CR 2004/2

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2004

Public sitting

held on Monday 23 February 2004, at 3 p.m., at the Peace Palace,

President Shi presiding,

***on the* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for advisory opinion submitted by the General Assembly of the United Nations)**

VERBATIM RECORD

ANNÉE 2004

Audience publique

tenue le lundi 23 février 2004, à 15 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

***sur les* Conséquences juridiques de l'édification d'un mur dans le Territoire palestinien occupé (Demande d'avis consultatif soumise par l'Assemblée générale des Nations Unies)**

COMPTE RENDU

Present:	President	Shi
	Vice-President	Ranjeva
	Judges	Guillaume
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
		Owada
		Simma
		Tomka
	Registrar	Couvreur

Présents : M. Shi, président
M. Ranjeva, vice-président
MM. Guillaume
Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek
Al-Khasawneh
Buergenthal
Elaraby
Owada
Simma
Tomka, juges

M. Couvreur, greffier

Palestine is represented by:

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Mr. Georges Abi-Saab, Professor of International Law, Graduate Institute of International Studies, Geneva, Member of the Institute of International Law, Counsel and Advocate;

Mr. James Crawford, Whewell Professor of International Law, University of Cambridge;

Mr. Vaughan Lowe, Chichele Professor of International Law, University of Oxford, Counsel and Advocate;

Mr. Jean Salmon, Professor Emeritus of International Law, Université libre de Bruxelles, Member of the Institute of International Law, Counsel and Advocate;

Mr. Peter Bekker, Member of the Bar of New York, Senior Counsel;

Mr. Anis Kassim, Member of the Bar of the Hashemite Kingdom of Jordan, Senior Counsel;

Mr. Raja Aziz Shehadeh, Barrister at law, Ramallah, Palestine, Senior Counsel;

Ms Stephanie Koury, Member, Negotiations Support Unit, Counsel;

Mr. Jarat Chopra, Member, Negotiations Support Unit, Professor of International Law, Brown University, Counsel;

Mr. Rami Shehadeh, Member, Negotiations Support Unit, Counsel;

H.E. Mr. Yousef Habbab, Ambassador, General Delegate of Palestine to the Netherlands, Adviser;

Mr. Muin Shreim, Counsellor, Permanent Observer Mission of Palestine to the United Nations, Adviser;

Ms Feda Abdelhady Nasser, Counsellor, Permanent Observer Mission of Palestine to the United Nations, Adviser;

Mr. Michael Tarazi, Member, Negotiations Support Unit, Adviser/Media Co-ordinator;

Ms Kylie Evans, Lauterpacht Research Centre for International Law, University of Cambridge;

Mr. François Dubuisson, Centre de droit international de l'Université libre de Bruxelles;

Mr. Markus W. Gehring, Yale University;

Mr. Jafer Shadid, delegation of Palestine in the Netherlands.

The Republic of South Africa is represented by:

H.E. Mr. Aziz Pahad, Deputy Minister for Foreign Affairs and Leader of the Delegation;

H.E. Ms P. Jana, Ambassador of the Republic of South Africa to the Kingdom of the Netherlands and diplomatic representative to the International Court of Justice;

H.E. Mr. D. S. Kumalo, Permanent Representative of the Republic of South Africa to the United Nations;

Mr. M. R. W. Madlanga, S.C.;

Ms J. G. S. de Wet, Acting Chief State Law Adviser (International Law), Department of Foreign Affairs;

Mr. A. Stemmet, Senior State Law Adviser (International Law) Department of Foreign Affairs;

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The People's Democratic Republic of Algeria is represented by:

H.E. Mr. Noureddine Djoudi, Ambassador of Algeria to the Kingdom of the Netherlands;

Mr. Ahmed Laraba, Professor of International Law;

Mr. Mohamed Habchi, Member of the Constitutional Council;

Mr. Abdelkader Cherbal, Member of the Constitutional Council;

Mr. Merzak Bedjaoui, Director of Legal Affairs, Ministry of Foreign Affairs.

The Kingdom of Saudi Arabia is represented by:

H.E. Mr. Fawzi A. Shubokshi, Ambassador and Permanent Representative of the Kingdom of Saudi Arabia to the United Nations in New York, Head of Delegation;

Mr. Hazim Karakotly, Minister plenipotentiary, Ministry of Foreign Affairs in Riyadh;

Mr. Sameer Aggad, First Secretary in the Ministry of Foreign Affairs in Riyadh;

Mr. Saud Alshawaf, Legal Counsellor;

Mr. Ziyad Alsudairi, Legal Counsellor;

Mr. Muhammed Omar Al-Madani, Professor Emeritus of International Law, Legal Counsellor;

Mr. Khaled Althubaiti, Legal Counsellor;

Mr. David Colson, Legal Counsellor;

Mr. Brian Vohrer, Assistant Legal Counsellor.

The People's Republic of Bangladesh is represented by:

H.E. Mr. Liaquat Ali Choudhury, Ambassador of Bangladesh to the Netherlands;

Ms Naureen Ahsan, First Secretary at the Embassy of Bangladesh in The Hague.

Belize is represented by:

H.E. Mr. Bassam Freiha, Permanent Representative of Belize to Unesco;

Ms Mireille Cailbault.

The Republic of Cuba is represented by:

H.E. Mr. Abelardo Moreno Fernández, Deputy Minister for Foreign Affairs;

H.E. Mr. Elio Rodríguez Perdomo, Ambassador Extraordinary and Plenipotentiary to the Kingdom of the Netherlands;

Mr. Enrique Prieto López, Minister Counsellor at the Embassy of Cuba in the Netherlands;

Mrs. Soraya E. Alvarez Núñez, Official of the Multilateral Affairs Division, Ministry of Foreign Affairs.

The Republic of Indonesia is represented by:

H.E. Mr. Mohammad Jusuf, Ambassador the Republic of Indonesia to the Kingdom of the Netherlands, Head of Delegation;

Ms Nuni Turnijati Djoko, Minister, Deputy Chief of Mission, member;

Mr. Mulya Wirana, Counsellor (Political Affairs), member;

Col. A Subandi, Defence Attaché, member;

Mrs. Kusuma N. Lubis, Counsellor (Information Affairs), member;

Mr. Sulaiman Syarif, First Secretary (Political Affairs), member;

Mr. Daniel T. S. Simanjuntak, Third Secretary (Political Affairs), member.

The Hashemite Kingdom of Jordan is represented by:

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H.E. Mr. Mazen Armouti, Ambassador of the Hashemite Kingdom of Jordan to the Kingdom of the Netherlands;

Sir Arthur Watts, Senior Legal Adviser to the Government of the Hashemite Kingdom of Jordan;

Mr. Guy Goodwin-Gill, Legal Adviser to the Government of the Hashemite Kingdom of Jordan;

Mr. Nigel Ashton, Historical Adviser to the Government of the Hashemite Kingdom of Jordan;

Mr. Mahmoud Al-Hmoud, Legal Adviser;

Mr. Bisher Al Khasawneh, Legal Adviser;

Mr. Samer Naber, Legal Adviser;

Mr. Ashraf Zeitoon, Political Adviser;

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The Republic of Madagascar is represented by:

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Malaysia is represented by:

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Datin Seri Sharifah Aziah Syed Zainal Abidin, wife of the Minister for Foreign Affairs;

H.E. Tan Sri Ahmad Fuzi Abdul Razak, Secretary-General, Ministry of Foreign Affairs, Malaysia;

H.E. Dato' Rastam Mohd Isa, Permanent Representative of Malaysia to the United Nations;

H.E. Dato' Noor Farida Ariffin, Ambassador of Malaysia to the Kingdom of the Netherlands;

Mr. John Louis O'hara, Head, International Affairs Division, Attorney-General's Chambers;

Professor Nico Schrijver, Professor of International Law, Free University, Amsterdam and Institute of Social Studies, The Hague; Member of the Permanent Court of Arbitration;

Professor Dr. Marcelo G. Kohen, Professor of International Law, The Graduate Institute of International Studies, Geneva;

Mr. Ku Jaafar Ku Shaari, Undersecretary, OIC Division, Ministry of Foreign Affairs;

Mr. Hasnudin Hamzah, Special Officer to the Foreign Minister;

Mr. Zulkifli Adnan, Counsellor, Embassy of Malaysia in the Netherlands;

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Mr. Cheikh Tidiane Thiam, Director of Legal and Consular Affairs, Ministry of Foreign Affairs.

The Republic of the Sudan is represented by:

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Mr. Ali Al Sadig, Deputy Head of Mission at the Embassy of the Sudan in the Netherlands.

The League of Arab States is represented by:

H.E. Mr. Amre Moussa, Secretary General of the League of Arab States;

Mr. Michael Bothe, Professor of Law, Head of the Legal Team;

Ms Vera Gowlland-Debbas, Professor of Law;

Mr. Yehia El Gamal, Legal Adviser;

Mr. Salah Amer, Legal Adviser;

Mr. Mohammed Gomaa, Legal Adviser;

Mr. Mohamed Redouane Benkhadra, Legal Adviser of the Secretary General, Head of the Legal Department, League of Arab States.

The Organization of the Islamic Conference is represented by:

H.E. Mr. Abdelouahed Belkeziz, Secretary General of the Organization of the Islamic Conference;

Ms Monique Chemillier-Gendreau, Professor of Public Law, University of Paris VII-Denis Diderot, as Counsel;

Mr. Willy Jackson, *chargé de cours*, University of Paris VII-Denis Diderot, as Assistant to Counsel;

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La Palestine est représentée par :

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M. James Crawford, professeur de droit international à l'Université de Cambridge (chaire Whewell), conseil et avocat;

M. Vaughan Lowe, professeur de droit international à l'Université d'Oxford (chaire Chichele), conseil et avocat ;

M. Jean Salmon, professeur émérite de droit international à l'Université libre de Bruxelles, membre de l'Institut de droit international, conseil et avocat;

M. Peter Bekker, membre du barreau de New York, conseil principal;

M. Anis Kassim, membre du barreau du Royaume hachémite de Jordanie, conseil principal;

M. Raja Aziz Shehadeh, *Barrister at Law* à Ramallah, Palestine, conseil principal;

Mme Stephanie Koury, membre du groupe d'appui aux négociations, conseil;

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M. Markus W. Gehring, Université de Yale;

M. Jafer Shadid, délégation de la Palestine aux Pays-Bas.

La République sud-africaine est représentée par :

S. Exc. M. Aziz Pahad, vice-ministre des affaires étrangères, chef de la délégation;

S. Exc. Mme P. Jana, ambassadeur de la République sud-africaine auprès du Royaume des Pays-Bas;

S. Exc. M. D. S. Kumalo, représentant permanent de la République sud-africaine auprès de l'Organisation des Nations Unies;

M. M.R.W. Madlanga, juge;

Mme J. G.S. de Wet, conseiller juridique en chef *a.i.* (droit international), ministère des affaires étrangères;

M. A. Stemmet, conseiller juridique principal (droit international), ministère des affaires étrangères;

Mme T. Lujiza, conseiller juridique (droit international), ministère des affaires étrangères;

M. I. Mogotsi, directeur, direction du Moyen-Orient, ministère des affaires étrangères.

La République algérienne démocratique et populaire est représentée par :

S. Exc. M. Noureddine Djoudi, ambassadeur d'Algérie auprès du Royaume des Pays-Bas;

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M. Mohamed Habchi, membre du conseil constitutionnel;

M. Abdelkader Cherbal, membre du conseil constitutionnel;

M. Merzak Bedjaoui, directeur des affaires juridiques au ministère des affaires étrangères.

Le Royaume d'Arabie saoudite est représenté par :

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M. Hazim Karakotly, ministre plénipotentiaire au ministère des affaires étrangères à Riyad;

M. Sameer Aggad, premier secrétaire au ministère des affaires étrangères à Riyad;

M. Saud Alshawaf, conseiller juridique;

M. Ziyad Alsudairi, conseiller juridique;

M. Muhammed Omar Al-Madani, professeur émérite de droit international, conseiller juridique;

M. Khaled Althubaiti, conseiller juridique;

M. David Colson, conseiller juridique;

M. Brian Vohrer, conseiller juridique adjoint.

La République populaire du Bangladesh est représentée par :

S. Exc. M. Liaquat Ali Choudhury, ambassadeur du Bangladesh auprès du Royaume des Pays-Bas;

Mme Naureen Ahsan, premier secrétaire à l'ambassade du Bangladesh auprès du Royaume des Pays-Bas.

Le Belize est représenté par :

S. Exc. M. Bassam Freiha, ambassadeur délégué permanent du Belize auprès de l'Unesco;

Mme Mireille Cailbault.

La République de Cuba est représentée par :

S. Exc. M. Abelardo Moreno Fernández, vice-ministre des affaires étrangères;

S. Exc. M. Elio Rodríguez Perdomo, ambassadeur extraordinaire et plénipotentiaire auprès du Royaume des Pays-Bas;

M. Enrique Prieto López, ministre conseiller à l'ambassade de Cuba aux Pays-Bas;

Mme Soraya E. Alvarez Núñez, fonctionnaire à la direction des affaires multilatérales du ministère des affaires étrangères.

La République d'Indonésie est représentée par :

S. Exc. M. Mohammad Jusuf, ambassadeur de la République d'Indonésie auprès du Royaume des Pays-Bas, chef de la délégation;

Mme Nuni Turnijati Djoko, ministre, chef de mission adjoint, délégué;

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Le colonel A. Subandi, attaché de défense, délégué;

Mme Kusuma N. Lubis, conseiller (affaires de presse), délégué;

M. Sulaiman Syarif, premier secrétaire (affaires politiques), délégué;

M. Daniel T. S. Simanjuntak, troisième secrétaire (affaires politiques), délégué.

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S. Exc. M. Mazen Armouti, ambassadeur du Royaume hachémite de Jordanie aux du Royaume des Pays-Bas;

Sir Arthur Watts, conseiller juridique principal du Gouvernement du Royaume hachémite de Jordanie;

M. Guy Goodwin-Gill, conseiller juridique du Gouvernement du Royaume hachémite de Jordanie;

M. Nigel Ashton, conseiller historique du Gouvernement du Royaume hachémite de Jordanie;

M. Mahmoud Al-Hmoud, conseiller juridique;

M. Bisher Al Khasawneh, conseiller juridique;

M. Samer Naber, conseiller juridique;

M. Ashraf Zeitoon, conseiller politique;

Mme Diana Madbak, personnel administratif.

