INTERNATIONAL COURT OF JUSTICE

Request for an
Advisory Opinion
on the
Legal Consequences of the
Construction of a Wall
in the Occupied Palestinian Territories

WRITTEN STATEMENT
SUBMITTED BY
THE HASHEMITE KINGDOM OF JORDAN

30 January 2004

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(iii) The occupying State is not entitled in occupied territory to construct a wall which serves to establish, underpin or increase its unlawful control over and de facto annexation of that territory or any part thereof

(iv) The occupying State is not entitled in occupied territory to construct a wall which seriously and disproportionally impairs the enjoyment by the inhabitants of that territory of their human rights

(v) The occupying State is not entitled in occupied territory to construct a wall which seriously and disproportionally impairs the rights of the inhabitants of that territory to the effective ownership of their land and property

(vi) A State's right of self-defence in respect of its own sovereign territory does not entitle it to exercise that right by building a wall

(a) constituting unnecessary and disproportionate action in territory which is not its own, such as occupied territory, or

(b) to protect settlements which it has unlawfully introduced into occupied territory

(vii) Any violations of international obligations as a result of the construction and planning of the wall require reparation to be made.

VI. Summary of Jordan's Statement

VII. Submissions

I. Introduction

1.1 This is the written statement by the Hashemite Kingdom of Jordan ("Jordan") submitted to the International Court of Justice ("the Court") in response to the Order of the Court made on 19 December 2003 inviting Member States of the United Nations to submit, by 30 January 2004, written statements on the question submitted to the Court for an advisory opinion.

1.2 On 8 December 2003 the General Assembly of the United Nations, at its resumed tenth emergency special session, adopted resolution A/RES/ES-10/14 in which it requested the Court urgently to render an advisory opinion on the following question:

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

1.3 At an earlier stage of the Assembly's resumed tenth emergency special session the General Assembly had adopted resolution ES-10/13 of 21 October 2003. In paragraph 1 of that resolution the Assembly

> "demand[ed] 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".

1.4 That resolution, in paragraph 3, also requested the Secretary-General to report periodically on compliance with the resolution, but with the first

report to be on compliance with paragraph 1. The Secretary-General duly submitted that first report on 24 November 2003 (UN Doc. A/ES-10/248). At paragraph 28 of that report the Secretary-General,

> "concluded that Israel is not in compliance with the Assembly's demand that it "stop and reverse the construction of the wall in the Occupied Palestinian Territory."

1.5 That report was placed before the resumed tenth emergency special session of the Assembly for its debate on 8 December 2003, and was expressly referred to in the Assembly's request for an advisory opinion.

1.6 In addressing the issues which arise in these proceedings Jordan is constrained to note that the substance of the matter which is the subject of these advisory proceedings raises some very major issues of law and fact, particularly the historical facts going back more than 50 years. Those facts shape the legal issues which call for consideration in these advisory proceedings. Moreover, the legal issues themselves are exceedingly complex and in many respects controversial, and require the most careful analysis.

1.7 Jordan will in this written statement address the relevant facts and legal issues as fully as it can within the limits of the timetable set by the Court. Should the Court consider that it would benefit from a fuller exposition of the matters of fact or law which arise in these proceedings, Jordan is ready to respond to the best of its ability to any such request which the Court might make. Should the Court also consider that the time needed to comply with such a request would cause delays during which, notwithstanding that the matter is *sub judice*, further construction of the wall could continue to occur, thereby prejudicing the present proceedings, the Court, acting pursuant to Articles 41 and 68 of the Statute and Articles 75, paragraph 1,

and 102, paragraph 2 of the Rules, may wish to examine *propriu motu* whether the circumstances require the indication of provisional measures.

II. General background

2.1 Since June 1967, that is for nearly 37 years, the Security Council and General Assembly have been passing resolutions insisting that the territories occupied by Israel after the 1967 war, and particularly the West Bank and East Jerusalem, are "occupied territories" for purposes of international law, and that Israel's rights and powers in relation to those territories are governed, and limited, by international law, and in particular by the Fourth Geneva Convention of 1949. These resolutions have had no noticeable effect on Israel's conduct. No progress has been made in resolving problems arising in relation to these occupied territories; indeed, the situation now is probably worse than it has ever been.

2.2 The events leading up to the General Assembly's request for an Advisory Opinion, have been shaped, principally, by two considerations: Israel's continued occupation of territories, which do not belong to it, for the thirty-seventh consecutive year; and Israel's decision to build a wall along a route which suggests a purpose well beyond the stated justification of self-defence. Indeed, given the wall's route penetrates deep into Palestinian territory at several junctures, threatening to place all the major Jewish settlement blocs in the occupied Palestinian territories well behind it, it would appear that a principal aim behind the wall's construction is the Israeli Government's desire to consolidate these blocs and assure their long-term presence. And rather than lift its occupation of almost four decades, Israel appears therefore to be moving to annex substantial portions of the West Bank.

2.3 All of this weighs against the requirements enumerated in the Middle East "Road Map", indeed, against the very principle that has guided every peace effort in the Middle East since 1967: "land-for-peace", as expressed for the first time in Security Council Resolution 242 (1967).

2.4 Indeed, by the time the General Assembly requested the Advisory Opinion on 8 December 2003, the only prescription available for a resumption of those peace efforts lay with the Quartet-sponsored "Road Map". Elaborated by the United States, the Russian Federation, the European Union and the United Nations throughout the Autumn of 2002, and then launched in Aqaba, Jordan, on 4 June 2003, this "performance-based plan" was designed to bridge the need for an immediate end to the current hostilities, with the vision first articulated in Security Council Resolution 1397 (2002), and then subsequently expounded by the President of the United States in 24 June 2002, of two States, Palestine and Israel, existing side-by-side in peace and security. To that end, the "Road Map" elaborated a series of parallel steps required from both sides, using for its terms of reference the principles of both the Madrid Peace Conference of 1990 and of "land for peace"; Security Council Resolutions 242 (1967), 338 (1973), and 1397 (2002); agreements previously reached by the parties; and the Arab peace initiative of 2002. Jordan, with others, also maintained that the two-State vision would only be possible if it were based on a full withdrawal by Israel from the territories occupied by it in June 167.

2.5 Regrettably, the Road Map's early implementation has been undercut: Israel's persistence in carrying out its policy of extra-judicial killings, which often resulted in the loss of innocent Palestinian life, as well as its proclivity for enforcing collective punishment against "protected persons", the Palestinian civilian population or parts of it, through *inter alia* closures and the demolition of homes, prevented the building of any confidence among the Palestinians. Neither was confidence-building possible in Israel while suicide bombings, perpetrated against Israel's civilian population and authored by Palestinian extremist organizations, regularly found lethal expression. In all instances, the Hashemite Kingdom of Jordan took a firm position by condemning unreservedly actions undertaken by both the

Israeli Government and by the Palestinian militants in bringing only misery and suffering to the civilian population of the other.

2.6 Yet, in spite of the set-backs to the implementation of the "Road Map", two informal peace initiatives begun on 27 July 2002 and 1 December 2003 respectively: the Nusseibeh-Ayalon peace plan, and the Geneva Accords, did appear to raise some popular interest in the region, creating what appeared to be some much-needed momentum for a renewal in peace-making. Israel's decision to erect the wall, along the route chosen, puts an end to that possibility. For the wall has already begun to truncate the occupied territories, threatening the national aspirations of the Palestinians, even their own existence on their land, and creating fears elsewhere.

2.7 In approving the first phase of the wall's construction on 23 June 2002, one day before President George W. Bush's promoted his vision of a two-State settlement, Israel argued the wall would serve the purpose of enhancing security, by staving off the attacks of Palestinian militants. This submission will endeavour to explain how the full route, approved by the Israeli Government on 1 October 2003, is neither proportionate to the threats posed to it, in view of the negative effects the wall engenders for the Palestinian population at large, nor could the route be justified by the principle of military necessity.

2.8 Against this general background to the current situation, the Court may wish to be briefly reminded of the history of the area after the First World War.

2.9 After the fall of the Ottoman Empire and the end of the 1914-1918 War, a Mandate for Palestine was entrusted to the United Kingdom in 1920 by the League of Nations, formally approved by the Council of the League on 24 July 1922, and entered into force on 29 September 1923. Initially the

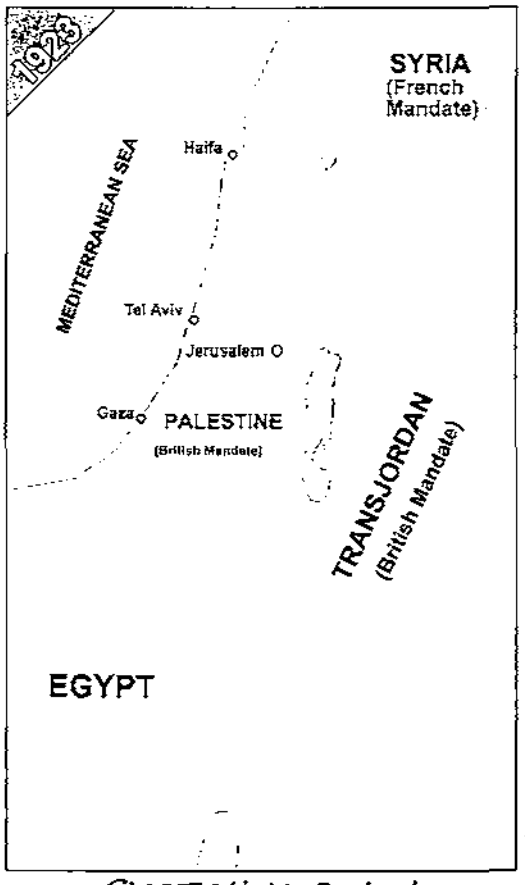
Mandate covered Palestine and Transjordan, but in 1922 Transjordan was excluded from the application of key provisions of the Palestine Mandate. Palestine continued, however, to be subject to the initial mandate of 1919. The territorial extent of Palestine under the Mandate is indicated in Sketch Map No. 1 following page (7).

