DISSENTING OPINION OF JUDGE BUERGENTHAL

1. I have voted against the instant Order because I believe that the Court's decision is wrong as a matter of legal principle.

2. Israel challenges Judge Elaraby's participation in these proceedings on the ground that his previous professional involvement and personal statements on matters which go to the substance of the question before the Court in this advisory opinion request require that he not participate in these proceedings.

3. As far as Judge Elaraby's professional activities as diplomatic representative of his country and its legal adviser are concerned, the Court rejects Israel's objection by concluding that these activities, having been performed many years before the question of the construction of the wall now submitted to the Court first arose, do not fall within the activities contemplated by Article 17, paragraph 2, of the Statute to justify that he be precluded from participation in the case.

4. With regard to the newspaper interview that Judge Elaraby gave two months before his election to this Court at a time when he was no longer his country's diplomatic representative, the Court finds no basis for precluding Judge Elaraby's participation in these proceedings, because Judge Elaraby "expressed no opinion on the question put in the present case".

5. Israel seeks Judge Elaraby's disqualification on the ground, *inter alia*, that the views expressed by Judge Elaraby in the interview bear directly on issues that will have to be addressed in the advisory opinion request and that, given their nature, they create an appearance of bias incompatible with the fair administration of justice.

6. In principle, I share the Court's opinion that Judge Elaraby's prior activities, performed in the discharge of his diplomatic and governmental functions, do not fall within the scope of Article 17, paragraph 2, of the Statute of the Court so as to prevent his participation in these proceedings. This conclusion can be justified on the ground that these views were not Judge Elaraby's personal views, but those of his Government whose instructions he was executing. The Court has in the past taken a similar position in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (*I.C.J. Reports 1971,* p. 18, para. 9). Although I can imagine circumstances where this general rule will not withstand closer scrutiny, I agree with the Court in applying it to the instant case.

7. I part company with the Court's conclusions, however, with regard to the interview Judge Elaraby gave in August of 2001, two months before his election to the Court, when he was no longer an official of his Government and hence spoke in his personal capacity. See *Al-Ahram Weekly Online*, 16-22 August 2001, Issue No. 547.

8. That interview reads in part as follows:

> "Today, he [Judge Elaraby] is concerned about a tendency to play into Israel's hands, and thus to marginalise the crux of the Arab Israeli conflict, which is the illegitimate occupation of territory. 'It has long been very clear that Israel, to gain time, has consistently followed the policy known as "establishing new facts". This time factor, with respect to any country, is a tactical element [in negotiations], but for the Israelis it is a strategy.' New facts and new problems are created on the ground in this manner, he explains, and the older, essential problems are forgotten. Grave violations of humanitarian law ensue: the atrocities perpetrated on Palestinian civilian populations, for instance, but also such acts as the recent occupation of the PNA's headquarters. 'I hate to say it', Elaraby continues, 'but you do not see the Palestinians, or any other Arab country today, presenting the issue thus when addressing the international community: Israel is occupying Palestinian territory, and the occupation itself is against international law. Israel has twice, in writing, with the whole world as witness, committed itself to the implementation of UN Security Council resolution 242 on the occupied territories: once at Camp David with Egypt [in 1978], and once in Oslo with the Palestinians [in 1993].' Very recently, he adds, the Sharon government launched a new strategy, wreaking confusion and gaining time by describing territories Israel has already recognised as occupied as 'disputed'. All these, explains Elaraby, 'are attempts to confuse the issues and complicate any serious attempt to get Israel out of the occupied territories. You can negotiate security, which will be mutual for both parties, but you cannot negotiate whether to leave or not.'"

9. Article 17, paragraph 2, of the Statute of the Court reads as follows:

> "2. No Member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity."

10. It is clear, of course, that the language of Article 17, paragraph 2,

does not apply in so many words to the views Judge Elaraby expressed in the above interview. That does not mean, however, that this provision sets out the exclusive basis for the disqualification of a judge of this Court. It refers to what would generally be considered to be the most egregious violations of judicial ethics were a judge falling into one of the categories therein enumerated to participate in a case. At the same time, Article 17, paragraph 2, reflects much broader conceptions of justice and fairness that must be observed by courts of law than this Court appears to acknowledge. Judicial ethics are not matters strictly of hard and fast rules — I doubt that they can ever be exhaustively defined — they are matters of perception and of sensibility to appearances that courts must continuously keep in mind to preserve their legitimacy.

11. A court of law must be free and, in my opinion, is required to consider whether one of its judges has expressed views or taken positions that create the impression that he will not be able to consider the issues raised in a case or advisory opinion in a fair and impartial manner, that is, that he may be deemed to have prejudged one or more of the issues bearing on the subject-matter of the dispute before the court. That is what is meant by the dictum that the fair and proper administration of justice requires that justice not only be done, but that it also be seen to be done. In my view, all courts of law must be guided by this principle, whether or not their statutes or other constitutive documents expressly require them to do so. That power and obligation is implicit in the very concept of a court of law charged with the fair and impartial administration of justice. To read them out of the reach of Article 17, paragraph 2, is neither legally justified nor is it wise judicial policy.

12. In paragraph 8 of this Order, the Court declares that "whereas in the newspaper interview of August 2001, Judge Elaraby expressed no opinion on the question put in the present case; whereas consequently Judge Elaraby could not be regarded as having 'previously taken part' in the case in any capacity".

13. What we have here is the most formalistic and narrow construction of Article 17, paragraph 2, imaginable, and one that is unwarranted on the facts of this case. It is technically true, of course, that Judge Elaraby did not express an opinion on the specific question that has been submitted to the Court by the General Assembly of the United Nations. But it is equally true that this question cannot be examined by the Court without taking account of the context of the Israeli/Palestinian conflict and the arguments that will have to be advanced by the interested parties in examining the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory". Many of these arguments will turn on the factual validity and credibility of assertions bearing directly on the specific question referred to the Court in this advisory opinion request. And when it comes to the validity and credibility of these arguments,

what Judge Elaraby has to say in the part of the interview I quoted above creates an appearance of bias that in my opinion requires the Court to preclude Judge Elaraby's participation in these proceedings.

14. What I consider important in reaching the above conclusion is the appearance of bias. That, in my opinion, is what Article 17, paragraph 2, properly interpreted, is all about and what judicial ethics are all about. And that is why I dissent from this Order, even though I have no doubts whatsoever about the personal integrity of Judge Elaraby for whom I have the highest regard, not only as a valued colleague but also a good friend.

(Signed) Thomas BUERGENTHAL.