La République de Madagascar est représentée par :

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M. Odon Prosper Rambatoson, inspecteur au ministère des affaires étrangères.

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Mme Datin Seri Sharifah Aziah Syed Zainal Abidin, épouse du ministre des affaires étrangères;

S. Exc. Tan sri Ahmad Fuzi Abdul Razak, secrétaire général du ministère des affaires étrangères;

S. Exc. Dato' Rastam Mohd. Isa, représentant permanent de la Malaisie auprès de l'Organisation des Nations Unies;

S. Exc. Dato' Noor Farida Ariffin, ambassadeur de la Malaisie auprès du Royaume des Pays-Bas;

M. John Louis O'hara, directeur de la division des affaires internationales, bureau de l'*Attorney-General*;

M. Nico Schrijver, professeur de droit international à l'Université libre d'Amsterdam et à l'Institut d'études sociales de La Haye, membre de la Cour permanente d'arbitrage;

M. Marcelo G. Kohen, professeur de droit international à l'Institut universitaire de hautes études internationales, Genève;

M. Ku Jaafar Ku Shaari, sous-secrétaire à la division de l'Organisation de la Conférence islamique, ministère des affaires étrangères;

M. Hasnudin Hamzah, conseiller spécial auprès du ministre des affaires étrangères;

M. Zulkifli Adnan, conseiller de l'ambassade de la Malaisie aux Pays-Bas;

M. Ikram Mohd. Ibrahim, premier secrétaire de la mission permanente de la Malaisie auprès de l'Organisation des Nations Unies;

M. Mohd. Normusni Mustapa Albakri, conseil *(Federal Counsel)*, division des affaires internationales, bureau de l'*Attorney-General*.

La République du Sénégal est représentée par :

S. Exc. M. Saliou Cissé, ambassadeur du Sénégal aux Pays-Bas, chef de la délégation ;

M. Cheikh Niang, ministre-conseiller à la mission permanente du Sénégal auprès de l'Organisation des Nations Unies;

M. Cheikh Tidiane Thiam, directeur des affaires juridiques et consulaires au ministère des affaires étrangères.

La République du Soudan est représentée par :

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M. Ali Al Sadig, chef de mission adjoint à l'ambassade du Soudan aux Pays-Bas.

La Ligue des Etats arabes est représentée par :

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M. Michael Bothe, professeur de droit, chef de l'équipe juridique;

Mme Vera Gowlland-Debbas, professeur de droit;

M. Yehia El Gamal, conseiller juridique;

M. Salah Amer, conseiller juridique;

M. Mohammed Gomaa, conseiller juridique;

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L'Organisation de la Conférence islamique est représentée par :

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M. Willy Jackson, chargé de cours à l'Université Paris VII – Denis Diderot, assistant du conseil;

S. Exc. M. Babacar Ba, ambassadeur, observateur permanent de l'Organisation de la Conférence islamique auprès de l'Office des Nations Unies à Genève.

The PRESIDENT: Please be seated. The sitting is now open. The Court meets this afternoon to hear the following participants on the question submitted to the Court: South Africa, Algeria, Saudi Arabia and Bangladesh. Thus, I shall now give the floor to His Excellency Mr. Aziz Pahad, Deputy Minister for Foreign Affairs of South Africa.

Mr. PAHAD: Mr. President, honourable judges, the Government of the Republic of South Africa humbly submits to this Court that there are compelling reasons for this Court to give an advisory opinion as requested by the United Nations General Assembly on 8 December 2003. As we have submitted in our Written Statement, we wish to reiterate that the jurisdiction of this Court to hear this matter is beyond question.

We believe that at stake are the lives of all the peoples in the Middle East, particularly the Palestinians and Israelis, as demonstrated by the suicide bombing in Jerusalem just yesterday, an incident that we also condemn.

This underlines the urgency for this hearing. The decision to confirm the jurisdiction of this Court would send a clear message to the Palestinians and Israelis that they must redouble their efforts in achieving peace in the interest of their peoples.

Honourable judges, the legal consequences arising from the construction of the separation Wall is an issue that this Court cannot ignore. The separation Wall is not a security wall. It is a wall to enforce occupation, a wall that has separated hundreds of thousands of Palestinians from their families, homes, lands, and religious sites.

We submit that this Court should deal with the merits of this case no matter how difficult or complicated they may be.

South Africa, which was once a subject of this Court, is in the midst of celebrating ten years of our democracy. After centuries of division and conflict, South Africans found the political will to build a new democratic society based on reconciliation and peaceful coexistence. The fact that this Court had the courage to pronounce on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* contributed to the achievement of democracy in our region.

We fully understood then, as we do now, that there could be no military solution to fundamental political problems.

Therefore, South Africa is committed to a two-State solution — the State of Israel within secure borders and a viable Palestinian State within equally secure borders. The separation Wall is anathema to the peace process as envisaged in the Road Map as it eliminates the prospect of the two-State solution. As His Holiness Pope John Paul II has so eloquently stated, the Middle East needs bridges and not walls.

Honourable judges, in rendering the advisory opinion requested by the General Assembly, this Court could play a fundamental role in contributing meaningfully towards sustainable peace and security in the Middle East, and indeed the whole world.

I now have the honour to introduce Advocate Madlanga, Senior Counsel, and his legal team — Ms de Wet, Ms Lujiza, and Mr. Stemmet — to complete our submission.

The PRESIDENT: Thank you, Your Excellency. I now give the floor to Mr. Madlanga.

Mr. MADLANGA: Thank you, Mr. President. Honourable Members.

I. INTRODUCTION

1. We are honoured to stand here today addressing you on this very important issue in the history of the Israeli-Palestinian conflict and we trust that our submissions will be of some value in the determination of the issues.

2. Let me at the outset indicate that our oral submissions differ somewhat from our written submissions as a result of the focus by some States on the jurisdiction issue.

3. We then saw it necessary to focus sharply on this issue in our written submissions. Having said that, let me indicate that the format that our submissions will take is the following: we will deal firstly with and focus on the objections raised to the jurisdiction of the Court by others and secondly, indicate why the Court has jurisdiction to issue an advisory opinion. If time permits, we will touch on the substantive issues or the merits of the matter.

4. In case time does not permit, let me at the outset state and emphasize that South Africa strongly affirms the submissions that have already been made on the merits of the matter. South Africa also strongly affirms the illustrations in the substantiation that has been given by the Palestinian representatives on the issue.

5. Indeed, it was quite plain from those submissions and substantiations what effect the separation Wall has — the horrendous effect it has on the lives of the people and therefore on the violation of international law norms, and all of those negatively affected the Palestinian people.

6. Assertions that the Court does not have jurisdiction in the present matter, or that it should apply its discretion against considering the merits thereof, are tantamount to a request to the Court to paralyse itself and undermine the very role ascribed to it by the Charter. Acceding to these unfounded arguments will result in the Court foregoing this unique opportunity at this crucial moment in its history to fulfil its primary role and obligation to provide advice on international law matters, something which falls squarely within its jurisdiction. To decline to act in respect of this burning issue may bring the relevance of the Court into question at a time when the United Nations system is under severe pressure.

I shall now deal with the first of the two points I indicated will be dealt with, and that is the question of jurisdiction.

II. JURISDICTION OF THE COURT

7. A matter that has been raised by all those that contest the jurisdiction of the Court is the fact that the Court has a discretion to decide whether or not to give an advisory opinion. This fact cannot be contested as Article 65, paragraph 1, clearly states that the Court *may* give an advisory opinion on any legal question at the request of whatever body that may, in accordance with the Charter of the United Nations, make such a request.

8. In this regard, the position of the Court in the case concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion* (*I.C.J. Reports 1950*, p. 72) is noted. The discretion therefore undoubtedly exists. The question that begs answering, though, is how the Court should exercise this discretion in such a manner that it remains faithful to the requirements of its judicial character.

9. In answering this question, it is instructive to recall and to reflect on the Court's own views on this matter. The main aspect arising from the Court's earlier consideration of how it should exercise its jurisdiction is the fact that the Court should in principle *not* refuse to give an advisory opinion. This the Court stated in the *Interpretation of Peace Treaties* case. The Court expressed itself thus

> "[t]he Court has constantly been mindful of its responsibilities as 'the principal judicial organ of the United Nations' . . . When considering each request, it is mindful that it should not, in principle, refuse to give an advisory opinion. In accordance with the consistent jurisprudence of the Court, only 'compelling reasons' could lead it to such a refusal." (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996(I)*, p. 235, para. 140.)

10. The Court then declared that there has been no refusal in the history of the present Court, based on the discretionary power of the Court, to act upon a request for an advisory opinion. In fact, the Court has never refused to give an advisory opinion whenever all the other requirements for the exercise of this jurisdiction have been met. In sum, the Court asserted quite strongly that it will not take lightly a decision to refuse to give an advisory opinion.

11. The question should then be what are the "compelling reasons" that need to exist in order for the Court to decide not to issue an advisory opinion?

12. One may here indicate that perhaps being able to tease out examples of these "compelling" reasons may be made somewhat difficult by the very fact that there has been no refusal of an exercise of discretion on this ground. That notwithstanding, what is positive therefrom is that this fact underscores the very point that the Court has made repeatedly, which is that it will not lightly or readily refuse to exercise this jurisdiction.

13. One of the main issues raised by the opponents of the Court's jurisdiction, is the lack of the judicial propriety for the Court if it accedes to the request to give an advisory opinion. This position appears to be based on a number of grounds, *inter alia*, the following:

— the lack of consent to the jurisdiction of the Court by Israel;

— the question relates to a substantive dispute between the parties;

— the fact that this is a political and not a legal question;

— the alleged *ultra vires* nature of the request;

— the assumption that any opinion on this matter will serve no purpose, and will be harmful to achieving a settlement of the conflict;

— the lack of facts before the Court due to the withdrawal by Israel to participate in the hearing.

14. "Propriety" is defined in the Oxford Dictionary as "correctness concerning standards of behaviour or morals; the details or rules of conventionally accepted behaviour; appropriateness; rightness". Based on the reasons that follow, we immediately conclude that there can be no doubt that it is correct and appropriate for the Court to give an advisory opinion in this case. If the

arguments against the Court's jurisdiction are weighed one by one, the only logical conclusion is the unquestionable jurisdiction of the Court to issue an advisory opinion in the present case. We will now deal with some of these arguments individually.

(i) The lack of consent to the jurisdiction of the Court by Israel

15. By virtue of being a Member of the United Nations, a State and, in this particular case Israel, accepts the possibility of the General Assembly requesting an advisory opinion from the Court in accordance with the relevant provisions of the Charter and the Statute of the Court on a legal question.

16. The Court, in the *Namibia* case, emphasized the aforementioned principle by stating: "South Africa, as a Member of the United Nations, is bound by Article 96 of the Charter, which empowers the Security Council to request advisory opinions on any legal question" (*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. 23, para. 31).

17. A number of States, in their written opinions or submissions, have used the *Eastern Carelia* case as authority that "no State can, without its consent, be compelled to submit its disputes with other States either to mediation or arbitration, or to any other kind of pacific settlement" (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 27). However, this case needs to be distinguished from the present, as all Member States of the United Nations by virtue of acceding to the Charter have accepted the competence of the United Nations organs to refer matters to the Court for advisory opinions.

18. Furthermore, Article 65, paragraph 1, of the Statute of the Court provides that: "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

19. Article 96, paragraph 1, of the United Nations Charter stipulates that: "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on *any legal question*."

20. These two provisions establish the competence of the General Assembly to request an advisory opinion from the Court and also the competence of the Court to give the requested opinion

on any legal question. The choice of *"any"* in both Articles makes the Court's jurisdiction quite expansive and circumscribed by whether the issue at hand is a legal question.

21. The advisory opinion has been requested by the General Assembly in line with Article 96, paragraph 1, of the United Nations Charter. This provision does not require the General Assembly to obtain the consent of any party before it requests an advisory opinion from the Court.

22. The Court, in the *Western Sahara* case *(I.C.J. Reports 1975)* affirmed that its competence to give an opinion did not depend on the consent of the interested States, even when the case concerned a legal question actually pending between them. An instance where the Court would refuse to render an opinion is when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.

23. The lack of consent to the giving of an advisory opinion from any particular State is not relevant to the jurisdiction of the Court to provide the requested opinion. As the Court said in its Advisory Opinion on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*:

> "The jurisdiction of the Court . . . to give advisory opinions on legal questions, enables United Nations entities to seek guidance from the Court in order to conduct their activities in accordance with law. These opinions are advisory, not binding. *As the opinions are intended for the guidance of the United Nations, the consent of States is not a condition precedent to the competence of the Court to give them.*" (*I.C.J. Reports 1989*, pp. 188-189, para. 31; emphasis added.)

24. Similar views were expressed in the earlier case of the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* case (*I.C.J. Reports 1950*, p. 71). A clear distinction has always been maintained between contentious cases on the one hand and advisory opinions on the other. In the *Legality of the Threat or Use of Nuclear Weapons* case this Court has gone even further to say that:

> "[I]t is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996[I]*, p. 237, para. 16.)

25. Furthermore, this Court has found in the *Interpretation of Peace Treaties* case:

> "It follows that no State can prevent the giving of an advisory opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the

> course of action it should take. 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." *(Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*.)

We feel that this argument, raised by those opposing the jurisdiction of the Court, is an argument which, in our view, is completely misplaced because it seeks to bring in Article 36, jurisdiction of this Court, in a situation where it does not altogether apply.

(ii) The question before the Court relates to a substantive dispute pending between the Parties

26. The Court has acknowledged that underlying a request for an advisory opinion it is probable that there will be a controversy which has led the United Nations to make the request. In the case concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970),* the Court logically remarked that: "[d]ifferences of view 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" (*I.C.J. Reports 1971*, p. 24, at para. 34).

27. As the Court stated in its Advisory Opinion given in 1973 concerning the case on *Application for Review of Judgement No.158 of the United Nations Administrative Tribunal*: "The existence, in the background, of a dispute the parties to which may be affected as a consequence of the Court's opinion, *does not* change the advisory nature of the Court's task, which is to answer the questions put to it . . ." (*I.C.J. Reports 1973*, p. 171; emphasis added.)

28. In the case concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (I.C.J. Reports 1950)* the Court was of the view that a State could not prevent it from giving an advisory opinion "even where the request for an opinion relates to a legal question actually pending between States" (p. 71).