2.10 Transjordan's exclusion from the key provisions of the Palestine Mandate followed the consent of the Council of the League to a proposal submitted on 24 July 1922 by the British Government in a memorandum to the Council, stating that in accordance with Article 25 of the Palestine Mandate His Majesty's Government, as the mandatory, invites the Council of the League to pass the following resolution:

> "The following provisions of the Mandate for Palestine are not applicable to the territory known as Transjordan, which comprises all territory lying to the east of a line drawn from a point two miles west of the town of Akaba (Aqaba) on the gulf of that name up the centre of the wady Araba, Dead Sea and River Jordan to its junction with the River Yarmuk; thence up the centre of that river to the Syrian Frontier."

On 22 March 1946 Treaty of Alliance was signed between Great Britain and Transjordan. It proclaimed Transjordan independent and Amir Abdullah Ibn Al-Hussain its sovereign.

2.11 In the years immediately following the Second World War the situation in the territories covered by the Mandate for Palestine was troubled. Inter-communal Arab-Jewish strife resumed and anti-British violence was also extensive during this period. In 1947 the British Government sought the United Nations' help in resolving what had become known as 'the Palestine Question'. On 29 November 1947 the General Assembly adopted Resolution 181(II) which took note of the declaration by the mandatory Power that it planned to complete its evacuation of Palestine by 1 August



SKETCH MAP No. 1

SKETCH MAP No. 3

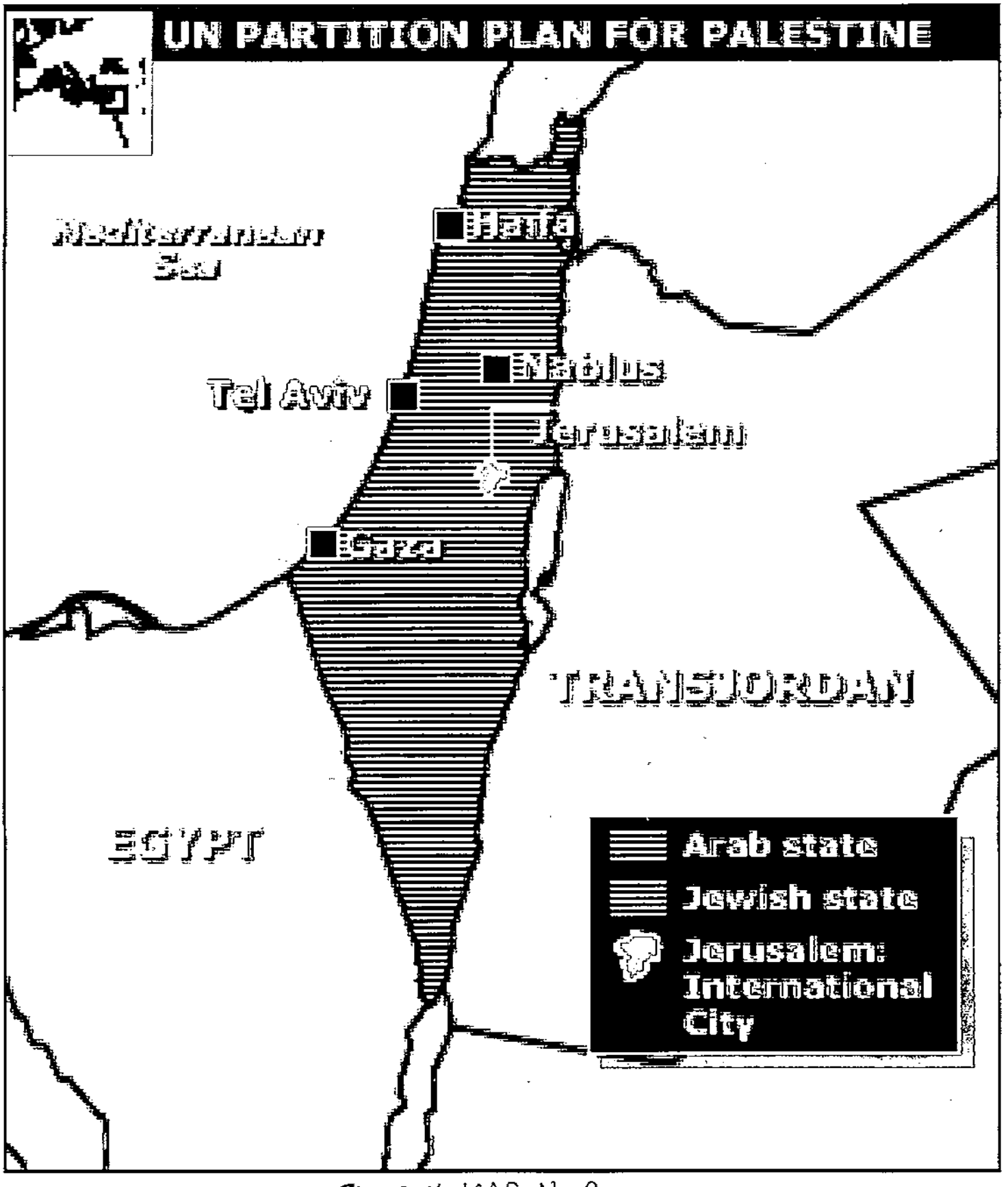
SKETCH MAP No. 4

SKETCH MAP No. 5

1948 and stipulated that the Mandate for Palestine should terminate as soon as possible but in any case not later than 1 August 1948. It also recommended the partition of Palestine into independent Arab and Jewish States, with an internationalized Jerusalem. The boundaries of the proposed territorial units under this partition plan are illustrated in Sketch Map No. 2 following p. 8. This partition plan would have allocated some 55 per cent of the territory under Mandate to Israel [the Jewish State], including most of the best arable and cultivated land which was home to a substantial Arab population: but this allocation was disproportionate to the size of the respective Arab and Jewish population in Palestine at the time. The plan was unacceptable to many concerned parties and was thus rejected.

2.12 Inter-communal strife and anti-British violence increased almost to the proportions of civil war. The British Government announced its intention to terminate the Mandate with effect from 15 May 1948. On the day before the Mandate was to expire, the establishment of the State of Israel was proclaimed in a radio address by David Ben Gurion on 14 May 1948.

2.13 Although there is now no room for contesting Israel's current status as a lawful member of the international community, it has to be recalled that Israel was created in armed conflict against the local (i.e. Palestinian) inhabitants and its origins were of doubtful legitimacy. As Professor James Crawford has noted, "Israel was created by the use of force, without the consent of any previous sovereign and without complying with any valid act of disposition": Crawford, J., 'Israel (1948-1949) and Palestine (1998-1999): Two Studies in the Creation of States', in *The Reality of International Law: Essays in Honour of Ian Brownlie*, Goodwin-Gill & Talmon eds., 1999, at p. 108.



SKETCH MAP No. 2

2.14 The proclamation of the State of Israel led immediately to the outbreak of armed conflict involving Israel and the Palestinian population, and also neighbouring Arab States seeking to protect the Arab population and lands of Palestine. The ensuing Arab-Israel hostilities resulted in Israel securing its effective de facto existence by establishing, by force, its authority over the territory under its control.

2.15 That territorial control extended over much more territory than that accorded to Israel under the UN partition plan endorsed by GA Resolution 181(II) (1947). That Resolution does not, therefore, provide the basis for Israel's original and lawful territorial extent. Rather, Israel's de facto territorial extent at the outset of its existence was based on the Armistice Agreement of 3 April 1949 which brought the Jordanian-Israeli hostilities to a formal cessation. That Agreement, following the cease-fire of January 1949, established a cease-fire line: although that line was not initially conceived of as an international boundary, it served in practice, confirmed by the passage of time, to circumscribe the limits of Israel's land territory in the major part of the former mandated territory of Palestine, and left in Arab hands certain parts of that former mandated territory, namely East Jerusalem, lands on the West bank of the River Jordan ("the West Bank"), and the Gaza strip on the shores of the Mediterranean Sea. The cease-fire line separating Israel from the West Bank was known as "the Green Line".

2.16 All negotiations leading to the cease-fire and armistice agreements were effectively under the auspices of the United Nations. The cease-fire lines diverged considerably from the lines set out in the Partition Resolution. In this context, it should be noted that Western Galilee, Liddaah, Ramleh, Jaffa and parts of the Southern West Bank, all of which had been assigned to the Arab State in the Partition Resolution, were effectively under Israeli control. The Jordanian front consisted then of lines dissecting Arab and Jewish population centres. For example, in Jerusalem the front line divided

the city into two halves, East and West. In the North, the lines left in Iraqi army hands Jenin, Tulkarm, Qalqilya and the narrow corridor in the coastal plain, holding Wadi Aara and the chain of hills overlooking Israeli held territory to the east, commonly known as *al-muthalath* (the triangle). However, in talks preceding the Rhodes armistice negotiations, Israel consented to the replacement of the Iraqi army with that of Jordanian Forces. This was conditional upon leaving the towns of Tulkarm, Qalqilya and Jenin in Jordanian hands, and making an adjustment of the front line to the South East of Wadi Aara so that the entire Afouleh-Hadera road would be under Israeli control. In the Southern and Central areas, Jordan was in control of the Hebron region apart from Beit Jibrin. The Armistice demarcation line ("the Green Line") defined in Articles 5 and 6 of the Israeli-Jordanian General Armistice Agreement of 3 April 1949 is illustrated on Sketch Map No. 3 following page 7.

