international law and therefor binding all states, without legal basis.

46. Articles 47 to 78 of the Fourth Geneva Convention of 1949, which are specially devoted to occupied territories, are applicable in this case. One of the fundamental rules is set forth in Article 47 of the Fourth Geneva Convention, under which the rights of persons living in occupied territories are fully protected by

international law. The Occupying Power, in this case Israel, may not alter their legal situation by either a unilateral act or annexation of the territory, for they remain protected persons.

47. The Separation Wall that has been and continues to be built by the Government of Israel, which results in the *de facto* incorporation of the parts of the Occupied Palestinian Territory, including in and around East Jerusalem into Israel, is in direct contravention of Article 47 of the Fourth Geneva Convention, and also violate various United Nations Resolutions alluded to before that called for the withdrawal of Israeli armed forces from the Occupied Palestinian Territory.

48. The Separation Wall, as described in detail in the report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Occupied Palestinian Territories (E/CN.4/2004/6), has resulted in vast expropriation of land and has destroyed homes, shops, schools, water networks and agricultural land belonging to the Palestinians. These acts are expressly prohibited by Article 53 of the Fourth Geneva Convention which states that "any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations".

49. The justification put forth by the Government of Israel for such a contravention of the aforementioned Article 53 and the construction of the Separation Wall itself, is that the purpose of the Separation Wall is for the security of Israel and such destruction or seizure of Palestinian property is demanded by the necessities of war, as permitted by Article 23 of the Hague Regulations of 1907. It must be made clear that the concept of "military necessity" does not release a state from the obligations of complying with international humanitarian law. The Geneva Conventions and Additional Protocols have already struck the balance between the demands made on the law of the conduct of war and the requirements of humanity.

50. In view of the aforementioned, a number of factors on the ground should be considered in order to evaluate in terms of international law, international

humanitarian law and international human rights law of the justification made by the Israeli Government for their actions, namely:

- (a) The construction of the Separation Wall within Palestinian territory including in and around East Jerusalem is in direct conflict with international law that provides that the territory may not be annexed in any war, including a war of self-defence;
- (b) The Separation Wall incorporates most of the illegal Israeli settlements, which still form the subject matter of negotiations between Israel and Palestine, into the Israel side. These Israeli settlements are illegal not only because they represent an attempt to acquire territory by force, but also because it contravenes Article 49 of the Fourth Geneva Convention which states clearly that the "Occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies";
- (c) The Separation Wall, according to the report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Occupied Palestinian Territories (E/CN.4/2004/6) and the Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/13 (A/ES-10/248 dated 3 December 2003), has resulted in closed areas where a permit system for Palestinians living and/or working in the area is operating and creates enclaves where Palestinian villages are cut off from basic services such as health services, schools, water resources and electricity networks, amongst others. These inhumane conditions created by the construction of the Separation Wall are forcing some Palestinians to leave their homes in the affected areas and thereby creating a generation of internally displaced persons. The consequences of the Separation Wall in this instance must be judged based on the principle of proportionality as recognized by international humanitarian law. This also constitutes human rights violations that must be judged against the International Covenant on Civil and Political Rights, and the International Covenant on Social, Economic and Cultural Rights both of which Israel has signed;

- (d) There have been various United Nations Resolutions condemning the annexation of East Jerusalem, as well as those that call for the return of its status before its occupation. East Jerusalem consequently is an occupied region, an area where international humanitarian law must apply.

51. It is an established principle of international law that the conduct of the military administration in only occupied area including the Occupied Palestinian Territory including in and around East Jerusalem is to be judged by the standards of international law. Security measures must be taken in accordance with international humanitarian law, and they must allow for a quick return to normal civilian life. The permanent nature of the Separation Wall negates all the aforesaid.

52. The right of the Israel Government to take security precautions is not disputed. However, this right is not exercised in a vacuum. There are rules, principles and limitations accorded by international humanitarian law as outlined above, on how and to what extent this right can and must be exercised.

Human rights

53. The origins of modern international human rights law are to be found in the Charter of the United Nations. One of the purposes of the United Nations, as expressed in Article 1(3) of the Charter, is to promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. This theme is also taken up in Articles 13, 55 and 56. Article 55(c) provides that the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all, while Article 56 obliges Member States to take action to achieve these purposes.