29. Relying on the aforementioned case, the Court, in the *Western Sahara* case reaffirmed this principle *(I.C.J. Reports 1975)* and rejected the contention of Spain that it should not give an advisory opinion because it would be an opinion on what in effect was *the subject of a dispute between itself and other States*.

30. The present legal question before the Court is similar to the one dealt with in the *Western Sahara* case in that it is "located in a broader frame of reference than the settlement of a particular dispute and embrace[s] other elements. These elements . . . are not confined to the past but are directed to the present and the future." (*I.C.J. Reports 1975*, p. 26, para. 35.)

31. In the present case the General Assembly requested an advisory opinion on the legal consequences arising from the use of this unique measure. It is thus correct and appropriate for the General Assembly to request an advisory opinion as the use of such a measure is of international concern and, being unique, its legal consequences under international law need to be established.

(iii) The question is a political and not a legal one

32. It has been submitted that the question before the Court is not a legal question, because it is not possible to ascertain with reasonable certainty the meaning of the question, there is an underlying assumption of illegality and it does not specify for whom the legal consequences will arise.

33. It has been contended by some that the question before the Court has two possible meanings: firstly that it requires the Court to find that the construction of the separation Wall is unlawful and then to proceed to the consequences, and/or alternatively, that the Court must assume illegality before proceeding. In this regard an attempt is made to distinguish the present matter from the Advisory Opinion given on the legal consequences that arose from the continued South African presence in Namibia, where the illegality of such presence had already been established by Security Council resolution 276 (1970).

34. It is submitted that this is a highly artificial interpretation of the question posed to the Court. In the first place it disregards the resolution by the referring organ, the General Assembly, that the construction of the separation Wall is "in contradiction to the relevant provisions of international law", resolution ES-10/13. Secondly, it assumes that the Court can only work during the second stage of a two-stage process, requiring first a determination on the illegality of actions by Member States from another organ, the Security Council. This approach denies the Court, as the principal legal organ of the United Nations, the opportunity to interpret legal questions put before it.

35. Furthermore, the point has been raised that, unlike the question put before the Court in the *Namibia* case which enquired as to the legal consequences *for States*, no such specification has been made in the present case. This, I submit, is not unusual.

36. Both Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute of the Court define legal questions to be put to the Court *unconditionally* and in the widest possible terms. Prescriptions on the term "any legal question" referred to the Court are nowhere to be found and will serve only to undermine the competency bestowed on the Court by the Charter and its own Statute. This approach lacks any legal basis and will only serve to make the Court a hostage of terminology, denying it the opportunity to play its proper role and, as the Court itself has determined in the *Corfu Channel* case, its role is "to ensure respect for international law" (*Corfu Channel, Merits, I.C.J. Reports 1949*, p. 35).

37. As to the interpretation of the question, it is submitted that the meaning is clear within the context: the Court is requested to pronounce on the legal consequences, in terms of international law, that will arise from a specific factual situation, namely the construction of the separation Wall by Israel. This determination must be done in terms of applicable rules and principles of international law, including the Fourth Geneva Convention of 1949, and the relevant Security Council and General Assembly resolutions. It should be noted that the factual situation, namely the construction of the separation Wall referred to in the question, is without precedent. It necessarily raises several legal questions and uncertainties in respect of which the General Assembly *could* need the opinion of the Court.

38. It has also been argued that due to the alleged "political" nature of the matter before the Court, it should be entrusted to resolution by political process rather through an advisory opinion by the Court. This approach implies an inability of the Court to address matters with a political complexion. The Court has already vigorously denied that this argument has any validity. In the *Nuclear Weapons* case, the Court found:

> "The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a 'legal question' and to 'deprive the Court of a competence expressly conferred on it by its Statute'." (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, p. 234.)

(iv) The alleged *ultra vires* nature of the request

39. We state here that Professor Crawford has, quite correctly in our view, indicated that the Court unquestionably does have jurisdiction and also that the General Assembly unquestionably does have the competence to refer this matter to this Court for the giving of an advisory opinion. It has been contended that the request for the advisory opinion is *ultra vires* the 10th Emergency Special Session of the General Assembly from which resolution ES-10/14 emerged. This contention is based on *inter alia* the fact that the Uniting for Peace resolution, in terms of which the 10th Special Emergency Session had been convened, foresees that only issues of immediate concern can be dealt with, while the Session has been going on since 1997. It was also convened to deal with another matter, namely Israeli settlements. The argument continues that the Security Council is exclusively mandated to deal with areas accorded to it by Chapter VI, i.e., the pacific settlement of disputes. Thus, the argument continues; the present matter falls within such competence to the exclusion of the General Assembly.

40. In this regard, it was further argued that even if the General Assembly was convened in a regular session, it would not have the competence to adopt the request for an advisory opinion, as the special powers of the Security Council relating to the maintenance of international peace and security exclude the General Assembly, with general powers in this regard, from acting in this field.

41. We submit that the arguments raised in this regard, which we will not repeat fully or itemize, aim to restrict the competence of the General Assembly to request advisory opinions to the point where such competence will be negligible and are incompatible with the broad competence ascribed by Article 96, paragraph 1, of the Charter, to the Security Council and the General Assembly on the basis of equality. The competence of the General Assembly to request advisory opinions matches the scope of its other competencies provided for in the Charter.

42. It is also legally untenable to argue that the General Assembly's competence to request an advisory opinion is excluded by the Security Council's competencies in terms of Chapter VI of the Charter, and, by implication, that the Court's competence to pronounce on such request is also excluded. Such an interpretation apparently rests upon Article 12 of the Charter which stipulates that while the Security Council is exercising the functions assigned to it in the Charter, in respect of any dispute or situation, the General Assembly shall not make any recommendation with regard to

that dispute or situation unless upon request of the Security Council. It is argued that this includes requests for an advisory opinion from the Court.

43. This contention implies that as far as the referral to the Court of legal questions relating in some or other way to the peace and security is concerned, the Security Council has the exclusive competence. The contention is, in our view, fatally flawed, and is aimed at unduly restricting the role of the Court as principal legal organ of the United Nations.

44. There is clear authority that Article 12 does not trump the authority of the General Assembly to request advisory opinions on matters in respect of which the Security Council is exercising its functions:

> "The General Assembly and the Security Council may request Advisory Opinions *directly* on the basis of Article 96 (1). This competence extends *the scope of the activities of either organ* according to the general provisions of the Charter *concerning the competence of the one or the other*." (Simma, B. (ed), *The Charter of the United Nations: A Commentary*, 1995, p. 1010.)

We are certain here that the honourable Members and the President will recognize where this particular quotation comes from, from the honourable Member on the extreme side. Any suggestion that there exists within the Charter a separation of powers that prevents the General Assembly from seeking an advisory opinion under such circumstances, is untenable. There is also authority that the Security Council has primary, not exclusive, responsibility in this regard which does not exclude separate but complementary competence by the General Assembly and the Court (Gray, Christine, *The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua, European Journal of International Law*, 2003, p. 871). The Court has also reached the same conclusion in the *United States Diplomatic and Consular Staff in Tehran* case:

> "Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendations with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute, no such restriction is placed on the functioning of the Court by any provision either of the Charter or the Statute of the Court." (*I.C.J. Reports 1980*, pp. 21–22.)

45. As regards Article 12, it has been interpreted very narrowly by the General Assembly, a situation which has been accepted by the Member States and the Security Council. We again quote from the honourable Member of the Court:

> "The General Assembly does not lose its competence to discuss the dispute or situation while the Security Council is dealing with it, nor even to assess it. Article 12 (1) in United Nations practice bars the General Assembly only from making recommendations concerning the specific dispute or situation. This does not restrict its recommendatory power . . . with regard to aspects of the dispute or situation not directly connected with the maintenance of or threat to the peace. For example, the General Assembly, having referred the Palestine question to the Security Council, certainly did not stop dealing with the problem and making recommendations concerning it. It in fact continued to deal with the political, economic and social aspects, while the Security Council dealt with the military and security aspects of the issue." (Simma, *op. cit.*, p. 258.)

46. In view of the long-standing practice with regard to the application of Article 12, paragraph 1, it is difficult to imagine that its application can prevent the General Assembly from seeking an advisory opinion within the present circumstances.

(v) Assumption that an advisory opinion will serve no purpose and will be harmful to achieving a negotiated settlement of the conflict

47. As regards the argument that the Israeli-Palestinian conflict is being addressed by a political process, and that an advisory opinion on the question put to the Court by the General Assembly will be devoid of legal purpose, will not assist the General Assembly in its work and will hinder, rather than help, the achievement of the Road Map's objectives, it should be noted that the Court has, on several occasions, rejected objections of this nature: both in the *Nicaragua* case and in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* (*I.C.J. Reports 1998*, p. 275, para. 61). It is submitted that this principle is not affected by the fact that in the present case the Security Council forms part of the Quartet. As the Court pronounced in the case of *Military and Paramilitary Activities in and against Nicaragua (Jurisdiction, I.C.J. Reports 1984*, p. 436 para. 98): "[The Court] has been asked to pass judgment on certain legal aspects of a situation which has also been considered by the Security Council, a procedure which is entirely consonant with its position as the principal judicial organ of the United Nations".

48. The Court has been consistent in its approach that neither the motive nor context of a question matters with regard to the issue of jurisdiction. In this regard it stated in the *Use of Nuclear Weapons* case that it: "also finds that the political nature of the motives which may be said to have inspired the request and the political implications that the opinion might have are of no relevance in the establishment of its jurisdiction to give such an opinion" (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, para. 17).

49. The Court continued that "no matter what might be its conclusions in any opinion it might give, they would have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter". The Court thus rejected the notion that its opinion might adversely affect ongoing negotiations as a ground to find no jurisdiction.

50. It should be pointed out that any statement to the effect that an opinion by the Court on the question before it will hinder, rather than help, the Road Map process, is mere conjecture. Quite the opposite is true: the request for an advisory opinion from the Court by the General Assembly was motivated in resolution ES/10/14 of 12 December 2003 on the basis of its grave concern about the devastating impact that the Wall will have on the prospects of solving the Israeli-Palestinian conflict and establishing peace in the region (preambular paragraph 16).

51. The Court should not shy away from its obligation where an opportunity presents itself to provide advice, based on solid legal principles, especially when faced with a unique situation of international concern like the one we have here today, in respect of which there have been clear indications of the horrendous effects that the Wall has on the Palestinian people.

52. The Court's role in an advisory opinion will be complementary in nature and will not be binding on either of the parties. Thus, it is our contention that the Court's opinion can serve to bring the current situation from the brink of disaster, back on track.

53. Furthermore it must also be asked how can an argument be sustained before this Court, given its past record, that in exercising its duty as primary judicial organ of the United Nations on a matter of such grave international concern, the Court's involvement will harm rather than help an international peace process. Is this not another attempt to call into question the relevance of the role of the Court as part of the broader United Nations system?

(vi) The lack of facts before the Court

54. With regard to the argument that there is a lack of facts before the Court, the Court needs to determine "whether it has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact, the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 28–29, para. 46).

55. In the present case there are no disputed facts that we must emphasize. The Court has before it the two reports: that of the Secretary-General of the United Nations and that of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories occupied by Israel. The existence of the Wall is an undisputed fact that is bound to have legal consequences in terms of the rules and principles of international law as provided for in the question put to the Court and on which the Court should pronounce itself.

56. In the *Namibia* case, the Government of South Africa argued that: "Since the Court may only give an Advisory Opinion on a *legal* question, it may consequently be doubted whether it is entitled to furnish an Opinion if, in order to do so, it also has to make findings as to primary facts." (Statement submitted by the Government of the Republic of South Africa, Vol. 1, p. 143, para. 45). The Court rejected this argument completely (*I.C.J. Reports 1971*, p. 27, para. 40).

57. As a matter of policy a Member State should not be allowed to undermine the judicial function of the Court by refusing to place facts it considers essential before the Court, and then benefit from this situation by seeking to use it as a means of denying the Court jurisdiction. Such a stratagem is, in our view, so simple and transparent that it falls to be rejected out of hand by the Court.

Conclusion

58. In light of the arguments raised above, it is submitted that the Court does have jurisdiction to provide the advisory opinion sought by the General Assembly. The Court must remain faithful to the requirements of its judicial character, discharge its functions as the principal legal organ of the United Nations and thus dispel any possible perceptions of abdicating its judicial responsibility.

IV. SUMMARY OF MERITS

59. We now, assuming that time still permits, summarize or give a summary of the merits. Detailed arguments on the merits were placed before the Court in our written statement and it suffices to summarize the main substantive legal arguments raised in respect of the legal consequences of the construction of the separation Wall.

Applicability of international humanitarian law

60. There is no doubt that the Geneva Conventions apply to the 1967 armed conflict. Israel's obligations as an Occupying Power in the Palestinian Territory are governed by rules and principles of international law, international humanitarian law and international human rights law. The general framework of international law governing occupation as contained in the Hague Regulations of 1907 and the Fourth Geneva Convention, is applicable to the Occupied Palestinian Territory and to Israel as the Occupying Power. Israel is a party to the four Geneva Conventions and it is widely accepted that the Hague Regulations of 1907 are declaratory of general international law, as confirmed by the Court in its *Nuclear Weapons Advisory Opinion*. Furthermore, the United Nations General Assembly reaffirmed the applicability of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including Jerusalem, and the other occupied Arab territories, in its resolution A/RES/56/60 of 14 February 2002.

***De facto* annexation**

61. The *de facto* consequence of the construction of the separation Wall, which deviates from the Green Line, which represents the actual boundary between Israel and Palestine, is that that area will be annexed and incorporated within the territory of Israel. This *de facto* annexation is an attempt to create facts on the ground that will be difficult to change. Such a construction not only violates various Security Council resolutions, but is also in direct breach of the rule of customary international law against the acquisition of territory by force or annexation. In international law, annexation of this kind is tantamount to conquest, which was banned by the prohibition of the use of force contained in Article 2, paragraph 4, of the Charter. Furthermore, the construction of the separation Wall violates one of the fundamental rules of international humanitarian law as laid out 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.