2.17 It follows that the territory of Israel, at the date of its admission to membership of the United Nations following Security Council Resolution 70 of 4 March 1949 and General Assembly Resolution 273(III) of 11 May 1949, was no greater than that area left under its control by the Armistice Agreement. The remainder of the mandated territory of Palestine was manifestly not Israeli territory or under its control, and it was not (and is not now) open to conquest, accession or settlement by Israel, and Israel had (and has) no latent or putative claim to sovereignty over it.

2.18 In 1948, during the Arab-Israeli hostilities, the only effective authority in relation to the West Bank was that of Jordan: in December 1949 the West Bank was placed under Jordanian rule, and it was formally incorporated into Jordan on 24 April 1950 . This was the result of the signing by King Abdallah of a resolution passed to him for signature by Jordan's National Assembly (including representatives of both East and West Banks), which supported the unity of the two Banks as one nation State called the

Hashemite Kingdom of Jordan, "without prejudicing the final settlement of Palestine's just case within the sphere of national aspiration, inter-Arab cooperation and international justice".

2.19 The signing of this resolution was the culmination of a series of earlier requests made by the Palestinian Arabs through conferences attended by the elected Mayors of major West Bank towns and villages (Hebron, Ramallah, Al-Beereh, Jenin, Nablus, Tulkarm, Qalqilya and Anabta), as well as leading religious clerics (Muslims and Christians alike), and a multiplicity of notables, tribal leaders, activists, college presidents, the Chief Shariaa Judge, and the Mufti of Jerusalem Saed-Ideen Al-Alami. Following these conferences, King Abdallah consented to a proposed constitutional amendment to expand the membership of the Jordanian Parliament to include elected representatives from all the West Bank constituencies. Elections for the expanded Parliament were held on 11 April 1950 and a new Parliament was elected with half of its members elected from the West Bank.

2.20 This provoked something of a crisis in relations between Jordan and other Arab States, but any risk of serious problems was averted when the Government of Jordan formally declared in 1950 that unity with the Palestinian territory was "without prejudice to the final settlement" of the Palestinian problem: this declaration was accepted by the Arab League.

2.21 The boundaries of the Hashemite Kingdom of Jordan as it resulted from these events are illustrated in Sketch Map No. 4 following page 7. It was with those publicly known boundaries that Jordan became a Member of the United Nations in 1955, without any objection about Jordan's territorial extent being made by any State (including Israel, which was already at that time a Member State). Furthermore, after the unification of the West Bank within Jordan's territory, Jordan concluded with a considerable number of

States bilateral and multilateral treaties whose application extended to the entirety of Jordan including all of the West Bank: none of the other parties to those treaties made any reservation to the effect that their applicability to the West Bank was excluded. The Security Council evidently shared that view when it adopted Resolution 228 (1966): the Council observed that, "the grave Israeli Military action which took place in the southern Hebron area [of the West Bank] on 13 November 1966... constituted a large scale and carefully planned military action *on the territory of Jordan* by the armed forces of Israel" (emphasis added).

2.22 In 1967 Israel launched an aggressive war on its neighbours, and as a result of fierce but brief hostilities between 5-11 June the West Bank and East Jerusalem, inter alia, were occupied by Israel's armed forces. Since the legality of Israel's conduct in planning and constructing a wall in the West Bank and East Jerusalem is closely connected with the status of those territories, and since their status is governed by the circumstances in which they came to be under Israeli military occupation, the events leading up to the 1967 conflict are relevant to the answer to be given to the question on which an advisory opinion has been sought.

2.23 Those events themselves have a background which is relevant not only to the 1967 conflict but also to much else that preceded that conflict and followed it. It is evident from the public record that from the earliest days of its existence Israel has been driven by an overriding policy to secure for the State of Israel the whole of the former mandated territory of Palestine, and to drive out of that territory the vast bulk of the indigenous Arab population in order to make room for an incoming Jewish population. The consistency of this purpose is apparent from the extracts from the public record set out at Annex 1 to this statement. On Israel's expansionist policies, particularly from June 1967 onwards, see also Nur Masalha,

Imperial Israel and the Palestinians: The Politics of Expansion (2000); a copy is being filed with the Court.

2.24 The 1967 hostilities had had their immediate origins, however, in the rise in the mid-1960s in the number of incursions into Israel by independent Palestinian guerrilla groups and disproportionate massive Israeli military retaliation. Although these incursions were in military terms not significant, the Israeli military reprisals against them were disproportionately harsh. By the spring of 1967 the situation had become extremely tense.

2.25 Both Egypt and Jordan were parties to the multilateral 1964 Arab Defence Pact but, sensing that war was now likely, King Hussein suggested an Egyptian-Jordanian Mutual Defence Treaty. President Nasser immediately accepted the idea, and the Treaty was signed on 30 May 1967.

2.26 In the days preceding the outbreak of hostilities on 5 June, Israel border positions with Jordan were reinforced, and included the introduction of tanks into the demilitarized zone around Jerusalem, in violation of Article III.2 and Annex II.2 of the 1949 Armistice Agreement. Random small arms fire against Jordanian positions in Jerusalem was also reported in the early hours of 5 June.

2.27 On 5 June 1967 Israel launched a surprise attack, virtually eliminating the Egyptian air force in a single blow. In response to the Israeli attack, to the Israeli build-up and incursions across its border, and in accordance with its collective self-defence obligations under the Pact with Egypt, Jordanian forces shelled Israeli military installations. Israeli forces counterattacked into the West Bank and Arab East Jerusalem. Israel now had complete control of the skies, and after a spirited defence of Arab East Jerusalem, the outnumbered and outgunned Jordanian army was forced to retreat. When

the final UN cease-fire was imposed on 11 June 1967, Israel stood in possession of a wide swathe of Arab land, including the Egyptian Sinai and Egyptian-occupied Gaza Strip, Syria's Golan Heights, and, most significantly in the present context, what remained of Arab Palestine – the Jordanian West Bank, including Arab East Jerusalem.

2.28 The circumstances surrounding Israel's use of force are sometimes presented as an instance of (pre-emptive) self-defence. However, there is no convincing evidence that, nor is there any truth in the suggestion that, Egypt, Syria or Jordan, individually or collectively, at that time intended or planned to attack Israel, or that Israel's existence was threatened at any time, or that there was any substantial or imminent armed attack on Israel such as would justify Israel's use of force in self-defence; and in any event the use of force by Israel was wholly disproportionate in the circumstances. This has been substantiated by later public statements made by Israeli leaders of the time. In particular, Mr. Menachem Begin (Minister without Portfolio in the Israeli Cabinet during the 1967 war and later Israel's Prime Minister) in an address to the Israeli staff war college on 8 August 1982 pointed to the fact that the 1967 war was a war of choice. Begin stated that: "In June 1967, we again had a choice. The Egyptian army concentrations in the Sinai approaches do not prove that Nasser was really about to attack us. We must be honest with ourselves. We decided to attack him". (Annex 2, at p. 4). Similarly, Yitzhak Rabin, Israel's Chief of Staff during the 1967 war and later Prime Minister of Israel, in an interview with Le Monde is reported to have stated: "I do not believe that Nasser wanted war. The two divisions which he sent into Sinai on May 14 would not have been enough to unleash an offensive against Israel. He knew it and we knew it."

2.29 In short, Israel's invasion and occupation of the West Bank lacked any legal basis in international law. It constituted a blatant violation of one of the cardinal rules of contemporary international law, namely that which

prohibits resort to armed force in international relations. That prohibition has the character of *ius cogens* (see below, paragraph 5.39 FF).

2.30 Of the States participating in the conflict, Jordan paid by far the heaviest price. As a result of the war, Hundreds of Thousands of Palestinian Arabs were displaced and fled to Jordan's East Bank territories, or were forced to leave or were expelled, many of them uprooted for the second time in less than two decades. Jordan's economy was also devastated. About 70% of Jordan's agricultural land was located in the West Bank, which produced 60-65% of its fruit and vegetables. Half of Jordan's industrial establishments were located in the West Bank, while the loss of Jerusalem and other religious sites devastated the tourism industry. Altogether, the areas now occupied by Israel had accounted for some 38% of Jordan's gross national product.

2.31 After the cease-fire was secured, the Security Council on 14 June 1967 unanimously adopted resolution 237(1967), calling upon Israel to ensure the safety, welfare and security of the inhabitants of the areas where military operations had taken place, and to facilitate the return of the displaced persons. The Governments concerned were asked to respect scrupulously the humanitarian principles governing the protection of civilian persons in time of war contained in the Fourth Geneva Convention of 1949.

