

WRITTEN STATEMENT OF ITALY

[Translation]

Observations by the Government of the Italian Republic, represented by Mr. Ivo M. Braguglia, Head of Diplomatic Litigation and Treaties, in his capacity as Agent, having elected domicile at the Embassy of Italy in The Hague concerning the request for an advisory opinion on the question: “*Legal consequences of the construction of a wall in the Occupied Palestinian Territory*” within the meaning of Article 66, paragraph 2, of the Statute of the Court and of the Court’s Order of 19 December 2003.

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The International Court of Justice, in its Order of 19 December 2003, invited States to furnish information on the request for an advisory opinion related to the case concerning the “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”.

The decision to request the International Court of Justice, pursuant to Article 96 of the Charter of the United Nations, to give an urgent advisory opinion was made by the General Assembly under Article 65 of the Statute of the Court. The request for an opinion relates to the following question:

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

1. The Government is firmly of the opinion that the Court should decline to reply to the question laid before it by the General Assembly resolution of 8 December 2003 concerning the 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.

In the present circumstances, the Court should exercise its discretionary power — clearly established in Article 65, paragraph 1, of its Statute — in order to refrain from addressing the question raised in the said resolution.

In the current situation in the Middle East, the main problem consists in achieving a negotiated solution based on the “road map” drawn up by the Quartet composed of the United Nations, the European Union, the United States of America and the Russian Federation and endorsed by the United Nations Security Council in resolution 1515 (2003) adopted unanimously on 19 November 2003, a resolution that views the “road map” as a means of realizing the “vision” of a region where two States, Israel and Palestine, live side by side within secure and recognized borders.

This resolution is the last in a long series dating back to seminal resolution 242 (1967).

2. At the meeting of the emergency special session (1013), convened under the “Uniting for peace” resolution, that was held on 24 April 1997 and at the resumed session on 20 October 2003, there was virtually no discussion of the draft resolution requesting an advisory opinion from the

Court, except for a few remarks by the delegate of Palestine and the delegates of Malaysia, Iran and Cuba. As all speakers took the line that the construction of the wall was illegal, there was no reason to request the Court's opinion on a matter that was already taken for granted. Moreover, this view was endorsed by 144 States, while only four countries, including Israel, opposed it. It is therefore logical to ask why the resolution concerning the request to the International Court of Justice received 90 votes in favour and eight against and gave rise to no fewer than 74 abstentions by the most diverse countries — not only the European Union and associated countries, all represented by Italy which then held the presidency of the European Union, but also countries of Central and South America, Canada, Japan, New Zealand and the Philippines, Korea, Singapore, many African and Pacific countries, Switzerland and even Russia.

This expression of opinion by countries with totally different legal systems reflects, in our view, the conviction that it is utterly pointless, in the light of the functions assigned to the General Assembly, to request a legal opinion.

It has already been acknowledged that the wall that is being built “in the Occupied Palestinian Territory, including in and around East Jerusalem, . . .” departs from “the armistice line of 1949 and is in contradiction to relevant provisions of international law” (General Assembly resolution ES-10/13). Requesting a legal opinion will in no way help the parties to relaunch the dialogue that is needed to implement the “road map”. Yet implementation of the “road map” is a priority.

One need only mention, for example, the opinion of the Russian Federation, a State that is certainly not disposed to back Israel's initiatives, and compare it to the opinion of the United States of America, which supports Israel and for that reason exercised the right of veto in the Security Council.

The two converge in rejecting an opinion by the Court, which can only serve to politicize the Court's work without moving the situation one inch forward towards a mutually agreed solution.

3. It is interesting to examine why the Court has been given the power to decline to give an advisory opinion (Art. 65, para. 1).

This power already existed in the days of the Permanent Court of International Justice which exercised it, at the very beginning of its work, in the *Statute of Eastern Carelia* case. In that case, the Court observed that “[a]nswering the question would be substantially equivalent to deciding the dispute between the parties”, which the Court was unable to do because one of the parties, Russia, was not a Member of the League of Nations and had expressly rejected the Court's intervention. It was impossible for the Court to act under those circumstances.

This early stance was not reiterated because the Court has always held that, as an organ of the United Nations, it should, as far as possible, assist in shedding light on any questions that are being discussed (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*): ***“The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself ‘an organ of the United Nations’, represents its participation in the activities of the Organization, and, in principle, should not be refused.”***

But the Court has held to the view that Article 65, paragraph 1, gives it the power to decline a request for an advisory opinion. This was the line it took in the *Interpretation of Peace Treaties* case cited above: ***“Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request . . . the Court possesses a large amount of discretion in the matter.”***

The Court has further stated that it could decide not to give an advisory opinion because of “compelling reasons” inherent in the question raised on the ground that its refusal could be viewed as beneficial for the requesting organ and the well-being of the Organization as a whole (*Applicability of Article VI, Section 22, of the Convention of the Privileges and Immunities of the United Nations* — 15 December 1989).

4. It should therefore be borne in mind that the power to decline to give an advisory opinion undoubtedly exists for the Court and that it may, if necessary, be exercised. The Italian Government considers that this is a valid point in the present case, since all circumstances warranting a refusal to give an opinion exist.

One cannot, for example, disregard the fact that the dispute underlying the building of the wall relates to a territory whose fate has not yet been determined.

There is some difficulty in identifying the parties to the dispute in respect of which the Court should give an opinion because one of them is still in an inchoate state.

Under these circumstances, delivering an advisory opinion would widen the gulf between Israel and the Palestinian entity, would congeal the situation when what is needed is flexibility and would clearly have the opposite effect to that needed to solve the real problem.

The question is and remains essentially political, and it consists in establishing clear rules of conduct for the parties with a view to resolving, once and for all, the different issues that exist (including the issue of frontiers and that of Israeli settlements in various parts of the territories in question) and then — and only then — determining the frontiers of the territory by consenting to the establishment of the Palestinian State.

It follows that it is certainly not for the International Court of Justice to address the question of the wall, which has already been settled by General Assembly resolution ES-10/13.

5. For these reasons, and for others that have been raised by friendly and allied countries, the Italian Government is firmly of the view that the Court should refrain from giving an advisory opinion.

Rome/The Hague, 29 January 2004

(Signed) Ivo M. BRAGUGLIA.
Agent of the Italian Government