Justification of self-defence and military necessity

62. The principle of self-defence cannot be employed as a justification for the construction of the separation Wall. It is established international law that the right to self-defence is a temporary right. In the present case however, the permanent structure of the separation Wall suggests the opposite. The principles of necessity and proportionality, which form part of the doctrine of self-defence, enshrined in Article 51 of the Charter, have been violated by Israel through the construction and the severe consequences of the separation Wall. These consequences have been the unwarranted restrictions of movement, isolation of civilians from their farmlands, destruction of crops and impairment of access to 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) which is before the Court. These consequences are totally disproportionate and unnecessary, bearing in mind that the focus of Israeli defence is occasional and irregular attacks by lone operators.

63. A question of fact that begs the Court's consideration is why, if the separation Wall as a measure of self-defence is intended to protect Israeli citizens and territory, it is not being constructed on *undisputed* Israeli territory? Is the logical explanation for the chosen route of the separation Wall cutting across occupied territory not an attempt of *de facto* annexation? The answer in our view is obvious and in the affirmative.

64. The justification that has consistently been advanced by the Israeli Government for the construction of the separation Wall, is that it is *necessary* to ensure the security of Israel. They maintain that the destruction and seizure of Palestinian property and the violation of human rights of the Palestinian population are demanded by the necessities of war, as permitted by Article 23 of the Hague Regulations of 1907. In this regard the Court should take note that the Israeli Government in this instance is relying for protection on the very same Hague Regulations that they have always maintained do not bind them. Nonetheless, it is submitted that the concept of "military necessity" does not release a State from the obligations of complying with international humanitarian law. The Geneva Conventions of 1949 and their Additional Protocols, together with the Hague Regulations, have already struck the balance between the demands made on the law of conduct of war and the requirements of humanity.

65. The right of Israel to security has never been denied, but this right must be exercised within recognized norms of international law.

The right to self-determination

66. The separation Wall violates two of the most fundamental principles of contemporary international law, namely the prohibition on the forcible acquisition of territory and of the right to self-determination.

67. The right to self-determination and the concept of territory are intrinsically linked. The right of the Palestinian people to self-determination is unquestionable, has been reaffirmed by the United Nations on numerous occasions and forms the underlying principle of the two-State solution.

68. As the Special Rapporteur of the Commission on Human Rights has correctly pointed out in his report,

> "A people can only exercise their right to self-determination within a territory. The amputation of Palestinian territory by the construction of the Separation Wall seriously interferes with the right of self-determination of the Palestinian people as it substantially reduces the size of the self-determination unit."

Human rights violations

69. Further consequences of the separation Wall have been grave infringements of recognized human rights principles as enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 16 December 1966, which Covenants have both been ratified by Israel. The grave human rights situation resulting from the construction of the separation Wall is well documented in both the report of the Secretary-General and also the report of the Special Rapporteur, which documents are in the Court's possession.

70. Article 2 of the International Covenant on Civil and Political Rights provides clearly that

> "each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised by the Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

71. These rights are universal and inalienable rights of all members of the human family, and it is incorrect in law and even amoral to suggest that the residents of the Occupied Palestinian Territory are not entitled to these rights.

Mr. President, honourable Members of the Court, we thank you very much for the opportunity you gave to us.

The PRESIDENT: Thank you, Mr. Madlanga. I now give the floor to Professor Laraba who will speak for Algeria.

M. LARABA :

INTRODUCTION

Merci, Monsieur le président. Monsieur le président, Madame et Messieurs de la Cour, j'ai l'honneur de vous faire part des observations de la République algérienne relatives à la demande d'avis consultatif qui a été demandée en urgence par l'Assemblée générale dans sa résolution du 18 décembre 2003 portant sur les conséquences en droit de l'édification d'un mur par Israël en tant que puissance occupante en Territoire palestinien occupé.

Je n'entends pas revenir ici sur un certain nombre de considérations factuelles liées à la construction du mur. Le rapport du Secrétaire général des Nations Unies en date du 24 novembre 2003 est a cet égard suffisamment éloquent. De même, un certain nombre d'exposés, notamment ceux de ce matin, ont envisagé avec beaucoup de précision le processus de construction du mur et les bouleversements déjà constatés à l'égard de la population palestinienne vivant dans la région où le mur est en train de se construire. Je ferai simplement un certain nombre de brèves remarques avant de passer à l'essentiel de mon propos :

— l'Histoire retiendra que c'est le 14 avril 2002 que la décision de principe de construire un mur a été arrêtée par le Gouvernement israélien. Il faudra sans doute que l'on se souvienne également que, en vérité, l'idée de la construction d'un mur de séparation date du milieu des années quatre-vingt-dix. C'est autour de l'année 1995 qu'a été envisagée pour la première fois cette construction. Ce rappel est important parce qu'il incite, il oblige, à analyser avec circonspection l'argument avancé selon lequel la construction du mur a été fondamentalement motivée par les opérations menées par les Palestiniens;

— ce mur est censé être provisoire. Rien n'est moins sûr. En effet, tout laisse penser qu'il est construit pour durer, en application de l'idée selon laquelle tout ce qui est construit est gardé. Il consiste, nous le savons, en un système de clôtures, de barrières, de murs et d'enclaves qui portent, de façon frontale, atteinte à l'unité du Territoire de la Palestine;

— ce mur n'est en vérité qu'un aspect d'une opération beaucoup plus vaste. Il est une illustration, sans doute la plus spectaculaire -- car c'est le plus grand changement introduit depuis 1967 -- d'un projet politique et juridique global devant aboutir à rompre la continuité territoriale du Territoire de la Palestine;

— les deux principales conséquences qui en découlent sont les suivantes :

a) d'une part, une dégradation progressive mais sûre des droits les plus fondamentaux de la protection de la population palestinienne. Selon le bureau de l'ONU pour la coordination des affaires humaines, ce sont près de 700 000 Palestiniens qui vont pâtir de la construction de ce mur. Une fois terminé, ce dernier empiétera sur près de 15 % du territoire de la Palestine occupé. Et ce sont 270 000 Palestiniens qui vont vivre dans des zones fermées;

b) la deuxième conséquence inéluctable réside dans l'immigration forcée de la population palestinienne soit par expulsion directe ou par expulsion indirecte en raison d'une situation quotidienne devenue intenable.

C'est sous le bénéfice de ces brèves remarques, sans doute teintées d'aspect politique mais également ayant des conséquences juridiques extrêmement importantes, que la République algérienne entend faire part de son point de vue en envisageant les trois questions principales qui font l'objet de débats à l'occasion de cette demande d'avis consultatif, I) celle de la recevabilité de la demande et de la compétence de la Cour internationale de Justice, II) celle relative à la détermination du droit pertinent pour évaluer, pour apprécier la demande de l'Assemblée générale et III) les conséquences juridiques de la construction du mur au regard précisément de ce droit une fois qu'il aura été déterminé. Donc trois points qui s'articulent, qui s'enchaînent logiquement les uns après les autres.

I. LA QUESTION DE LA RECEVABILITÉ ET DE LA COMPÉTENCE

Je ne voudrais pas davantage revenir sur deux points qui ont été déjà très largement abordés. Je voudrais simplement envisager d'une part la question du droit de l'Assemblée générale de demander un avis consultatif avant d'en arriver à la compétence de la Cour pour donner l'avis consultatif demandé.

I.1. Sur le droit de l'Assemblée générale de donner un avis consultatif

On pourrait penser que songer à envisager pareille question semble relever de l'évidence parce que l'article 96 de la Charte des Nations Unies accorde dans son paragraphe premier un tel droit à l'Assemblée générale. Je voudrais simplement dire que l'Assemblée générale peut en vertu de ce paragraphe premier demander un avis consultatif sur «toute question juridique». Je voudrais faire la comparaison entre la formulation retenue par ce paragraphe premier *in fine* avec celle qui a été retenue dans le paragraphe 2 du même article s'agissant des autres organes de l'ONU ou des institutions spécialisées. Dans un cas, l'Assemblée générale peut demander un avis consultatif sur toute question juridique. Dans le deuxième cas, la marge de manœuvre, si je puis dire ainsi, des autres organes et des institutions spécialisées est beaucoup plus circonscrite puisque le paragraphe 2 de l'article 96 précise que la question posée devrait être liée aux activités de ces organes et institutions. Il semble que la portée de l'article 96, paragraphe premier, est beaucoup plus absolue alors que la deuxième est toute relative.

Dès lors que l'Assemblée générale peut demander un avis consultatif sur toute question juridique, dès lors dans le même temps que l'Assemblée générale exerce un certain nombre de compétences en application notamment des articles 10 et 11 de la Charte, vu précisément en matière de maintien de la paix, il est tout à fait logique qu'un certain nombre de questions comportant à la fois des aspects politiques et des aspects juridiques soient au quotidien traitées par l'Assemblée générale. Les rédacteurs de l'article 96, paragraphe premier, ne l'ignoraient pas. Eux qui ont été dans le même temps les rédacteurs des articles 10 et 11. Il est donc évident que sur toute une série de questions, les aspects politiques peuvent coexister et coexistent avec les aspects juridiques. Il est évident également que si l'Assemblée générale sollicite un avis consultatif, c'est parce que, en son sein, bien évidemment, des opinions différentes, des points de vue divergents se sont exprimés. Ce qui importe là, ce n'est pas le fait que la question posée ait pu ou pourrait avoir des aspects politiques, ce qui importe c'est de voir si véritablement la question posée par l'Assemblée générale renvoie à un certain nombre de questions juridiques sur lesquelles elle demande à être éclairée par l'organe judiciaire principal s'agissant des Nations Unies.

Dans son avis consultatif de 1980 relatif à l'*Interprétation de l'accord du 25 mars 1951 entre l'OMS et l'Egypte*, la haute juridiction a précisé qu'«en fait, lorsque des considérations

politiques jouent un rôle marquant, il peut être particulièrement nécessaire à une organisation internationale d'obtenir un avis de la Cour sur les principes juridiques applicables en la matière en discussion» (*C.I.J. Recueil 1980*, p. 87, par. 33). Dans le même temps, il est vrai que la Cour «doit refuser de donner l'avis qui lui est demandé» (*C.I.J. Recueil 1962, Certaines dépenses des Nations Unies, avis consultatif*, p. 155) si elle considère que la question qui lui a été posée n'est pas une question juridique.

Ce *dictum* a une interprétation *a contrario* qui est la suivante : face à une question juridique, la Cour ne peut pas se soustraire à son rôle de conseil juridique. Elle doit donner un avis consultatif, malgré les aspects politiques de la question, car cet avis peut être d'une très grande importance. Ainsi que le soulignait le président Bedjaoui dans son intervention lors de la célébration du cinquantième anniversaire de la Cour internationale de Justice, «les avis de la Cour déploient des effets pacificateurs importants, ne serait-ce que par leur apport considérable au bon fonctionnement des organisations universelles… La Cour a également assisté l'organisation concernée dans la recherche d'une solution à un différend déjà né.» («le cinquantième anniversaire de la Cour internationale de Justice», *RCADI* 1996, p. 27). Cette référence au différend déjà né me permet d'aborder, s'agissant toujours de la possibilité pour l'Assemblée générale de demander un avis consultatif, un second point.

Un second point qui renvoie à un argument qui est souvent avancé pour contester le droit de l'Assemblée générale de demander un avis consultatif. Cet argument consiste à dire que l'Assemblée générale s'est déjà prononcée sur la question et que, dès lors qu'elle s'est déjà prononcée sur la question qu'elle pose, il n'y a plus lieu pour elle de demander un avis consultatif. Dès lors qu'elle se serait prononcée notamment sur l'illicéité de la construction du mur, la demande de l'Assemblée générale perdrait de son objet, de son opportunité, de son utilité. Cette thèse ne peut pas être retenue pour deux raisons principales. Tout d'abord, un argument de fait. Ce n'est pas la première fois que l'organe qui sollicite l'avis consultatif a eu à se prononcer préalablement sur des questions qui concernent le problème qu'il soulève devant la haute juridiction. On peut rappeler à cet égard, par exemple, mais c'est à titre illustratif simplement, l'avis consultatif rendu dans l'affaire du *Sahara occidental* de 1975 qui n'a pas cessé de faire l'objet de résolutions adoptées par l'Assemblée générale entre 1966 et 1973. Cela n'a pas, bien évidemment, empêché la

Cour de donner son avis consultatif comme on le sait sur cette question. On peut songer, deuxième exemple, à l'avis consultatif demandé pour la première fois par le Conseil de sécurité s'agissant de la situation de la Namibie. Cet avis consultatif a été demandé par le Conseil de sécurité alors même qu'il s'était déjà prononcé sur la question qu'il soumet à la Cour et alors même qu'il ne s'en était pas caché puisque la rédaction de la question elle-même renvoyait à cette prise de position. Je vous rappellerai, Monsieur le président, Madame et Messieurs de la Cour, que la question du Conseil de sécurité était libellée de la manière suivante : «Quelles sont les conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité ?», résolution par laquelle il avait bien évidemment condamné en 1970 la présence continue de l'Afrique du Sud en Namibie.

Il y a ensuite un argument de droit qu'on pourrait également faire prévaloir qui consiste à dire que même lorsqu'un organe, comme le Conseil de sécurité ou l'Assemblée générale, a eu à envisager des questions juridiques, il peut éprouver la nécessité de solliciter la Cour internationale de Justice car c'est elle qui, en dernier ressort, peut porter toute une série d'aspects juridiques précis, de commentaires et d'analyses qui peuvent contribuer utilement à faire évoluer la question débattue au sein de l'Assemblée générale.

I.2. La Cour internationale de Justice est dans son rôle en donnant un avis consultatif sur les conséquences de la construction du mur par Israël

L'un des arguments avancés pour contester cette compétence pour demander à la Cour de se déclarer incompétente réside dans le fait de considérer que cette demande d'avis vise en fait à régler un différend que l'une des parties concernées ne souhaite pas régler par le recours à la juridiction internationale. On serait en somme en présence d'une espèce de détournement de procédure. Ici encore, l'argument n'est pas inédit. Il présente même de fortes similitudes avec celui qui avait été avancé en son temps, fin 1974-début 1975, à l'occasion de l'affaire du *Sahara occidental* et de la demande d'avis consultatif formulée par l'Assemblée générale. Dans le cas du *Sahara occidental*, la question de la compétence de la Cour a même été compliquée par la tentative avortée de saisine de la Cour au contentieux et par le refus d'une des parties intéressées d'aller au contentieux devant la Cour. Ceci n'a pas empêché la Cour de rendre comme on le sait cet avis consultatif, alors même qu'elle a considéré que «le consentement d'un Etat intéressé conserve son

importance … pour apprécier s'il est opportun de rendre un avis consultatif» (affaire du *Sahara occidental, avis consultatif, C.I.J. Recueil 1975*, par. 32). Ce passage de l'avis consultatif de 1975 est traditionnellement abondamment cité par ceux des Etats qui veulent amener la Cour à rejeter la demande d'avis consultatif. Ce que l'on oublie simplement ou ce que l'on perd de vue, c'est que cet extrait n'est pas isolé, il s'intègre dans un tout. Ce que l'on oublie, c'est que la Cour internationale de Justice a fini par rendre son avis consultatif dans l'affaire du *Sahara occidental*. Donc, cet extrait n'est pas du tout décisif tout comme d'ailleurs le sempiternel rappel de l'affaire du *Statut de la Carélie orientale* de 1923 affaire qui date maintenant de quatre-vingt-un ans et qui est souvent utilisée pour demander à la Cour de se déclarer incompétente.