2.32 Before the end of June, however, Israel gave legal force to its expansionist policies by adopting the Municipalities Ordinance (Amendment No. 6) Law of 27 June 1967. This Law extended the boundaries of East Jerusalem (which it had occupied in the hostilities) to include a number of outlying villages. Immediately thereafter Israel applied Israeli law to this extended area, thereby effectively annexing East Jerusalem. These actions were condemned by the United Nations as involving unlawful changes to the

status of Jerusalem (e.g. Security Council Resolutions 252(1968), adopted 13-0-2; 267(1969), adopted unanimously; 271(1969), adopted 11-0-4; and 298(1971), adopted 14-0-1; General Assembly Resolutions 2253(ES-V) (4 July 1967) and 2254(ES-V) (14 July 1967). Notwithstanding that condemnation, Israel later confirmed its annexation of East Jerusalem by adopting a "basic law" of 30 July 1980 by which "Jerusalem in its entirety" (i.e. both West and East Jerusalem taken together) was declared to be the "eternal capital" of Israel: this was again condemned and held by the United Nations to be null and void and to be rescinded forthwith (Security Council Resolution 478(1980), adopted 14-0-1; General Assembly Resolution 35/122 C (11 December 1980), and General Assembly Resolution 36/120 D and E (10 December 1981).

2.33 At its fifth emergency special session in July 1967, convened after the fighting began, the General Assembly called upon Governments and international organizations to extend emergency humanitarian assistance to those affected by the war. The Assembly asked Israel to rescind all measures already taken and to desist from taking further action which would alter the status of Jerusalem: UNGA Resolution 2253(ES-V) (4 July 1967).

2.34 Later that year, on 22 November 1967, the Security Council unanimously adopted, after much negotiation, resolution 242(1967), laying down principles for a peaceful settlement in the Middle East. The resolution emphasises "the inadmissibility of the acquisition of territory by war" and stipulates that the establishment of a just and lasting peace should include the application of two principles: "withdrawal of Israel armed forces from territories occupied in the recent conflict", and "termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized

boundaries free from threats or acts of force". The resolution affirms the need for "achieving a just settlement of the refugee problem". Resolution 242 was reinforced six years later by SC Resolution 338 of 22 October 1973.

2.35 Egypt and Jordan accepted Resolution 242(1967) and considered that Israeli withdrawal from all territories occupied in the 1967 war as a precondition to negotiations. Israel, which also accepted the resolution, stated that the questions of withdrawal and refugees could be settled only through direct negotiations with the Arab States and the conclusion of a comprehensive peace treaty.

2.36 Far from withdrawing from the territories it had occupied in the 1967 war as demanded by UN resolutions, Israel immediately began to plan a programme of encouraging Israeli settlers to live in the West Bank areas which had come under Israeli military occupation. Very soon after the cessation of hostilities Israel's Minister of Labour, Mr Yigal Allon, presented to the Israeli cabinet a plan for Jewish settlement of the West Bank. Although not formally approved, the 'Allon plan' was the basis for official settlement policy for the next few years. In 1973 Gush Emunim (an Israeli political movement) promulgated its own settlement plan which was more extreme than the 'Allon plan' and envisaged the settlement of "Eretz Israel" (i.e. the whole of Israel's land, included in which were the occupied territories). In 1977 Gush Emunim's plan was essentially adopted by Israel as government policy.

2.37 This policy has been described as having,

> "provided for extensive settlement throughout the West Bank, designed to ensure, by sheer numbers and fragmentation of the Palestinian population centres, that Arab control could not be established in the region... This policy, often described as 'creating facts', aimed for the establishment of such a substantial

> settler presence that full Israeli withdrawal would be impossible": Playfair in *International Law and the Administration of Occupied Territories* (1992), pp. 6-7).

2.38 To this end, official assistance (mainly in the form of tax relief and subsidies) was given by the Government of Israel to the construction of settlements in the occupied areas to which Jewish settlers were encouraged to move.

2.39 This policy, manifestly designed to alter the ethnic composition of the West Bank in clear violation of applicable international norms, was reinforced since its early days by an equally unlawful enforced change in geographical terminology. An order issued by the Israeli military government on 17 December 1967 effectively re-named the West Bank as "the Judaea and Samaria Region". That new terminology is now the standard usage in official Israeli statements.

2.40 Israel's settlement programme has been consistently condemned as unlawful by the international community: see, for example, Security Council Resolutions 446 (1979), and 465(1980). Notwithstanding such condemnation, however, the unlawful settlement programme has continued and expanded.

2.41 In 1987, and against the backdrop of intense diplomatic activity involving the P.L.O., the United States and Jordan ,among others, a Palestinian popular uprising (the Intifada) against the Israeli occupation broke out in the Gaza strip and spread to the West Bank. Arab support for the Intifada grew, culminating in an Arab emergency summit in Algiers in June 1988 to discuss ways and means of supporting the Intifada. It was against this background that on 31 July 1988 King Hussein of Jordan announced his decision to commence "administrative and legal disengagement from the West Bank" In elaboration of the reasons for his decision the King said:

> "Of late it has become clear that there is a general Palestinian and Arab orientation toward highlighting the Palestinian identity in full in all efforts and activities that are related to the Palestinian question and its developments. It has also become obvious that there is a general conviction that maintaining the legal and administrative relationship with the West Bank... goes against this orientation. It would be an obstacle to the Palestinian struggle, which seeks to win international support for the Palestine question, considering that it is a just national issue of a people struggling against foreign occupation. Since this is the orientation that emanates from a genuine Palestinian wish and a strong Arab willingness to promote the Palestinian cause, it is our duty to be part of this orientation and to meet its requirements."

2.42 Given that at the time the West Bank was under Israeli occupation and that Jordan's "legal and administrative relationship" with the West Bank was in any event in practice somewhat attenuated, it is clear that Jordan's disengagement decision from that relationship was an opening of the door to the realisation of Palestinian self-determination aspirations as this decision coincided with the recognition by the United States of the P.L.O. as the sole representative to the Palestinian people. In no way was Jordan's disengagement a surrender of the West Bank to Israeli authority. With regard to Israel, the West Bank remained wholly non-Israeli territory and Israel's presence there remained, as it had been since 1967, solely a matter of foreign military occupation. This is borne out by the continued consistent references in Security Council and General Assembly resolutions after July 1988 to the West Bank as occupied territory: the 1988 "disengagement" made no difference at all in that respect. See, for example, Security Council Resolutions 636 (1989) (which referred to Israel as "the occupying Power" and to the territories in question as "the occupied Palestinian territories", and reaffirmed the applicability of the Fourth Geneva Convention) and to similar effect, 641(1989), 672(1990), 681(1990), 694(1991), 726(1992), 799(1992), and 904(1994), five of which were adopted unanimously; General

Assembly Resolution 43/21 of 3 November 1988 reiterated the same points as those mentioned in relation to SC Res. 636(1989), and many subsequent Resolutions have been in similar terms.

2.43 In October 1994 Jordan and Israel concluded a Peace Treaty, which entered into force on 10 November 1994 (Annex 3). This Peace Treaty included provisions relevant to the West Bank. In particular, Article 3 dealt with the question of the international boundary between Jordan and Israel. The first three paragraphs of Article 3 are as follows:

> *"Article 3 - International Boundary*
>
> 1. The international boundary between Jordan and Israel is delimited with reference to the boundary definition under the Mandate as is shown in Annex I(a), on the mapping materials attached thereto and coordinates specified therein.
>
> 2. The boundary, as set out in Annex I(a), is the permanent, secure and recognized international boundary between Jordan and Israel, without prejudice to the status of any territories that came under Israeli military government in 1967.
>
> 3. The Parties recognize the international boundary, as well as each other's territory, territorial waters and airspace, as inviolable, and will respect and comply with them."

2.44 The Annex I(a) referred to in paragraph 1 of Article 3 delimits the boundary between Jordan and Israel in four consecutive sectors, namely (from North to South), the Jordan and Yarmouk Rivers, the Dead Sea, the Wadi Araba/Emek Ha'arava, and the Gulf of Aqaba. That delimitation is somewhat technical and complex, as can be seen from the text at Annex 3. Part of the first sector of the boundary as delimited in Annex I(a) runs along the eastern edge of the West Bank. The stipulation in Article 3.2 of the Peace Treaty that the boundary is without prejudice to the status of any

territories that came under Israeli military government in 1967 is reinforced by the terms of paragraph 2.I (g) of Annex I(a), which reads as follows:

> "g) The orthophoto maps and image maps showing the line separating Jordan from the territory that came under Israeli Military government in 1967 shall have that line indicated in a different presentation and the legend shall carry on it the following disclaimer:
>
> 'This line is the administrative boundary between Jordan and the territory which came under Israeli military government control in 1967. Any treatment of this line shall be without prejudice to the status of that territory'."

2.45 It is thus clear that the 1994 Peace Treaty leaves unaffected the status of the West Bank as territory which does not belong to Israel but which is under Israeli military occupation and as such subject to the 1949 Fourth Geneva Convention. As with Jordan's 1988 'disengagement' decision (above, paragraph ***), this conclusion is borne out by the continued consistent references in Security Council and General Assembly resolutions after 1994 to the West Bank as occupied territory. Moreover, the two Conferences of the High Contracting Parties to the Fourth Geneva Convention of 1949 held on 15 July 1999 and 5 December 2001 on measures to enforce the Convention in all the Occupied Territories, including Jerusalem, and the statement and the declaration emanating from the two meetings, further demonstrate that the 1994 Peace Treaty made no difference at all in that respect. See, for example, Security Council Resolution 1322(2000), which referred to Israel as "the occupying Power" and to the territories in question as those "occupied by Israel since 1967", and reiterated the applicability of Fourth Geneva Convention; and General Assembly Resolutions 49/132 (19 December 1994) which included those same three elements (this resolution was adopted just three days after GA Res. 49/88

in which the Assembly expressed its full support for the Peace Treaty), and ES-10/7 (2000), ES-10/9 (2001), among many others.