54. The first international instrument to codify fundamental human rights was the *Universal Declaration of Human Rights* of 1948, and despite being a Resolution of the General Assembly and of recommendatory nature, the rights enshrined therein are now accepted as customary international law, while some have also obtained the status of *ius cogens* norms of international law (Dugard, J. *International Law: A South African Perspective*, 2000, p 241). The effect hereof is that the provisions bind all

states. Treaty effect has also been given to the Universal Declaration in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Besides obtaining a universal character, human rights are also now accepted to be "inalienable and inviolable rights of all members of the human family" (Proclamation of Teheran, 1968).

55. It is therefore not correct to argue that the residents of the Occupied Palestinian Territory are excluded from the protection accorded by the major human rights treaties (and, by implication, of the specific human rights which have crystallised into principles of customary international law), on account of the absence of a Government-citizen relationship. This argument is seriously flawed. It denies the universal nature human rights have attained, as well as the fact that the *locus* of human rights vests in the individual and not in the Government. It stands to reason that even where the Government-citizen relationship is replaced with an Occupying Power-individual relationship, this unilateral act in which the individual played no role, cannot spirit away the protection afforded by international human rights law: the individual remains the beneficiary of at least a core of human rights and the protection so afforded. The contention in paragraph's 2-4 of the "Summary Legal Position of the Government of Israel" (Annex I to the Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/13 (A/ES-10/248 dated 3 December 2003) which appears to state that neither the protection afforded by international humanitarian law nor by that contained in the International Covenant of Civil and Political Rights are available to the residents of Occupied Palestinian Territory: a position that creates a legal *lacuna* with regard to the Occupied Palestinian Territory where there is no protection of any kind of individuals *vis-à-vis* the Occupying Power, is totally untenable.

56. With regard to specific human rights that are affected by the construction of the Separation Wall, both the Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/13 dated 24 November 2003 as well as the Report of the Special Rapporteur of the Commission on Human Rights, on the situation of human rights in the Palestinian territories occupied by Israel since 1967 refers to the expropriation of land, the destruction of fruit and olive trees, the

destruction of property, the infringement of freedom of movement, infringements of the rights to education, work, an adequate standard of living and health care and treatment in general of residents in an inhumane way contrary to the obligations contained in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Fourth Geneva Convention.

57. While these actions are *per se* in violation of the most basic principles of international human rights law, the impact thereof is being compounded by the fact that these measures, and the very fact of the construction of the Separation Wall, can never be justified by military necessity and are disproportionate to the threat they are directed towards.

V. CONCLUSION

In summary:

58. It is our contention that the construction of the Separation Wall is illegal, and regardless under which pretext it is being constructed, the practical consequence of the existing and planned Separation Wall is that it is being constructed on Palestinian Occupied Territory, including in and around East Jerusalem. This action, which is clearly illegal in terms of international law, represents the *de facto* annexation of parts of that territory. This must be viewed as one of the most serious consequences of the construction of the Separation Wall.

59. Although Israel has legitimate security concerns, it is submitted that the construction of the Separation Wall is a disproportionate and unnecessary measure which does not represent a legitimate security measure, as it stretches this concept beyond all measure, while also violating a number of basic principles of international law, such as the prohibition on the acquisition of territory by force, the right of the Palestinian people to self-determination and the rights that the Palestinian people are accorded in terms of international humanitarian law and international human rights law.

60. Furthermore, as this Separation Wall will in effect become a *de facto* border between Israel and Palestine, it will, instead of bringing security to Israel, undermine international attempts to bring about a comprehensive, just and lasting peace in the region, based on the two-state solution.

61. It is therefor submitted that the Court should find that the construction of the Wall is illegal in terms of international law.

APahad
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**MR AZIZ GOOLAM HOOSEIN PAHAD
DEPUTY MINISTER OF FOREIGN AFFAIRS**

**FOR AND ON BEHALF OF THE GOVERNMENT
OF THE REPUBLIC OF SOUTH AFRICA**

DATE: *29/1/04*
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