Dans le cas précis qui nous occupe aujourd'hui, l'Assemblée générale a fini par solliciter pour avis consultatif la haute juridiction parce qu'il y a eu débat en son sein, parce qu'elle a constaté l'existence d'opinions divergentes. En vérité, il en est toujours ainsi. Une demande d'avis consultatif postule automatiquement le constat de points de vue différents, voire même contradictoires. C'est pour l'ensemble de ces raisons que la République algérienne considère que la Cour devrait se déclarer compétente pour répondre à la question posée par l'Assemblée générale.

II. LE DROIT PERTINENT POUR APPRÉCIER LA LÉGALITÉ DE L'ÉDIFICATION DU MUR

Cette question est d'une importance particulière, parce qu'il y a eu un certain nombre de prises de positions de la part des parties concernées, de la part d'Etats et d'organisations qui font que l'examen de ce point est absolument déterminant et essentiel. On y a fait allusion tout à l'heure.

La question de l'Assemblée générale se caractérise par une très forte connotation juridique, il s'agit d'examiner *«en droit»* les conséquences de l'édification d'un mur au regard des «règles et des principes du droit international, notamment, la quatrième convention de Genève de 1949, et les résolutions» pertinentes du Conseil de sécurité et de l'Assemblée générale. On est sur un terrain éminemment juridique. La rédaction adoptée par l; Assemblée générale n'est pas une rédaction limitative. Elle est plutôt indicative, et suggestive, de sorte, je crois, que pour déterminer quel est le champ d'application, quel est le droit applicable, il importe d'envisager à côté des références de l'Assemblée générale un certain nombre de conventions, un certain nombre de développements du

droit coutumier indispensables pour avoir une appréciation juridique précise en la matière. Mais c'est aussi par rapport aux thèses juridiques exposées en annexe du rapport du Secrétaire général, thèses juridiques d'Israël et de la Palestine, qu'il convient d'envisager cette question du droit pertinent en la matière.

La position juridique d'Israël consiste à nier tout à la fois l'applicabilité de la quatrième convention de Genève de 1949 et les deux pactes onusiens de 1966 relatifs respectivement aux droits civils et politiques d'une part, aux droits économiques sociaux et culturels d'autre part. Pour la Palestine, le droit pertinent pour apprécier la liceité de la construction du mur renvoie à la violation des règles fondamentales du droit international général, du droit international humanitaire et du droit international des droits de l'homme.

C'est principalement à la lumière de l'ensemble de ces données que la République algérienne exposera son point de vue. Ce point de vue sur le droit pertinent s'articule autour des quatre points principaux suivants :

1) les principes et règles du droit international général;
2) l'applicabilité du droit international humanitaire;
3) l'applicabilité du droit international des droits de l'homme, notamment, les deux pactes de 1966, notamment mais pas seulement;
4) les résolutions du Conseil de sécurité et de l'Assemblée générale.

Mais avant d'aller plus avant dans le raisonnement de ces quatre points, il importe de faire une observation d'ordre général sur l'attitude juridique israélienne. Celle-ci repose — je l'ai dit, il y a un petit instant — sur l'inapplicabilité du droit humanitaire, et plus précisément de la quatrième convention de Genève de 1949, et des deux pactes des droits de l'homme de 1966. Seul, en vérité, l'article 23, lettre G, du règlement de La Haye de 1907 trouverait à s'appliquer à la situation, bien que non incorporé dans le droit interne israélien, comme d'ailleurs la quatrième convention de Genève de 1949. Mais, dans un cas, la non-incorporation n'empêche pas l'application; dans l'autre, conjugué avec le fait que la Palestine n'est pas une haute partie contractante, cette convention du 12 août 1949, la quatrième en l'occurrence, n'aurait pas à s'appliquer. Cette attitude, qui consiste à n'envisager qu'une convention de 1907 et à écarter les conventions largement postérieures qui ont eu à préciser, à affiner et à développer ce droit de 1907, tend à

suspendre le temps juridique. Elle exprime la volonté d'appliquer au présent uniquement des normes élaborées hier. C'est une certaine manière de réécrire l'Histoire et de nier qu'il ait pu y avoir des progrès dans la protection des droits fondamentaux de la personne humaine, ici de la population palestinienne confrontée à l'édification du mur. Cette population ne serait pas en somme éligible pour tirer profit de ces progrès. Et le territoire palestinien serait une espèce de zone de non-droits humains.

1. Sur le droit international général

Les principes et règles qui me semblent être pertinents pour apprécier la licéité de la construction du mur, ces principes et règles sont ceux qui sont incorporés notamment dans la Charte des Nations Unies, dans les conventions universelles d'une manière générale, mais ceux qui ont été consacrés plus particulièrement dans la Charte des Nations Unies et qui font partie des règles fondamentales dont l'évolution coutumière ne cesse de rendre compte.

On songe bien évidemment ici au respect du principe du droit des peuples à disposer d'eux-mêmes, au respect du principe de l'intégrité territoriale et au principe de l'interdiction de la modification des frontières et de l'occupation du territoire par la force. Par ailleurs, comme le droit de légitime défense a été également invoqué par Israël, il conviendra le moment venu d'en étudier et le contenu et l'applicabilité à la matière.

2. S'agissant du droit international humanitaire applicable

2.1. Sur l'applicabilité de la quatrième convention de Genève du 12 août 1949

Deux arguments ont été avancés par Israël pour estimer que, bien qu'il l'ait ratifiée, cette convention ne s'applique pas. Elle ne s'appliquerait pas, d'une part, parce qu'elle n'aurait pas été incorporée dans le droit interne israélien; elle ne s'appliquerait pas, d'autre part, parce que la Palestine n'est pas une haute partie contractante. Cette thèse n'est pas recevable pour un certain nombre de raisons que je vais formuler assez rapidement.

S'agissant tout d'abord de la non-incorporation de la quatrième convention dans le droit interne israélien :

a) on sait que le droit international conventionnel et coutumier contient des règles fondamentales auxquelles cet argument contrevient. En effet, d'une part, les Etats sont tenus d'exécuter de

bonne foi les traités auxquels ils ont librement souscrit. Telle est la lettre, nous le savons, de l'article 26 de la convention de Vienne sur le droit des traités, *pacta sunt servanda*, qui s'applique en la matière. C'est même une règle qui n'est pas simplement conventionnelle mais également une règle coutumière qui s'applique à l'ensemble des Etats, même ceux qui n'ont pas ratifié, comme c'est le cas d'Israël — et c'est le cas de beaucoup d'autres Etats — cette convention de Vienne sur le droit des traités. Deuxièmement, on sait qu'il existe une deuxième règle bien établie en droit international qui consiste dans la règle qu'un Etat ne peut pas se prévaloir de son droit interne pour ne pas respecter ses engagements internationaux. C'est au demeurant ce qui se dégage de l'article 27 de la convention de Vienne sur le droit des traités et, de manière générale, on le sait, l'une des évolutions les plus importantes du droit international contemporain a consisté dans l'affirmation absolue du principe de la supériorité des traités sur le droit interne des Etats. C'était là la première observation;

b) deuxième observation pour répondre donc à cette question de l'inapplicabilité de la quatrième convention pour cause de non-incorporation, il ne faut pas perdre de vue qu'un grand nombre de règles de la convention du 12 août 1949 sont d'application directe et qu'elles n'ont pas besoin d'une incorporation pour être exécutées;

c) c'est notamment le cas des dispositions de la section trois de la troisième partie de la quatrième convention qui, intitulée «Territoires occupés», traite précisément de la situation juridique des territoires et de la population par rapport à la puissance occupante.

II.2. Sur le deuxième argument selon lequel la Palestine n'est pas une haute partie contractante

On peut d'emblée sur ce point préciser que si la Palestine n'est pas, à ce jour, formellement une partie contractante, ce n'est pas faute de l'avoir demandé à plusieurs reprises et exprimé clairement sa volonté de rejoindre le consensus international sur ce point. On peut aussi, et surtout, souligner l'archaïsme de la thèse israélienne en ce qu'elle fait fi de la remarquable évolution observée dans l'application du droit international humanitaire depuis 1949. Faut-il ici rappeler que le Gouvernement provisoire de la République algérienne (GPRA) a adhéré aux quatre conventions de Genève en 1960, c'est-à-dire deux ans avant son accession à l'indépendance ? Peut-on ignorer les avancées que le protocole additionnel 1 de Genève de 1977 a fait faire au droit humanitaire ?

Son article premier, paragraphe 4, a étendu le champ d'application des conventions de Genève à l'ensemble des conflits internationaux. Ce protocole est considéré aujourd'hui comme reflétant le droit international en la matière. D'ailleurs, la jurisprudence internationale des années quatre-vingt-dix a eu à constater cette évolution. Dans son avis consultatif de juillet 1996, la Cour internationale de Justice a souligné que «Tous les Etats sont liés par celles des règles du protocole additionnel 1 qui ne représentaient, au moment de leur adoption, que l'expression du droit coutumier préexistant.» (*C.I.J. Recueil 1996*, par. 84.)

II.3. L'objectivation du droit international humanitaire

La thèse israélienne méconnaît totalement la caractéristique sans doute la plus essentielle de l'évolution de ce droit international humanitaire.

Déjà, l'article premier commun aux quatre conventions de Genève de 1949, en faisant peser sur les Etats contractants l'obligation de respecter et de faire respecter le droit humanitaire, avait ouvert cette voie de l'objectivation du droit international humanitaire. Aujourd'hui, le noyau dur du droit international humanitaire est composé, selon la fameuse formule de la Cour internationale de Justice dans son avis consultatif du 8 juillet 1996, de «normes intransgressibles». Cette évolution remarquable a été prise en compte dans d'autres circonstances, dans une autre hypothèse, par le Tribunal pénal international pour l'ex-Yougoslavie. En effet, dans sa décision *Kupreskic* du 14 janvier 2000, le Tribunal a estimé que les normes du droit international humanitaire «n'imposent pas d'obligations synallagmatiques», mais «des obligations envers l'ensemble de la communauté internationale, ce qui fait que chacun des membres de cette communauté a «un intérêt juridique» à leur observation» (par. 519). La conclusion que le Tribunal en tire dans le paragraphe suivant est que «la plupart des normes du droit international humanitaire sont des normes impératives du droit international ou *jus cogens*, c'est-à-dire qu'elles sont impérieuses et qu'on ne saurait y déroger» (par. 520).

3. A propos du droit international des droits de l'Homme (DIDH), notamment les deux pactes de l'ONU de 1966

En ce qui concerne l'application des deux pactes de 1966, là également deux observations. Tout d'abord au plan conventionnel et ensuite au plan coutumier. Au plan conventionnel, alors même qu'Israël a ratifié ce…

The PRESIDENT: May I interrupt you for a minute, Professor? I would like to point out to you that, with the exception of Palestine, all participants are supposed to speak for no more than 45 minutes, and you have already spoken for 40. It seems to me that you are far from finishing your statement, so may I suggest that you try to summarize the rest of your statement. Thank you.

M. LARABA : L'applicabilité des deux pactes de 1966, au plan conventionnel comme au plan coutumier, les deux pactes s'appliquent notamment parce que le pacte sur les droits civils et politiques dans son article 2, paragraphe 1, souligne qu'il s'applique à l'égard des individus relevant de la compétence de l'Etat partie et pas simplement sur le territoire. A propos du pacte sur les droits économiques, sociaux et culturels, là également il y a dans la convention une certaine transcendance incontestable qui peut expliquer que ce pacte puisse faire l'objet d'application. Mais c'est surtout l'évolution coutumière qui permet de considérer que ces deux pactes s'appliquent.

III. Les multiples violations du droit international découlant de la construction du mur

Dans son avis consultatif de 1996, la Cour internationale de Justice y a souligné que «la protection offerte par le pacte international relatif aux droits civils et politiques ne cesse pas en temps de guerre, si ce n'est par l'effet de l'article 4 du pacte…» (p. 240, par. 25).

La construction du mur viole d'une part les principes fondamentaux du droit international général, les principes fondamentaux du droit international humanitaire y compris les dispositions de la quatrième convention dont la section 3 de sa troisième partie et viole également les principes les plus fondamentaux du droit international des droits de l'homme.

Je voudrais ici insister sur l'évolution la plus récente en la matière. Elle consiste dans le fait que, à côté de règles relatives à la déportation, relatives à l'expulsion, sont apparues de nouvelles formes d'atteintes aux droits de l'homme qui sont tout à fait applicables en la circonstance. Ce sont les décisions, notamment du Tribunal pénal international pour l'ex-Yougoslavie, qui peuvent à cet égard être particulièrement intéressantes même si on est encore une fois dans une hypothèse qui est différente, qui n'est pas exactement celle qui nous occupe ici.

Dans l'affaire *Kupreskic* déjà citée, le Tribunal international a considéré par exemple que «la destruction généralisée des maisons et des biens s'apparentait à une véritable persécution». Et

poursuivant son avis, le Tribunal international a considéré que cette atteinte ««s'apparente en fait à une destruction des moyens d'existence d'une population donnée» (par. 631).

Dans la décision Blaskic, qui date du mois de mars 2000, le Tribunal pénal a considéré que

> «La confiscation ou la destruction d'habitations ou d'entreprises privées … ou de moyens de subsistance … peuvent être qualifiés d'actes de persécution… Le crime de persécution englobe … des actes … visant, par exemple, les biens pour autant que les personnes qui ont en été victimes aient été spécialement choisies pour des motifs … discriminatoires.» (Par. 227 et 233.)