2.46 To summarise, ever since the United Nations became involved, in the aftermath of Israel's aggression against Arab States in June 1967, the Security Council has

- continued to express its concern about the situation on the ground,
- declared null and void the measures taken by the Israeli government to change the status of Jerusalem,
- called for the cessation of Israeli settlement activity, which it determined had no legal validity,
- reaffirmed the applicability of the Fourth Geneva Convention to the Palestinian and other Arab territories occupied by Israel since 1967, including Jerusalem, and
- referred consistently to those territories as occupied territories.

2.47 Equivalent action has also been taken by the General Assembly in numerous resolutions.

III. Immediate background

3.1 Against that general background to the present situation in the West Bank, it is necessary to consider the immediate background which has led to the construction of the wall which is the subject of the present proceedings for an Advisory Opinion.

3.2 On 28 September 2000, the Leader of the then opposition Likud Party in Israel, Mr. Ariel Sharon, made a visit to the Haram Al - Sharif area in Jerusalem. This visit was referred to in Security Council Resolution 1322 (2000) as "provocative" and the Council "deplored" such provocation. As an immediate consequence of the provocative visit in question, portests erupted and the Israeli Forces used force to bring them to an end, resulting in 80 Palestinian deaths and numerous casualties in the immediate ensuing period. This tension occurred in the wake of an impending General election in Israel that brought the Likud Party to Power with Mr. Sharon as Prime Minister. By the time the election was over Israeli forces had already moved in and reoccupied many Palestinian cities and towns. Israel refused to positively abide by and respond to Security Council resolutions calling upon Israel to Withdraw its forces back to the pre 28 September 2000 positions in order to recreate conditions to restore and resume the Peace Process. This stalement led to further frustration and a vicious cycle of violence, including "suicide attacks" directed at Israelis and disproportionate Israeli reactions that included an expansion in illegal settlement activity in the occupied West Bank including East Jerusalem, to a point that was endangering the entire edifice of the Peace Process and any prospect for the emergence of a viable Palestinian State.

3.3 On 14 April 2002 approved a Government Decision which called for the construction in the West Bank of a system of walls, fences, ditches and barriers extending for 80 kilometres. On 23 June 2002 the Israeli Cabinet

took a further decision, approving the first phase of a "continuous" barrier in parts of the West Bank and Jerusalem: the decision stated that the barrier "is a security measure" which "does not represent a political or other border". The route to be followed by this wall was not made public at the time of the decision, which stated that the "exact and final route of the fence will be decided by the prime minister and minister of defence". Thereafter subsequent Cabinet decisions, particularly those taken on 14 August 2002 and 1 October 2003, established the full route to be followed by the wall.

3.4 The announcement that this wall was being planned by Israel, and the start made to put it into effect, was the subject of widespread international condemnation including a declaration from the European Union on 18 November 2003. (See text at Annex 4).

3.5 The international reaction critical of Israel's decisions to construct the wall which it had planned and begun to build was made evident in debates in both the Security Council and the General Assembly. These included the debates on 21 October 2003 and 8 December 2003 during the course of the resumed Tenth Emergency Special Session of the General Assembly.

3.6 Israeli Ministry of Defence documents say that the planned route of the wall will form one continuous line stretching 720 kilometres along the West Bank, more than twice the length of the entire Green line. A map of the route, both completed and planned, was published by the Ministry of Defence on 23 October 2003 (Annex 5). The route to be followed by the wall runs almost entirely on land occupied by Israel in 1967; it broadly follows the general direction of, but runs on the Arab Palestinian side of, the course of the Green Line which marked the cease-fire line established by the Armistice Agreement of 1949, deviating from it in places up to 22 kilometres into West Bank territory (a deviation which has to be seen

against the fact that the West Bank itself has a width which ranges between 50 and only 20 kilometres). Overall, the area between the wall and the Green Line comprises approximately 975 square kilometres, or 16.6 per cent of the entire West Bank.

3 .7 At the time of preparing this written statement more than 180 kilometres of the wall have been completed, and a further 25 kilometres are due for completion in the near future. Sketch Map No. 6 following page 25 indicates the completed, the planned but still-to-be-completed, and the officially contemplated sections of the wall, and also marks the course of the 1949 Green Line.

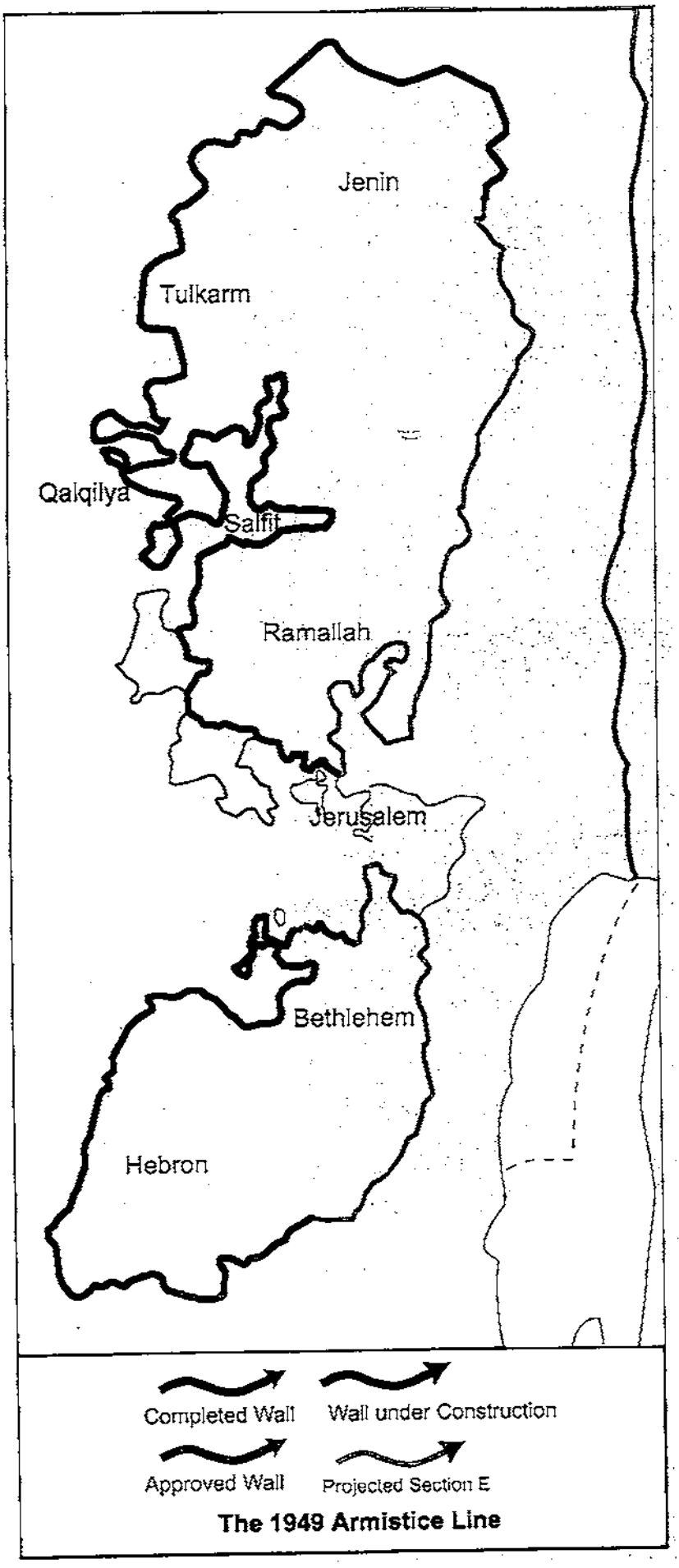
3 .8 Several features of the route followed by the wall are noteworthy

(1) (a) The wall has been completed along the northern and north-western boundaries of the West Bank(running for a total of 142 kilometres), and in certain sections south of Ramallah, to the east of Jerusalem, and north of Bethlehem.

(b) In all other areas the wall is as yet only planned or contemplated. While details may no doubt change between planning and construction, the general route to be followed by the wall is already clearly established on the basis of official reports and maps published by the Government of Israel.

(c) Looked at in very broad terms, the final result of the wall as constructed so far, as formally planned, and as publicly contemplated in officially-released material will be to create two major totally surrounded enclaved areas within the West Bank: one extends north from Jerusalem(embracing Ramallah to Jenin) and the other extends south from Jerusalem(embracing Bethlehem and

SKETCH MAP No. 6



Hebron), and there is a wall linking them and running some 10 kilometres to the east of East Jerusalem.

(2) (a) In the central northern sector of the West Bank boundary, to the north of Jenin, the wall so far constructed follows closely the course of the Green Line.

(b) At the eastern end of that sector the planned course of the wall runs almost due south, well into occupied West Bank territory, while the officially contemplated course of the wall extends further south roughly parallel to, and some 12 kilometres into the West Bank side of, the River Jordan.

(c) At the western end of the sector the planned course of the wall runs several kilometres into the West Bank, even though there is already a completed section of the wall in that area which closely follows the Green Line.