CONCLUSION

Au total, Monsieur le président, Madame et Messieurs de la Cour, et en conclusion, la République algérienne prie la Cour de se déclarer compétente et de répondre à la demande d'avis consultatif de l'Assemblée générale à la lumière du droit pertinent en la matière dont elle a présenté la quintessence. Elle lui demande respectueusement de déclarer l'illégalité de la construction du mur par Israël au regard de ce droit.

Selon l'Algérie, les conséquences en droit sont de deux ordres. D'une part, Israël est dans l'obligation de mettre fin à la situation illicite, d'autre part, cet Etat est tenu de réparer les dommages causés par la construction du mur. Ceci conduit à l'application du premier principe en la matière à savoir celui de la *restitutio in integrum* qui passe par la destruction du mur et la remise en état de la situation antérieure. C'est à ce prix que «le mur diabolique», pour reprendre la forte expression de Uri Avnery sera exorcisé, ce mur qui «se situe entre les enfants et leur école, entre les étudiants et leur université, entre les malades et leurs médecins, entre les parents et leurs enfants, entre les villages et leurs puits, entre les paysans et leurs champs». Je vous remercie de votre attention.

The PRESIDENT: Thank you Professor Laraba. Now this is time for a break of ten minutes and the hearings will resume at 4.45 p.m.

The Court adjourned from 4.40 a.m. to 4.45. p.m.

The PRESIDENT: Please be seated. I now give the floor to His Excellency Ambassador Shobokshi, Permanent Representative of the Kingdom of Saudi Arabia to the United Nations.

Mr. SHOBOKSHI:

1. Mr. President, Members of the Court, it is a great honour for me to appear before you today. This is the first time that Saudi Arabia has made an oral presentation to the International Court of Justice. I am deeply grateful for this opportunity to present the position of my country before this esteemed body.

2. I have the honour to represent my country as its Permanent Representative to the United Nations. I recognize that today I am in a different setting, and I will put forth my best efforts to make my comments within a legal framework.

3. As the Court is aware, the Kingdom of Saudi Arabia has presented a Written Statement on the question before the Court. We are mindful of our duty not to simply repeat what is said there. We are also cognizant of the time pressure the Court is under and the fact that the position of many of the parties that are here touch upon similar points. Thus, in using my time today, I will not make a comprehensive statement that responds to all of the points that have been raised with which we disagree. We will let our Written Statement stand and reflect our comprehensive point of view. Rather, I propose to address one specific argument that has been raised. That argument concerns the discretion of the Court. The argument is that an advisory opinion on the question is at cross purposes to the negotiating effort, designed to bring peace in the Middle East, which is today called the Road Map. We strongly disagree with this argument. We believe it is a false argument that if accepted leads only to further disintegration of the peace process. It is hoped that by responding to this one argument we will provide the Court with "information", as called for by Article 66 of the Statute of the Court. That is our responsibility here; it is not to argue as if this is a contentious case.

4. Before I proceed, however, I wish to make three preliminary observations.

5. First, we take note of the highly unusual posture of the pleadings that have been presented to the Court.

6. On the one hand, no State or other party appearing in this matter has sought to justify in law the separation Wall that Israel is building. On the other hand, some of us that are before the Court have made the case in law that there are legal consequences of the separation Wall, or barrier, or fence, whatever it may be called — and from here forward I will simply refer to it as the

Wall — and that those consequences arise from the conclusion that the Wall is unlawful. Since no party has argued to the contrary, we believe our conclusion is sound.

7. Of course, a group of States argues that the Court should not render an advisory opinion on the question as the General Assembly has requested. The argument they present is similar to arguments made in other advisory opinion cases to the effect that the question is vague, or that the Court will be in danger of prejudicing negotiations or of departing from its judicial function. Such arguments have failed in the past before this Court. It is notable, however, that in the cases where such arguments are made, one often at the same time finds those same States arguing in the alternative: that is, they argue their view that the Court should not render an opinion, but they then go on to argue their position on the substance of the matter in the event that the Court proceeds to render an opinion. This is not the case here.

8. For instance, in the *Nuclear Weapons* case, seven States argued in their Written Statements that the Court should not give its opinion[1]; of those States, six presented the alternative argument[2]. In the present matter, these same six States provided the Court with Written Statements again arguing that the Court should not render an advisory opinion, but this time in doing so they presented no alternative argument. The copy of my prepared remarks given to the Registry contains the relevant citations.

9. Thus, the alternative argument is not presented here. The States that argue that the Court should not exercise its power to render an advisory opinion on the question before it do not argue in the alternative that if the Court does, it should find that there is a legal basis for the Wall and thus no adverse legal consequences. The question may be asked, why not? The answer, simply, is that the Wall is indefensible as a matter of law.

10. Many States that have taken the position in their Written Statements that the Court should not render an advisory opinion on the question before it have elsewhere condemned the

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[1] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 236, para. 15 (hereafter "*Nuclear Weapons* case"). See United States of America, Written Statement, pp. 3-7; United Kingdom, Written Statement, pp. 9-20; Russian Federation, Written Statement, pp. 1-4; France, Written Statement, pp. 4-20; Finland, Written Statement, p. 1; Netherlands, Written Statement, pp. 2-4; Germany, Written Statement pp. 2-6.

[2] See United States of America, Written Statement, pp. 7-47; United Kingdom, Written Statement, pp. 21-73; Russian Federation, Written Statement, pp. 4-18; France, Written Statement, pp. 20-53; Netherlands, Written Statement pp. 4-13; Germany, Written Statement, p. 6 (incorporating argument that Germany made in a Written Statement submitted in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* advisory case referred to the Court by the World Health Organization).

Wall. They have done so by their affirmative vote for General Assembly resolution ES-10/13 of October 2003[3], which demands that Israel stop and reverse the construction of the Wall and states it is in contradiction with international law.

11. Therefore, the Court is in a curious position. Almost all States making written appearances before the Court hold the position that the Wall is illegal. Nonetheless, some of those States believe that the Court should not render an advisory opinion on the question before it because they say it will inhibit a negotiating process.

12. In our view, that is a sad commentary on the state of things. There is an internationally supported negotiating process. One side in the negotiations — that is, the Israeli side — has been and continues to deliberately enhance its position and change the territorial status quo to its benefit. It has been doing so since 1967; the Wall is the most recent manifestation. Nothing is being done about it, although almost all States say it is wrong. Whatever rhetorical exhortations may be made by the Quartet have done nothing to make Israel believe that there is an adverse consequence to taking more Palestinian land. Yet the argument is made that the General Assembly should be denied the Court's opinion on the legal consequences of the Wall — a wall that in our view denies a viable Palestinian State, denies the right of self-determination, and exacerbates the hatred that leads to increased violence.

13. Mr. President, Members of the Court, this attitude that the Court should not speak on this question does not make sense to us. If the Court, the highest international judicial body, cannot take a clear position on the law to guide the General Assembly on a specific request by that body as negotiations progress, it is not hard to understand the further descent into chaos and procrastination.

14. The second preliminary matter that I must touch on concerns terrorism.

15. It is important that the record show that Saudi Arabia condemns terrorism in all of its forms. We are committed to the fight against terrorism. We are a party to relevant multilateral and

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[3]United Nations General Assembly resolution A/RES/ES-10/13 (October 2003). Paragraph one states:

"*Demands* that Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law."

regional conventions and have embraced Security Council resolution 1373 of 2001[4]. However, as we have said in many fora, it is not enough just to condemn terrorism and fight terrorism. If one wishes to defeat terrorism, one needs also to address the motivation and the provocation that lead to terrorism. As our Foreign Minister, His Royal Highness Prince Saud al-Faisal said last year during the General Debate at the General Assembly:

> "[T]his international effort directed against terrorism will not eradicate this phenomenon if handled without addressing its roots . . .
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> . . . . . .
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> The deteriorating situation of peoples who are suffering oppression, injustice and persecution, or who are overburdened by occupation, and the inability of the international community, for one reason or another, to find just solutions for these problems, is what creates the environment that is exploited by evildoers . . ."[5]

This is part of the issue of terrorism.

16. A third preliminary point is to emphasize the constructive role and the interest of Saudi Arabia in the success of the Road Map. Indeed, the Road Map refers specifically to the initiative of His Royal Highness Crown Prince Abdullah — which was endorsed by the Beirut Arab League Summit of March 2002[6] — that calls for acceptance of Israel as a neighbour living in peace and security, in the context of a just and equitable settlement. The Road Map refers to the Saudi initiative as "a vital element of international efforts to promote a comprehensive peace on all tracks"[7]. Any student of this conflict will recognize that this initiative constitutes a major stride towards peace. We accept two States living side by side in harmony based upon a negotiated settlement.

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[4]Saudi Arabia is party to a number of multilateral conventions against terrorism including: Convention of the Organization of the Islamic Conference on Combating International Terrorism, adopted at Ouagadougou (1 July 1999); Arab Convention on the Suppression of Terrorism, signed at a meeting held at the General Secretariat of the League of Arab States in Cairo (22 April 1998); Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal (1 March 1991); Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal (24 February 1988); International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations (17 December 1979); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal (23 September 1971); Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague (16 December 1970); and Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo (14 September 1963).

[5]His Royal Highness Prince Saud Al-Faisal, Statement during the General Debate at the General Assembly, Fifty-eighth Session (29 Sept. 2003), available at http://www.un.org/webcast/ga/58/statements/saudeng030929.htm.

[6]Arab Peace Initiative, Arab League Summit (Beirut, 27-28 March 2002), available at http://www.al-bab.com/arab/docs/league/peace02.htm.

[7]United Nations doc. S/2003/529, p. 2.

17. Thus, Mr. President and Members of the Court, our criticism of the Wall cannot be viewed as supporting terrorism or as undermining the Road Map. To the contrary, we believe an advisory opinion on the question presented will contribute to the objective of eliminating terrorism and to bringing about a just and lasting peace in the region.

18. Before continuing, however, in the light of the importance that has been attached to the Road Map in the presentations made to the Court, and given the importance of the Saudi initiative to the Road Map, it is important to be very clear about what was decided at the Beirut Summit. The Saudi Arabian proposal, formulated in a speech by His Royal Highness Crown Prince Abdullah, said:

> "The only acceptable objective of the peace process is the full Israeli withdrawal from all the occupied Arab territories, the establishment of an independent Palestinian state with [East Jerusalem] as its capital, and the return of refugees.
>
> Without moving towards this objective, the peace process is an exercise in futility and a play on words and a squandering of time which perpetuates the cycle of violence."[8]

Thus it was proposed, and again I quote: "Normal relations and security for Israel in exchange for a full withdrawal from all occupied Arab territories, recognition of an independent Palestinian state with [East Jerusalem] as its capital, and the return of refugees."[9] This proposal was adopted unanimously; and as noted, it is referred to as "a vital element" of the Road Map.

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19. I now turn to our response to the argument that has been made that the Court's advisory opinion on the question of the legal consequences of the Wall would prejudice or hinder or be at cross-purposes to the Road Map, and thus the Court should refrain from giving its opinion. I will respond by looking at the argument from five different points of view.

20. To begin, the argument may be examined from what might be said to be a logical point of view. It is hard for us to understand how an advisory opinion from this Court that could inform the General Assembly and that is non-binding would truly hinder negotiations between two parties as claimed by Israel and several other States. The advisory opinion is an opinion of law, and the

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[8]His Royal Highness Crown Prince Abdullah, Speech at Arab Summit (Beirut, 27-28 March 2002), available at http://www.al-bab.com/arab/docs/league/abdullah02.htm.

[9]*Ibid.*

General Assembly believes it will be useful to its deliberations. We cannot lose sight of the fact that the purpose of the General Assembly's request for this position is to advise it in the conduct of its work, such work including the concern for human rights and self-determination, not to mention international peace and security. It is a fact that the Palestinian people have been denied the exercise of the right of self-determination for many decades, and this is a legitimate concern of the General Assembly.

21. The negotiations that are mandated by the Road Map do not take place in a vacuum. The interest of the General Assembly is not new. Resolution after resolution of both the General Assembly and the Security Council have been disregarded by the Occupying Power in the Occupied Palestinian Territory, including in and around Jerusalem. It is the Security Council that:

— beginning with resolution 242 in 1967 and, later, resolution 338 of 1973 requires the withdrawal of Israel from the territory it occupied in the 1967 War[10];

— beginning with resolution 252 in 1968 considers that all legislative and administrative measures and actions taken by Israel, including expropriation of land and properties thereon, which purport to change the legal status of Jerusalem are invalid and cannot change that status[11];

— in resolution 446 in 1979 determined that the policy and practices of Israel in establishing settlements in Palestine and other Arab territories occupied since 1967 have no legal validity and constitute a serious obstruction to achieving a comprehensive, just and lasting peace[12];

— determined in resolution 452 of 1979 that Israel's settlement policy constitutes a violation of the Fourth Geneva Convention of 1949[13].

The list goes on and on, and includes Security Council resolution 465 of 1980, which specifically referred to Israel's settlement policies as a flagrant violation of the Fourth Geneva Convention[14].

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[10]United Nations Security Council resolution 242 (1967).

[11]United Nations Security Council resolution 252 (1968); United Nations Security Council resolution 267 (1969); and United Nations Security Council resolution 298 (1971).

[12]United Nations Security Council resolution 446 (1979).

[13]United Nations Security Council resolution 452 (1979).

[14]United Nations Security Council resolution 465 (1980). Paragraph 5 states:

22. It remains for the parties to negotiate their own solution, but it is perfectly legitimate for the General Assembly to request the Court for an advisory opinion on the legal consequences of the Wall in the context of those resolutions and other principles of international law, and for the Court to exercise its mandate and to give its opinion.

23. The second point of view that I offer looks at this question chronologically over the last two years in light of the argument made in the Israeli Written Statement that the General Assembly's request is improper in light of the Security Council's endorsement of the Road Map in its resolution 1515. A chronological review of the last two years shows that the General Assembly's request for an advisory opinion is consistent with its responsibilities and does not infringe upon those of the Security Council. The Israeli Written Statement, at paragraph 3.2, states that Security Council resolution 1397 of 12 March 2002 "sets the agenda for the Quartet initiative". It is, of course, that initiative, which arose from the Madrid process, that resulted in the plan now called the Road Map. According to paragraph 1.16 of the Israeli Written Statement, the Government of Israel approved the construction of the Wall the very next month. Actual construction began in June that same year.

24. During 2002 and 2003 the Quartet issued communiqués following its meetings recording its progress[15]. In the communiqué of the Quartet dated 17 September 2002, one can see the complete Road Map[16]. It is true that it was not formally presented to Israel and to the Palestinian Authority until 30 April 2003, and it was not until 19 November 2003 that the Security Council passed a resolution in which it "endorsed" the Road Map[17]. That is the operative word "endorsed" — that is all. Throughout 2002 and 2003 the Road Map was promoted, acted upon, called upon and interpreted. Thus, leading up to the end of 2003, the Road Map was the centre of

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"*Determines* that all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof have no legal validity and that Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East."

[15]The Quartet issued seven joint-communiqués in total including one statement at the Envoys level, available at http://www.state.gov/p/nea/rt/c9963.htm.

[16]Middle East Quartet Communiqué (17 Sept. 2002), available at http://www.state.gov/p/nea/rt/15207.htm.

[17]United Nations Security Council resolution 1515 (2003).

the diplomacy on this subject; but even before the Security Council endorsed it in November 2003, its viability had become open to question.

25. The Israeli Written Statement portrays the scene as if on 19 November 2003 the Security Council took a momentous action — as if it had just discovered the Road Map — rather than simply endorsing something that had already been the focus of diplomacy for more than one year[18]. The Israeli Written Statement goes further to cast the General Assembly in the role of a villain by calling for this advisory opinion a few weeks later: as if the General Assembly sought to pre-empt the powers of the Security Council — making, as Israel asserts, the call for this advisory opinion *ultra vires* to the General Assembly[19].

26. Mr. President, Members of the Court, the genesis — the date of the beginning of the Road Map — is *not* 19 November 2003. If so, the Road Map is itself internally inconsistent as it calls for a three-year process to be completed by 2005. The Road Map is a negotiating effort that dates from early 2002, receiving the endorsement (a rather modest word after all) of the Security Council only recently.

27. In light of Israel's arguments that the actions of the General Assembly are *ultra vires*, it is useful to note what occurred in respect of the Wall in 2002 and 2003.

28. From the date of approval of the Wall by the Israeli Government to the adoption by the Security Council on 19 November 2003 of resolution 1515, the Quartet issued six communiqués. Only the last of these referred to the Wall, which was by then well along in its construction, and then only expressed general concern. Nonetheless, throughout the period there was mounting evidence of the humanitarian crisis created by the Wall, the growing realization that new *de facto* territorial annexation by Israel was occurring, and the increasing concern that the Wall would make negotiations impossible. However, the Security Council did not act nor did the Quartet act to convince Israel to reverse the situation.

29. In light of these growing concerns, however, on 14 October 2003 the Security Council considered a draft resolution[20]. A preambular paragraph of that draft resolution condemned "all

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[18]Israel, Written Statement, Chap. 4.

[19]*Ibid.*

[20]United Nations doc. S/2003/980.

acts of violence, terror and destruction", while an operative paragraph decided "that the construction by Israel, the occupying Power, of a wall in the Occupied Territories departing from the armistice line of 1949 is illegal under relevant provisions of international law and must be ceased and reversed".

30. The draft resolution was not adopted by the Security Council but in the debate no one said that the legal conclusion of the defeated resolution was wrong[21].

31. It is in this context of the failure to comment on the legality of the Wall, and thus to protect the Road Map, that the Emergency Special Session was called, which resulted in a request for this advisory opinion. Thus, this review of recent events shows that the General Assembly's action is not precipitous, it is not irresponsible, and that it is focused on the Wall, which is destructive of peace. There is no evidence in the chronology that suggests that the Road Map will be harmed if an advisory opinion is given.

32. We now turn to a third point of view on the argument that an advisory opinion will have negative consequences for the Road Map. This viewpoint looks at the issue from a practical and historical point of view. Let us be clear, the Road Map is simply a negotiating process. It is well supported by the international community, and that is good. However, one cannot avoid the fact that there have been other well-supported negotiating initiatives on this problem over the last 40 years. I say this not to cast doubt on our commitment to the Road Map but simply to ensure that the Road Map is seen for what it is.

33. The Court has been faced before with the argument that an advisory opinion on a question before it would prejudice sensitive negotiations. It was confronted in particular with the same argument ten years ago in the *Nuclear Weapons* case. At paragraph 17 of that Judgment the Court said, and I quote:

> "The Court is aware that, no matter what might be its conclusions in any opinion it might give, they would have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter. Beyond that, the effect of the opinion is a matter of appreciation. The Court has heard contrary positions advanced and there are no evident criteria by which it can prefer one assessment to another. That being so, the

[21] *Ibid.*

> Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction."[22]

The Kingdom of Saudi Arabia respectfully submits that those same reasons apply here.

34. Mr. President, Members of the Court, the argument that doing something today might prejudice something tomorrow is a feature of diplomatic life. It probably would be hard to find an experienced international diplomat who has not made that argument. As is the case here, it is normally made when we want to avoid putting the spotlight on what is happening now.

35. What is happening now is that the Road Map is in trouble. We recognize that some of the Quartet come to the Court and say: do not shine the spotlight on the problem. We support these members' work, but we believe they have seriously misread the situation. Fortunately another member, the United Nations, and one of its organs — a competent organ — the General Assembly — wants to put the spotlight on the problem and be informed of the legal consequences of Israel's actions — the legal consequences in light of the humanitarian crisis, the legal consequences for self-determination, and indeed, the legal consequences for international peace and security, not just for Palestine and Israel but for all States and international institutions.

36. Why should the spotlight be put on the problem? The spotlight should be put on the problem because the Wall is so provocative, so overreaching, so aggressive, and so disproportionate, that we believe it will be the death knell of the Road Map if it is not immediately reversed.

37. The Quartet knows this. Their last joint communiqué entitled "Final Quartet Statement" and dated 26 September 2003 indicated that they regarded the implementation of the Road Map as stalled. The Quartet also said the settlement activity must stop, and then expressed great concern over the Wall and its effect on the Road Map[23]. That was the position of the Quartet in September of last year. What has happened since then? Since then, the Security Council did endorse the Road

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[22] *Nuclear Weapons* case, *I.C.J. Reports 1996 (I)*, p. 237, para. 17.

[23] Middle East Quartet Communiqué (26 Sept. 2003), available at http://www.state.gov/p/nea/rls/24721.htm.

> "The Quartet members view with great concern the situation in Israel, the West Bank, and Gaza which has stalled implementation of the roadmap.
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> . . . . . .
>
> The Quartet members reaffirm that, in accordance with the roadmap, settlement activity must stop, and note with great concern the 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 roadmap process as it appears to prejudge final borders of a future Palestinian state."

Map, but the Wall continued to be built. The "fabric of life", as the Israeli Written Statement calls it, has become even more intolerable for the Palestinian people, and, yes, the cycle of violence continues.

38. Mr. President, Members of the Court, the fact that there was an Advisory Opinion on South West Africa[24] may have informed the views of some States and international organizations. In spite of South Africa's arguments that an opinion in that matter should not be issued, that did not deter the Court. The fact that the Court concluded that South Africa's occupation was illegal may actually have helped the process and left South Africa to conclude that its only option was to do what was right: withdraw. Today, Namibia is an independent State.

39. The concerns of Spain in Western Sahara[25] and those of a number of States in the *Nuclear Weapons* case[26] concerning the impact of an advisory opinion on sensitive issues in a sensitive process proved not to be true.

40. Thus, the argument that an advisory opinion on this question is counterproductive to the Road Map cannot be sustained. This is an advisory opinion. It is not binding, but it will inform the General Assembly that, by virtue of its request, has sought the Court's opinion on the question posed.

41. Before moving on I must say one thing about Israel's portrayal of the Road Map. To be sure, stage one of the Road Map concerns terrorism directed at Israel, but it also concerns Israeli provocations against Palestine. The Road Map is not as Israel repeatedly states a document that in bold letters says the first step is to eliminate all terrorist acts. What the Road Map says is that at the outset of stage one, I quote: "All official Palestinian institutions end incitement against Israel", and following thereafter — and again I quote: "All official Israeli institutions end incitement against Palestinians"[27]. The Palestinian obligation appears first on the page, but that is not an indication that Israel is free to continue its provocations, including the construction of the Wall, until it judges

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[24]*Legal Consequences for States of the Continued Presence of South Africa in Namibia, I.C.J. Reports 1971* (21 June).

[25]*Western Sahara, I.C.J. Reports 1975* (16 Oct.).

[26]*Nuclear Weapons* case, *I.C.J. Reports 1996 (I)*, p. 236, para. 15.

[27]United Nations doc. S/2003/529, p. 3.

it is satisfied that official Palestinian institutions have utterly succeeded in winning the war against terrorism.

42. The fourth point of view about this argument that the Road Map could be prejudiced if there is an advisory opinion is to note the vacuum of silence that accompanies the argument.

43. The silence I refer to is that no one says why the Road Map will be prejudiced if the Court gives an advisory opinion. Indeed, if one examines closely the words used, one finds that the argument is generally hedged with phrases such as "could potentially prejudice" or "could undermine". Thus, there is simply the qualified assertion without any reasoned support for the assertion. This is all the more surprising in that such assertions are normally accompanied by a reference to the Road Map as something that needs to be restarted — not as something that is active and vibrant and moving along. That the Road Map needs to be "relaunched," the term used by the European Union[28], there is no doubt; that this is a difficult and sensitive and long-standing problem, there is no doubt; but no reason is given as to why an advisory opinion would make it all more difficult.

44. We agree that the Road Map needs to be reinvigorated, but there is no basis for concluding that an advisory opinion on the legal consequences of the Wall hinders that possibility.

45. The fifth and final point of view concerning the argument that the Court should not pronounce upon matters that are the subject of negotiations considers the argument in light of its legal context.

46. Mr. President and Members of the Court, this Israeli position needs to be carefully considered because it is particularly counter-productive and not in accord with international law. In fact, what Israel is saying is that the Court should not examine the Wall in the context of the many resolutions of the Security Council and the General Assembly of the United Nations — nor should it examine treaties to which Israel is a party — based upon facts supplied by the United Nations or the Conference of the Parties to that treaty.

[28]Remarks of the President of the Council of the European Union at the General Assembly of the United Nations after the adoption of resolutions A/RES/ES-10/14 and A/RES/ES-10/13, reproduced in the Written Statement submitted to the Court by the European Union.

47. The fact is that the Security Council and the General Assembly, and the Conference of the Parties to the Fourth Geneva Convention[29], have spoken to some of the core issues at the heart of this matter. In any objective sense it is not prejudicial to the Road Map if the Court examines the Wall against those resolutions and treaty obligations. If Israel believes the Road Map will be prejudiced if the Court does no more than review a fact — namely, the Wall — and this is not a complex factual question — in light of the resolutions of the United Nations, customary international law and Israel's treaty obligations, that is a serious problem. That is a serious problem for the peace process. It is a serious problem because what it means is that so much that has gone before is in Israel's view irrelevant. Israel would prefer to live in a world where the International Court of Justice has not spoken on these same questions.

48. Israel occupied the West Bank, Gaza and East Jerusalem by force in 1967. The use of force is illegal under the United Nations Charter. The Security Council called for withdrawal by Israel in resolutions 242 of 1967 and 338 of 1973, but it has not occurred. Into the territory it occupied by force Israel moved its settlers. That is fundamentally illegal under international law no matter what the justification for the occupation might be; it was confirmed by the Security Council to apply in this instance; but Israel argues to the contrary.

49. Further, while it holds Palestinian territory by force, Israel denies the Palestinian people their human rights and denies it is an Occupying Power subject to international humanitarian law, and denies that it has obligations under the Fourth Geneva Convention, notwithstanding decisions of the Security Council and the General Assembly and the Conference of the Parties to the Fourth Geneva Convention to the contrary. Israel even takes issue in its Written Statement with the fact that the question before the Court uses the phrase "Occupied Palestinian Territory, including in and around East Jerusalem"[30].

50. Mr. President, Members of the Court, the international community through the political institutions of the United Nations and other treaty bodies has spoken to these issues on many occasions. The list of resolutions is long. Israel has rebuffed these conclusions and has sought excuses for its own failures in the short comings of others; or more boldly, it has challenged the

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[29]Declaration of Conference of High Contracting Parties to the Fourth Geneva Convention (Geneva, 5 Dec. 2001), available at http://www.eda/admin.ch/eda/e/home/foreign/hupol/4gc/docum2.Par0006.upfile.pdf.

[30]Israel, Written Statement, p. 11, para. 2.9.

international community by taking contrary positions and acting upon those positions to which there has been no or only a muted response. Now Israel builds a Wall. What Israel seeks to avoid today is hearing the Court say, in connection with the legal consequences of the Wall, what the Security Council and the General Assembly and the Conference of the Parties to the Fourth Geneva Convention have already said but have failed to enforce or implement in connection with Israel's post-1967 activities in the Occupied Palestinian Territory, including in and around Jerusalem. If Israel is not going to meet such obligations regardless of the prior failings of international institutions, there is no hope for the Road Map or future peace efforts.

51. The Court need not decide those issues that have been relegated to Phase III of the Road Map, which appears to be a central concern, including the borders of Palestine, when it answers the question before it; but at the same time, it will not be at cross purposes with the Road Map if:

— the Court notes that the Wall is largely within territory that Israel has occupied by force for more than 35 years and from which it has not withdrawn as required by Security Council resolution 242 of 1967 and later by 338 of 1973[31];

— the Court notes that the Wall encloses and makes contiguous to Israel almost all of the Israeli settlements in the West Bank which were condemned as illegal in Security Council resolution 446 of 1979, thereby consolidating and enhancing Israel's annexation of Palestinian land[32];

[31]See also United Nations Security Council resolution 471 (1980) ("Reaffirm[ing] the overriding necessity to end the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem"); United Nations Security Council resolution 476 (1980) (same).

[32]See also United Nations Security Council resolution 452 (1979) (considering the settlements to be in violation of the Fourth Geneva Convention of 1949 and calling upon Israel "to cease, on an urgent basis, the establishment, construction and planning of settlements in the Arab territories occupied since 1967, including Jerusalem"); United Nations Security Council resolution 465 (1980) (considering the settlements to be a violation of the Fourth Geneva Convention of 1949; determining that the settlements "constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East"; and calling upon Israel "to dismantle the existing settlements and in particular to cease, on an urgent basis, the establishment, construction and planning of settlements in the Arab territories occupied since 1967, including Jerusalem").