(3) (a) Along the north-western sector of the West Bank boundary (north of Tulkarm) the completed wall runs broadly parallel to the Green Line, but several kilometres inside the West Bank.

(b) In the centre of that sector the present completed wall is supplemented by a planned wall which would enclose a finger of land projecting some 15 kilometres into the West Bank.

(4) To the west of Tulkarm the present completed wall follows closely the Green Line, but an extension to the wall running to the east of Tulkarm and several kilometres into the West Bank is planned, apparently to make Tulkarm a small enclave completely surrounded by the wall.

(5) Between Tulkarm and Qalqiliya the completed wall runs up to several kilometres into the West Bank.

(6) At Qalqiliya part of the completed wall follows the Green Line but a further stretch of the completed barrier runs to the east of Qalqiliya, thus completely surrounding it and making it an enclave.

(7) South of Qalqiliya the completed wall, for the last few kilometres of its continuous course, intrudes several kilometres into the West Bank.

(8) From that terminus (so far) of the continuous completed sector of the wall, and as far as Ramallah, the course of the wall is planned only. It will generally run some 5 kilometres into the West Bank from the Green Line, but with two large irregularly shaped salients stretching eastwards and northwards into the west Bank for up to 22 kilometres (at a point at which the West Bank is only some 52 kilometres wide).

(9) At, and just south of, Ramallah there is a short stretch of completed wall, and from there the planned or contemplated wall runs south to join up with the large Bethlehem-Hebron planned or contemplated enclave, passing on its way some 10 kilometres to the east of East Jerusalem (at a point where the West Bank narrows to only about 30 kilometres).

3.9 It is apparent from the general configuration of the course to be followed by the wall as constructed, planned or contemplated that it is impossible to regard it is serving no other purpose than that of a defence of Israel's territory, i.e. territory to the north, west and south of the Green Line. The course of the wall along much of its length is far removed from any plausible 'defensive line' for the territories on Israel's side of the Green

Line. Moreover, the clear intention to encircle with a wall the two major Ramallah-Jenin and Bethlehem-Hebron enclaves is plainly inconsistent with the idea of 'defending' Israeli lands lying well to the west of those enclaves; in particular, the whole easternmost ring of those encircling walls has no relationship with any defence of those Israeli lands. An encircling wall may help to defend (unlawful) Israeli settlements within the encircled areas, but such a purpose is not a permissible purpose of any Israeli right of self-defence.

IV. Relevant facts

(a) The Israeli wall

4.1 The Secretary-General's Report of 24 November 2003 describes the wall in the following terms:

> "9. According to Israeli Ministry of Defence documents and field observation, the barrier complex consists of the following main components: a fence with electronic sensors designed to alert Israeli military forces of infiltration attempts; a ditch (up to 4 metres deep); an asphalt two-lane patrol road; a trace road (a strip of sand smoothed to detect footprints) that runs parallel to the fence; and a stack of six coils of barbed wire marking the complex's perimeter. This complex has an average width of 50-70 metres, increasing to as much as 100 metres in some places.
>
> 10. Ministry of Defence documents say that "various observation systems are being installed along the fence". These apparently include cameras and watchtowers in some places where the Barrier consists of concrete walls. A planned allied component is "depth barriers", secondary barriers that loop out from the main Barrier to the east. Two depth barriers are part of the planned route in the central West Bank. Another three "depth barriers" in the northern West Bank that have appeared on some unofficial maps have not been built and are not part of the 23 October official map.
>
> 11. Concrete walls cover about 8.5 kilometres of the approximately 180 kilometres of the Barrier completed or under construction. These parts of the Barrier, which the Israel Defence Forces (IDF) terms "gunfire protection walls", are generally found where Palestinian population centres abut Israel, such as the towns of Qalqiliya and Tulkarm, and parts of Jerusalem. Some are currently under construction, while others were planned and built separately from the current project, such as part of the wall next to

Qalqiliya, which was built in 1996 in conjunction with a highway project."

4.2 The wall thus involves quite a complex series of physical features, extending eventually for some 720 kilometres along the West Bank with an average depth of 50-70 metres. Such a system requires considerable land for its construction.

4.3 Within the first phase some 21,000 dunums of land have been razed for the footprint of the wall, including the uprooting of more than 100,000 trees. Also 150,000 dunums - 2 % of the West Bank - were confiscated in the 'First phase' of the wall, under the Israeli self-declared 'security zone'.

4.4 Approximately 210,000 acres - or 14.5% of West Bank land (excluding East Jerusalem) - will lie between the wall and the Green Line, according to the latest Israeli Government projections of the West Bank wall. Land obtained for the building of the wall is requisitioned by military orders in the West Bank and by the Ministry of defence in Jerusalem Municipality. Most orders are valid until 31 December 2005 and can be renewed. The orders generally become effective on the date on which they are signed, and are valid even if they are not personally served on the property owners. Orders are sometimes left on the property itself or served on the village council without personal service upon the property owner. Landowners have one or two weeks from the date of signature to object to the relevant committee; the property owner can also petition the High Court of Israel.

4.5 The physical wall has been supplemented since 2 October 2003 by the establishment of a closed area in the north-west part of the West Bank. On that date the Israel Defence Force ("IDF") issued a series of Orders establishing a "seam zone" in that region, creating a Closed Area comprising the land between the barrier system and the Green Line. This

Closed Area affects 73 square kilometres. The Orders provide that "no person will enter the seam zone and no one will remain there".

4.6 The IDF's Orders also introduced a new system of residency status. Residents of the Closed Area are able to remain, and others are able to obtain access to it, only on issuance of a permit or ID card by the IDF. However, Israeli citizens, permanent residents of Israel and those eligible to return to Israel in accordance with the Law of Return can remain in or move freely to, from and within the Closed Area without a similar permit.

(b) The human impact of the wall

4.7 It is readily apparent that a wall having such features cannot fail to have serious and damaging consequences for the population living, working, visiting or travelling through the affected parts of the West Bank.

4.8 The military requisitioning of the land needed for the construction of the wall clearly and directly affects the property owners in question. The provision made for objections and petitions is inadequate as a practical remedy for the loss and upheaval suffered by those affected. Although over 400 first-instance objections have been submitted and 15 petitions lodged with the High Court on behalf of families or entire villages, this compares with the very large number of requisition orders which have been made.

4.9 A further serious and damaging consequence flows from the establishment of the Closed Area by the IDF, and the introduction of the new system of residency permits. In the first place this new system manifestly discriminates in favour of Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel, all of whom can remain in or move freely to, from and within the Closed Area without the need for a permit such as that required for other persons. This discrimination places Arab Palestinians at a marked disadvantage.

4.10 While the Secretary-General reported (Report, para. 21) that most residents in the Closed Area had received permits, they were generally valid only for limited periods as short as one, three or six months. Non-residents of the Closed Area who needed or wanted access to the Area had mostly ("a majority") not yet received permits. Even those who are in possession of an IDF-issued permit or ID card do not have unfettered rights of movement into and out of the Closed Area. Access and egress are regulated by the schedule of operation of a series of 37 gates: these are apparently limited to openings of only 15 to 20 minutes three times a day, but despite posted opening times, the gates are not open with any regularity. In some cases, as in the case of the gate in the area of Jayyous in the District of Qalqiliya, the gate did not open for 25 days during the period from late June till early August 2003. In another case, a gate in the Faroun village in the District of Tulkarm has not opened since 9 October 2003 and has thus prevented the farmers from getting access to their farms since that date. Such limited and artificial access and egress arrangements, bearing no relationship to the practical needs of the affected communities, can only seriously affect the situation of all those concerned whose regular access to their farmlands, jobs, services, and families is thereby denied.

(c) The social and economic impact of the wall

4.11 Such a denial of regular access, particularly access to lands in order to cultivate them, will do little to encourage Palestinians to stay in the area, and indeed will do much to encourage them to leave it. In the past Israel has expropriated land for not being adequately cultivated, and the possibility cannot be discounted that this is the direction in which Israel is once again intentionally moving in establishing this discriminatory new permit system.

4 .12 Due to the wall's complete encirclement of Qalqiliya, nearly 10% of the 42,000 residents have been forced to leave their homes in the city in search of sustenance and employment "elsewhere".

4 .13 This effect of the barrier system must not be seen in isolation, but in the context of the closure system which Israel imposed after the outbreak of hostilities in September/October 2000 . That system, which is still in force, has as its main component a series of checkpoints and blockades which severely restrict the movement of Palestinian people and goods, causing serious socio-economic harm. Construction of the wall has greatly increased such damage in communities along its route, primarily through the loss of, or severely limited access to, land, jobs and markets. This is demonstrated by recent reports by the World Bank and the United Nations. As recorded in the UN Secretary-General's Report, "so far the Barrier has separated 30 localities from health services, 22 from schools, 8 from primary water sources and 3 from electricity networks" (para. 23). For reports on the impact of the wall, see 'The Impact of Israel's Separation Barrier on Affected West Bank Communities,' Report of the Mission to the Humanitarian and Emergency Policy Group (HEPG) of the Local Aid Coordination Committee (LACC), 4 May 2003; Update Number 1, 31 July 2003; Update Number 2, 30 September 2003; Update Number 3, 30 November 2003. See also United Nations, Office for the Coordination of Humanitarian Assistance, OPT, 'New Wall Projections', 9 November 2003; UNRWA, 'The impact of the first phase of security barrier on UNRWA-registered refugees', 1 October 2003; OCHA Humanitarian Update, Occupied Palestinian Territories, 1-15 December 2003; UNRWA, Reports on the West Bank Barrier, 'Town Profile: Impact of the Jerusalem Barrier', January 2004.