— the Court notes that the Wall in and around East Jerusalem violates the Security Council's decision found first in resolution 252 of 1968 that Israel's attempt to annex East Jerusalem is illegal[33]; and

— the Court notes that the Wall is a breach of the duties of the Occupying Power under the Fourth Geneva Convention of 1949 to which Israel is a party, as has been stated and restated by the Security Council and the General Assembly in resolutions for more than one quarter of a century[34].

Such findings by the Court in the course of considering the illegal consequences of the Wall, far from running at cross purposes with the Road Map, would be a welcome reminder of the reality, the legality, and the context within which those negotiations must occur.

52. Nowhere is this more obvious than with regard to the Israeli view that Security Council resolutions 242 and 338 do not require its withdrawal from the Occupied Palestinian Territory, including in and around East Jerusalem, and that its settlements are perfectly legal. Israel portrays its occupation and annexation of territory as a complex problem[35]. It is not a complex problem as a legal matter. It may be a complex political problem for Israel, but the Israeli Government does nothing but continue to make that problem more difficult. The establishment of settlements continues unabated with only an occasional charade of removing a far-flung outpost. Israel believes it has the right to acquire the territory of these settlements by force. Israel also believes it

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[33]The Security Council has repeatedly declared attempts to change the status of East Jerusalem illegal and has called upon Israel to rescind such measures. See United Nations Security Council resolution 267 (1969); United Nations Security Council resolution 271 (1969); United Nations Security Council resolution 298 (1971); United Nations Security Council resolution 446 (1979); United Nations Security Council resolution 465 (1980); United Nations Security Council resolution 471 (1980); United Nations Security Council resolution 476 (1980); United Nations Security Council resolution 478 (1980).

[34]The following resolutions affirm the applicability of the Fourth Geneva Convention of 1949: United Nations Security Council resolution 271 (1969); United Nations Security Council resolution 446 (1979); United Nations Security Council resolution 465 (1980); United Nations Security Council resolution 471 (1980); United Nations Security Council resolution 484 (1980); United Nations Security Council resolution 592 (1986); United Nations Security Council resolution 605 (1987); United Nations Security Council resolution 607 (1988); United Nations Security Council resolution 636 (1989); United Nations Security Council resolution 641 (1989); United Nations Security Council resolution 672 (1990); United Nations Security Council resolution 726 (1992); United Nations Security Council resolution 799 (1992); United Nations Security Council resolution 904 (1994); United Nations Security Council resolution 1322 (2000). Further, the following resolutions found Israel to be in violation of the Fourth Geneva Convention of 1949: United Nations Security Council resolution 452 (1979); United Nations Security Council resolution 465 (1980); United Nations Security Council resolution 469 (1980); United Nations Security Council resolution 471 (1980); United Nations Security Council resolution 592 (1986); United Nations Security Council resolution 605 (1987); United Nations Security Council resolution 607 (1988); United Nations Security Council resolution 636 (1989); United Nations Security Council resolution 641 (1989); United Nations Security Council resolution 681 (1990); United Nations Security Council resolution 694 (1991); United Nations Security Council resolution 799 (1992).

[35]Israel, Written Statement, p. 40, para. 3.52.

is not subject to the requirements of international humanitarian law in the territory it occupies. These are astounding propositions that fly in the face of international law and the will of the international community. That an advisory opinion might touch on such basic points in the examination of whether there are legal consequences of the Wall Israel finds to be prejudicial. It can only be prejudicial to Israel if Israel is deemed to have special rights to avoid the same rules that bind other States.

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53. Mr. President, Members of the Court, there is no legal bar that prevents the Court from rendering its opinion. The General Assembly has asked a legal question and is competent to do so. The question is neither vague nor abstract, and the facts are perfectly clear. The jurisprudence of the Court requires the Court to render an advisory opinion unless there are compelling reasons for it not to do so. In this matter the argument has been made that such a compelling reason is the Road Map, which as is said, must be relaunched, which some States believe could be prejudiced if the Court gives its opinion. We have sought to give a contrary view. We do not believe that the fact that there is a negotiating process is such a compelling reason to cause the Court to decide not to render its opinion.

54. In closing let me make one final comment. In its Written Statement Israel has made a reckless assertion to intimidate the Court. It argues that an opinion from the Court could embolden terrorists[36]. It is much more likely that the opposite is true. An advisory opinion on this question will not increase terrorism, nor will it harm the Road Map, but it may give hope that the rule of law will be respected. An advisory opinion will give guidance to the efforts of the General Assembly. It may recall the law that is applicable to all and that protects the people in occupied territory, and leads to self-determination and to peace. We all know this matter will not be resolved in a court; hopefully, it will be resolved one day through negotiations. Having the Court's advisory opinion as negotiations go forward to inform the General Assembly can hardly be a bad thing.

55. Finally, before I close, I must note that in addition to all of the other concerns, the Wall in East Jerusalem has an additional dimension. Its impact is to make access to the Holy Sites there

[36] *Ibid.*

virtually impossible to access by those who come to worship. This is of special concern to Saudi Arabia and should be of special concern to all.

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56. Thank you, Mr. President and Members of the Court, for your attention. That concludes my presentation.

The PRESIDENT: Thank you, Mr. Ambassador. I now give the floor to His Excellency Ambassador Choudhury of Bangladesh.

Mr. CHOUDHURY: Mr. President, esteemed Members of the Court, let me at the outset thank you for giving me this opportunity to appear before you and make this presentation. On behalf of the Government of Bangladesh I deem it a great honour and privilege to make certain submissions on the legal consequences of the construction of a wall in the Occupied Palestinian Territory. As a Member of the United Nations, the Non-Aligned Movement and the Organization of Islamic Conference, Bangladesh has consistently supported early termination of the illegal occupation of Palestinian territory as well as the right of self-determination of the Palestinian people. In line with its consistent principled position Bangladesh voted in favour of resolution ES-10/16 of 3 December 2003 in the General Assembly and in favour of the decision to request the International Court of Justice, pursuant to Article 65 of the Statute, to urgently render an advisory opinion on the legal consequences arising from the construction of the Wall by Israel.

I would make our submissions in the following order:

1. Submissions on the overriding importance and universal applicability of the advisory opinion to be rendered by the International Court of Justice.
2. Submissions on application of United Nations Security Council and United Nations General Assembly resolutions for a just and lasting peace in the Middle East based on the termination of the illegal occupation of Palestinian territory and the self-determination of the Palestinian people.
3. Submissions in respect of the application of the Fourth Geneva Convention and other international instruments.

4. Submissions in respect of the legal consequences of the construction of the Wall.

1. The overriding importance and universal applicability of the advisory opinion to be rendered by the International Court of Justice

Under the first heading Bangladesh would like to submit that the request for an advisory opinion made in resolution ES-10/16 is well founded in international law and is timely and appropriate in the context of the prevailing conditions in the Occupied Palestinian Territory. The basis of this submission is the persistent and continuing Israeli disregard of resolutions adopted by the United Nations Security Council, principally resolutions 242 and 348 and relevant resolutions of the United Nations General Assembly, the provisions of the Geneva Conventions and Additional Protocols and general international law. This persisting pattern of disregard over the decades threatens to undermine the authority and application of fundamental and peremptory norms of the United Nations Charter and international law.

Bangladesh considers that for the above reasons the advisory opinion to be rendered by the International Court of Justice will have significance beyond the Middle East and to future situations of conflict in different parts of the world. Since in the view of Bangladesh, the International Court of Justice will deliberate on fundamental principles of the Charter of the United Nations and international law, the Court's pronouncement, will be timely, appropriate and likely to make a most valuable contribution to the establishment of peace not only in the Middle East but all over the world.

In this connection Bangladesh would like to recall the observations of the distinguished South African delegations in the debate of 8 December 2003 at the 10th Emergency Special Session of the General Assembly, in reference to the request for an advisory opinion as follows:

> "a clear precedent already exists for such an approach. In 1971 the United Nations Security Council called for an advisory opinion from International Court of Justice on the legal consequences for States of the occupation of Namibia. That opinion proved to be a turning point in the long struggle for independence of that country. We believe that Palestinians and Israelis alike would similarly benefit from a ruling of the International Court of Justice."

Bangladesh fully concurs with this view. We also fully concur with the positions strongly stated in the previous presentations highlighting how the advisory opinion of this esteemed court will be in full consonance with positions taken by it in the past, the objective dictates of moral and

legal compulsions and the overarching imperative to take all necessary steps to establish enduring peace in Palestine.

Bangladesh expresses its conviction that the advisory opinion to be rendered by the International Court of Justice will strengthen the application of the basic principles enshrined in the United Nations Charter and in general international law and would reaffirm that a just and lasting peace in the Middle East can only be established on the basis of these principles.

2. The application of the principles of the United Nations Charter, the resolutions of United Nations Security Council and United Nations General Assembly, for a just and lasting peace in the Middle East based on the termination of the illegal occupation of Palestinian territory and the self-determination of the people of Palestine

We would like to submit that a just and lasting peace in the Middle East is based on the fundamental principle of the United Nations Charter and general international law that forcible occupation of Palestinian territory is illegal and attempted annexation of territory through use of force is also illegal. This principle underlines the relevant Untied Nations Security Council resolutions including resolutions 242, 338, 1397 and 1402. It also informs the peace process, and the recommendations of the Mitchell Report, the Tenet Work Plan and the Road Map endorsed by the Quartet. This fundamental principle requires the withdrawal of Israeli forces from the occupied territories and the declaration of Israeli settlements illegal and an obstacle to peace and calls for the complete cessation of settlement activities. The construction of the Wall operates to frustrate and undermine the application of this fundamental principle and represents a move to annex and permanently occupy the territory of Palestine and alter the ground realities to the detriment of the people of Palestine. A series of United Nations General Assembly resolutions have reaffirmed the inalienable right of the Palestinian people to self-determination including their right to have an independent State of their own while recognizing that all States in the region have the right to live in peace within secure and internationally recognized boundaries. The ongoing construction of the Wall effectively denies the right of the people of Palestine to self-determination. The construction also negates the inalienable right to return of the Palestinian people.

3. The application of international humanitarian law and in particular the Fourth Geneva Convention

The Fourth Geneva Convention of 1949 prohibits the occupying power from depriving protected persons from the benefit of the Convention in any case or in any manner whatsoever including annexation of the whole or part of the occupied territory (Art. 47). This provision has been described as having "an absolute character". The provision also incorporates a universally recognized rule endorsed by jurists and confirmed by numerous rulings of national and international courts, namely, "As long as hostilities continue the Occupying Power cannot therefore annex the occupied territory, even if it occupies the whole of the territory concerned. A decision on the point can only be reached in the peace treaty." The construction of the Wall violates and breaches this basic rule, which has been declared applicable to the Occupied Territory of Palestine by resolutions of the United Nations Security Council and the United Nations General Assembly. The construction of the Wall also breaches Articles 9, 39, 51 of the Fourth Geneva Convention. It effectively deprives the Palestinian people from enjoyment of their property, access to employment and means of livelihood, access to natural resources necessary for human survival.

For these reasons it is our submission that the construction of the Wall constitutes a grave breach of the Geneva Conventions of 1949.

The four Geneva Conventions of 1949 and the Additional Protocols of 1977 enjoy universal acceptance and have passed into customary international law. These instruments constitute the central pillars of international humanitarian law. In the hierarchy of norms, the Geneva Conventions enjoy precedence. The Israeli claim that the Wall constructed in the Occupied Palestine Territory as a security barrier is not tenable. The location of the Wall itself raises grave questions of legality and the actual motive behind the construction of the Wall in the Occupied Territories. As was made amply clear in the Palestinian presentation this morning, the security needs could very well have been addressed by Israel without fundamentally altering the character of the Occupied Territories and segmenting it into small parcels with the presence of Israeli settlements. Bangladesh respectfully submits that the International Court of Justice reaffirms the sanctity of the Geneva Conventions and their application to the situation now obtaining in Palestine. It is necessary that this be so for the maintenance of international peace and security and that an affirmation of fundamental points of law is essential to uphold the rule of law amongst

nations. The International Court of Justice, we hope, will adjudge and declare the construction of the Wall as illegal and contrary to general international law. We also hope that the esteemed Court will spell out in clear terms the legal consequences of the construction of this Wall.

4. The legal consequences of the construction of the Wall

The construction of the Wall in Palestine territory by the Occupying Power represents the culmination of a long-standing policy of permanent occupation and annexation of territory. The construction engenders crimes against humanity and in particular the following:

(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking a direct part in hostilities,

(b) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives,

(c) Intentionally directing attacks against personnel, installations, materials, units or vehicles involved in a humanitarian assistance or peace-keeping mission in accordance with the United Nations Charter, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflicts,

(d) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the Occupied Territory within or outside this Territory,

(e) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives,

(f) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war,

(g) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party,

(h) Committing outrages upon personal dignity, in particular humiliating and degrading treatment,

(i) Intentionally directing attacks against building, materials, medical units and transport and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law,

(j) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Convention.

Bangladesh submits that the impact of the construction of the Wall in and at the vicinity of Jerusalem also deserves special consideration by the International Court of Justice, as it alters or purports to alter the special status of the Holy City sacred to three great faiths. Bangladesh believes that the solution of the problem of Jerusalem and abandoning the construction of the Wall in the vicinity of the Holy City is a key to the achievement of just and durable peace in the Middle East.

Conclusion

Mr. President, in conclusion, we would like to reiterate that the construction of the Wall contravenes, in letter and sprit, the United Nations General Assembly resolution A/ES/10/13 of October 2003, which asserts that the construction of the Wall in the Occupied Palestinian Territory, including in and around East Jerusalem, is a departure from the Armistice of 1949 and it does not follow the "Green Line" of 1967. Bangladesh believes that the advisory opinion of the International Court of Justice, based on the submissions made by us and others, can act as a catalyst for the achievement of a just and lasting peace in the Middle East and to the re-establishment of the rule of law amongst nations.

Thank you, Mr. President.

The PRESIDENT: Thank you, Mr. Ambassador. This concludes the oral statement and the comments of Bangladesh and brings these hearings to a close. The Court will meet again tomorrow at 10 a.m. when it will hear Belize, Cuba, Indonesia and Jordan.

The Court is adjourned.

The Court rose at 5.50 p.m.