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> "so far the Barrier has separated 30 localities from health services, 22 from schools, 8 from primary water sources and 3 from electricity networks" (para. 23)

4.15 The Secretary-General's Report also shows that some of the harshest consequences of the wall's construction and route are faced by Palestinians living in enclaves. The Report gives as an examples the towns of Qalqiliya and Nazlat Issa. The wall surrounds Qalqiliya, with only one exit and entry point, which is controlled by an Israeli military checkpoint.

> "This has isolated the town from almost all its agricultural land, while surrounding villages are separated from its markets and services. A United Nations hospital in the town has experienced a 40 per cent decrease in caseloads. Further north, the Barrier is currently creating an enclave around the town of Nazlat Issa, whose commercial areas have been destroyed through Israel's demolition of at least seven residences and 125 shops."

4.16 In addition, the land and property of residents in 22 villages in the District of Qalqiliya will be isolated by the wall; a total of 47,020 dunums (11,755 acres) will be west of the wall while another 7,750 dunums (1,937 acres) are destroyed by the wall.

4.17 In the case of Nazlat Issa, some 218 buildings have been demolished to date, the majority of which have been stores, an important source of income and survival for a number of communities. At least an additional 75 stores, 20 factories, 20 homes, and 1 primary school are subject to demolition orders and demolition is expected to take place in the near future, resulting

in most of the village and its entire economic infrastructure being devastated. Nazlat Issa will be the first village to be destroyed along the wall.

4.18 The operation of the completed sections of the wall has a particularly severe impact on agriculture. As paragraph 25 of the Secretary-General's Report states,

> "In 2000, the three governorates of Jenin, Tulkarm, and Qalqiliya produced US$ 220 million in agricultural output, or 45 per cent of total agricultural production in the West Bank. Palestinian cultivated land lying on the barrier's route has been requisitioned and destroyed and tens of thousands of trees have been uprooted. Farmers separated from their land, and often also from their water sources, must cross the barrier via the controlled gates. Recent harvests from many villages have perished due to the irregular opening times and the apparently arbitrary granting or denial of passage. According to a recent World Food Programme survey (E/CN.4/2004/10 Add. 2 dated 31 Oct 03) this has increased food insecurity in the area, where there are 25,000 new recipients of food assistance as a direct consequence of the Barrier's construction."

4.19 The wall runs through parts of Jerusalem as well as through the West Bank. Its route through Jerusalem,

> "will also severely restrict movement and access for tens of thousands of urban Palestinians. A concrete wall through the neighbourhood of Abu Dis has already affected access to jobs and essential social services, notably schools and hospitals. The northern section of the Barrier has harmed long-standing commercial and social connections for tens of thousands of people, a phenomenon that will be repeated along much of the route through Jerusalem. The residences of some Jerusalem identity card holders are outside the barrier, while those of some

> West Bank identity card holders are inside the Barrier. This raises concerns about the future status of residency for Palestinians in occupied East Jerusalem under current Israeli laws": Secretary-General's Report, para. 26.

4.20 An improved system of access permits allowing reasonably free access and egress through the wall would do much to alleviate the socio-economic harm which has been identified, but even if such an improved system were to be introduced it would by no means remove all cause for grievance and hardship. As the Secretary-General's Report states at paragraph 27:

> "Moreover, such [improved] access cannot compensate for incomes lost from the Barrier's destruction of property, land and businesses. This raises concerns over violations of the rights of the Palestinians to work, health, education and an adequate standard of living."

V. Relevant legal considerations

(a) The Court's jurisdiction

(i) The request raises a legal question which the Court has jurisdiction to answer

5.1 The Court's jurisdiction to give an advisory opinion derives from Article 65, paragraph 1 of the Statute of the Court. This stipulates 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."

5.2 Article 96, paragraph 1, of the Charter of the United Nations provides that:

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

5.3 The competence of the General Assembly to request an advisory opinion extends to "any legal question", without restriction. Even if there were to be implied into Article 96, paragraph 1, of the Charter a limitation that the legal question has to arise within the scope of the General Assembly's activities, that condition would be satisfied in respect of the present request: the Court's reasoning, *mutatis mutandis*, at p. 233 (paragrahs 11 and 12) of its Advisory Opinion of 8 July 1996 on *Legality of the Threat or Use of Nuclear Weapons* (ICJ *Reports* 1996, p. 226) leaves no room for doubt on this matter.

5.4 It is beyond question also that the question put to the Court by the General Assembly is a "legal question". The question put to the Court asks the Court to rule on "the legal consequences arising from" certain specified circumstances. It is a question

> "framed in terms of law and rais[ing] problems of international law ... [and is] by [its] very nature susceptible of a reply based on law ..." (*Western Sahara,* Advisory Opinion, ICJ *Reports* 1975, p. 18, para. 15).

5.5 To rule on the question which the Court now has before it the Court must identify existing principles and rules of international law, and interpret and apply them to the circumstances now in question, and thus offer a response to the question posed based on law.

5.6 Since the opinion has been requested by the General Assembly, and will be given by the Court to the General Assembly, the lack of consent to that process from any particular State is not relevant to the Court's jurisdiction to give the opinion requested of it. As the Court said in its Advisory Opinion on *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations,* ICJ *Reports* 1989:

> "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" (at pp. 188-189, para 31).

5.7 The distinction between contentious cases (where consent is required) and advisory proceedings (where it is not) had earlier been made clear by the Court in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,* ICJ *Reports* 1950, where it noted that the

> "situation is different in regard to advisory proceedings even where the Request for an opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. 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" (at p. 71)

5 .8 The fact that the legal question on which the Court's advisory opinion is requested may also have a political dimension does not deprive the Court of jurisdiction to answer the legal question put to it. As the Court said in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* (*supra*),

> "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"... Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law...
>
> The Court moreover considers that the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion": ICJ *Reports* 1996, p. 234, para 13: citations omitted.

5 .9 In taking that position the Court was following its previous well-established practice. The Court has frequently been urged to decline to give an advisory opinion on grounds which, put broadly, amount to the matter in issue being more political than legal. It has never done so.

5.10 In *Constitution of the Maritime Safety Committee of IMCO*, ICJ *Reports* 1960 the Court said:

> "The Statements submitted to the Court have shown that linked with the question put to it there are others of a political character. The Court as a judicial body is however bound, in the exercise of its advisory function, to remain faithful to the requirements of its judicial character" (at p. 153)

The Court proceeded to give the opinion which had been requested.

5.11 In *Certain Expenses of the United Nations*, ICJ *Reports* 1962, the Court was faced with the argument that the question put to the Court was intertwined with political questions and that for that reason the Court should refuse to give an opinion. The Court said:

> "It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, name the interpretation of a treaty provision" (at p. 155)

5.12 The determination of the legal consequences which flow from a certain course of conduct is no less "an essentially judicial task".

5.13 In *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ *Reports* 1980, the Court, on its own initiative raised the issue whether the request had been nothing but a political manoeuvre and should therefore be declined. After observing that any such contention "would have run counter to the settled jurisprudence of the Court" the Court continued that that jurisprudence established that:

> "if ... a question submitted in a request is one that otherwise falls within the normal exercise of its judicial process, the Court has not to deal with the motives which may have inspired the request... Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate...." (at p. 87, para, 33)

5 .14 In *Military and Paramilitary Activities in and Against Nicaragua*, ICJ *Reports* 1986, the Court said that it "has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force" (at p.435, para 96). That is as true today as it was in 1986.

5 .15 It is equally irrelevant to the Court's jurisdiction that the subject-matter of the request for an advisory opinion is or has been separately considered by the General Assembly or Security Council. When that question was raised in *Military and Paramilitary Activities in and against Nicaragua (Jurisdiction)*, ICJ *Reports* 1984, the Court noted that it

> "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" (at p. 436, para. 98).

5 .16 The Court similarly observed that,

> "the fact that a matter is before the Security Council should not preclude it being dealt with by the Court and that both proceedings could be pursued *pari passu*" (at p. 433, para. 93)

5.17 The Court had already come to the same conclusion in *United States Diplomatic and Consular Staff in Tehran*, ICJ *Reports* 1980, where it noted that,

> "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 or situation, no such restriction is placed on the functioning of the Court by any provision either of the Charter or the Statute of the Court" (at pp. 21-2, para. 40)

5.18 These were both contentious cases, and concerned concurrent action by the Court and Security Council: given the more limited legal effects of advisory proceedings and of action in the General Assembly, any concurrent action by the Court and the General Assembly in the present proceedings leads *a fortiori* to the same conclusion.

5.19 In short, in giving the advisory opinion which the General Assembly has requested of it, the Court is called upon to "engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the [wall being constructed]": *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, (*supra*, p. 235, para. 18).

5.20 The General Assembly has put a legal question to the Court, and is competent to request from the Court an advisory opinion on that question. The Court has jurisdiction to give such an opinion.

(ii) There are no compelling reasons which should lead the Court to refuse to give the advisory opinion requested of it

5.21 The Court has a measure of discretion whether or not to exercise its jurisdiction to give the advisory opinion which has been requested of it.

Article 65, paragraph 1, of the Statute states that the Court "may" give an advisory opinion, and the Court has made it clear that this language

> "leaves the Court a discretion as to whether or not it will give an advisory opinion that has been requested of it, once it has established its competence to do so". (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (*supra*), p. 235, para. 14)

5 .22 However, for over 50 years the Court has held to the view that it should not in principle refuse to give an advisory opinion on a matter which has been properly placed before it. In *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, ICJ *Reports* 1950, p. 71) the Court said:

> "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."

5 .23 More recently, in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* (*supra*, p. 235, para. 14) the Court cited that earlier statement, and continued:

> "The Court has constantly been mindful of its responsibilities as "the principal judicial organ of the United Nations" (Charter, Art. 92). 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... There has been no refusal, based on the discretionary power of the Court, to act upon a request for advisory opinion in the history of the present Court..." (ibid., p. 235, para. 14)

5 .24 Even the Court's predecessor on only one occasion declined to respond to a question put to it for an advisory opinion by the Council of the League of Nations, and then it did so for reasons other than the exercise of its discretionary power: *Status of Eastern Carelia,* PCIJ, Series B, No. 5 (1923). The circumstances, however, were special, particularly in that the question on which an advisory opinion was requested directly concerned the main point of an existing bilateral dispute which had arisen between two States, and that one of those two States was not a Member of the League of Nations, was therefore not bound by the provisions of the Covenant dealing with the pacific settlement of disputes, and was, although in the possession of relevant facts, nevertheless not willing to participate in the proceedings.

5 .25 The present circumstances are of an entirely different order. All States concerned are members of the United Nations and have therefore accepted the possibility of the Court responding to a request for an advisory opinion submitted in accordance with the relevant provisions of the Charter and the Statute. There are no facts which it is necessary for the Court to have before it in giving its advisory opinion, but which are inaccessible to the Court by reason of the State in possession of those facts being a non-Member of the United Nations and unwilling to participate in the proceedings. While the question put to the Court in the present request relates to a particular set of circumstances (namely the construction of the wall being built by Israel), the request for an advisory opinion does not address a legal question actually pending between States but rather relates to the obtaining of guidance by the General Assembly as to the legal consequences which flow from the construction of that wall, so that the General Assembly may with a fuller understanding of those legal consequences be better placed to carry out its functions. Nor, since the opinion will not only be addressed to the Assembly for its guidance but will also only be advisory, will the giving of the opinion effectively decide any existing bilateral dispute between States.

It being the Assembly, not States, which has sought the Court's advisory opinion, the opinion when given will serve to assist the Assembly in exercising its functions, and it will be for the Assembly to consider for itself the usefulness of the opinion in the light of its own needs.

5.26 Even in cases where (which is not the present situation) the advisory opinion is considered to have been requested upon a legal question actually pending between two or more States, it does not follow that the Court should decline to give an advisory opinion. In *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,* ICJ *Reports* 1950, the Court acknowledged that the inability of any State to prevent the giving of an advisory opinion applied,

> "*even where* the Request for an opinion relates to a legal question actually pending between States" (p. 71, quoted above, at paragraph 5.7: emphasis added).

5.27 Relying on that case, the Court, in the *Western Sahara* case, ICJ *Reports* 1975, rejected Spain's contention 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, and Spain did not consent to the proceedings. The Court continued:

> "The Court, it is true, affirmed [in that case] ... 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. However, the Court proceeded not merely to stress its judicial character and the permissive nature of Article 65, paragraph 1, of the Statute but to examine, specifically in relation to the opposition of some of the interested States, the question of the judicial propriety of giving the opinion. Moreover, the Court emphasized the circumstances differentiating the case then under consideration from the *Status of Eastern Carelia* case and explained the particular

grounds which led it to conclude that there was no reason to refuse to reply to the request. Thus the Court recognized that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion. In short, the consent of an interested State continues to be relevant, not for the Court's competence, but for the appreciation of the propriety of giving an opinion....

"33. In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be 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....

"34. The situation existing in the present case is not, however, the one envisaged above. There is in this case a legal controversy, but one which arose during the proceedings of the General Assembly and in relation to matters with which it was dealing. It did not arise independently in bilateral relations..." (at pp. 24-25, paras. 32, 33, 34)

5 .28 After reviewing the circumstances in which the legal question put by the General Assembly to the Court had arisen, the Court continued:

"Thus the legal questions of which the Court has been seised are located in a broader frame of reference than the settlement of a particular dispute and embrace other elements. These elements, moreover, are not confined to the past but are also directed to the present and the future.

"39. The above considerations are pertinent for a determination of the object of the present request. The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion,

> exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory" (at pp. 26-27, paras. 38 and 39).

5.29 The similarities between the situation before the Court in that case, and the situation now before the Court, are striking. In the present case, too, the legal controversy arose during proceedings of the General Assembly and in relation to matters with which it was dealing; it did not arise independently in bilateral relations; the legal questions of which the Court has been seised are not located in the settlement of a particular dispute, but are rather located in the broader frame of reference of the General Assembly's involvement, from the earliest days of the United Nations, in all aspects of the aftermath of the termination of the Mandate for Palestine and in particular the consequences of the 1967 hostilities between Israel and certain Arab States; the Assembly is not seeking an advisory opinion in order to pave the way for the exercise its powers and functions for the peaceful settlement of a bilateral dispute; rather it seeks the Court's opinion in order to gain assistance in the proper exercise of its functions concerning the problem of Palestine. Just as the Court concluded in the *Western Sahara* case that nothing in the giving by the Court of a reply to the General Assembly's request for an advisory opinion 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, and would not therefore involve any judicial impropriety on the part of the Court, so too is the same conclusion called for in the present case.

5 .30 In sum, as put by Rosenne,

> "Owing to the organic relation now existing between the Court and the United Nations, the Court regards itself as being under the duty of participating, within its competence, in the activities of the Organization, and no State can stop that participation" (*The Law and Practice of the International Court of Justice 1920-1996*, (1997), at p. 1021).

5 .31 As already noted, the fact that the legal question on which the Court's opinion is requested may also involve a political question affords no reason for the Court to decline to exercise its jurisdiction to do so (above, paragraphs 5.8 - 5.14). No doubt, as the Court made clear in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* (*supra*, p. 237, para 17), whatever conclusions are reached by the Court in the opinion which it gives in response to the General Assembly's request, those conclusions will be relevant not only to the Assembly's disposition of the specific matters which it has under consideration, but also to the continuing debate in the United Nations on matters of wider import in relation to the search for peace in the Middle East. But any such effects which the Court's opinion might have are a matter of appreciation as to which there are doubtless differing views; in any event they can be no more than a matter for speculation at this stage. Such uncertain and speculative impacts of the Court's opinion cannot constitute a compelling reason for the Court to decline to exercise its jurisdiction.

5 .32 The fact that the legal question posed by the General Assembly is one on which States have different legal views does not mean that the Court is therefore called upon to consider a legal question actually pending between States. It will, indeed, usually be the case that a request for an advisory opinion relates to a legal issue on which divergent views exist - were it not so, there would be no need for the requesting organ to seek the Court's

opinion on the matter. It is precisely because there are divergent legal views that the General Assembly has in this case considered that it stands in need of an advisory opinion from the Court as to the legal consequences with regard to matters currently before the Assembly.

5.33 It is for the General Assembly, and not for the Court, to determine whether the Assembly needs the advisory opinion which it has sought; it is for the Assembly, rather than the Court,

> "to decide for itself on the usefulness of an opinion in the light of its own needs... [Moreover] the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution": *Legality of the Threat or Use of Nuclear Weapons* (*supra*, p. 237, para. 16).

5.34 Moreover, the fact that the legal question posed by the General Assembly may have political aspects is not a reason which justifies the Court in declining to exercise its jurisdiction to give the opinion which has been requested (see above, paragraphs 5.8 - 5.14).

5.35 There is, in short, no "compelling reason" for the Court to decline to exercise the jurisdiction which the Charter and Statute have conferred upon it. The Court's task is "to ensure respect for international law, of which it is the organ" (*Corfu Channel (Merits)*, ICJ *Reports* 1949, p. 35): that task applies to advisory proceedings as much as to contentious proceedings. The nature of the Court's judicial task has been

> "summarized as being so far as possible in the concrete case, contentious or advisory, to separate the legal problem from its broader political context, to consider that legal problem in an objective and even abstract way, and to articulate the decision on the

> basis of that examination, to the exclusion of all extra-legal considerations. On the whole this conception of the judicial task has met with general acceptance in the sense that both the General Assembly (in the case of advisory opinions) and the individual States (in the case of judgments) have acted upon them." (Rosenne, *The Law and Practice of the International Court of Justice 1920-1996*, (1997), p. 178)

5.36 In exercising its jurisdiction in the present proceedings the Court will wish to note in particular certain elements which are expressed in, or flow from, the terms of the question put to the Court for an advisory opinion:

(i) the request seeks an advisory opinion on "the legal consequences arising from" the construction of the wall, and thus covers legal consequences without any limitation as to the States, entities, organisations or persons for which those consequences arise;

(ii) the General Assembly categorises Israel as "the occupying Power";

(iii) the General Assembly categorises the territory in which the wall is being constructed as "the Occupied Palestinian Territory" and regards that Territory as "including in and around East Jerusalem";

(iv) the question relates to "the wall being built by Israel ... as described in the report of the Secretary-General", and since that report describes the wall in its entirety - i.e. as constructed, planned and contemplated - it is the wall in its entirety which is covered by the question put before the Court by the General Assembly;

(v) the General Assembly includes the Fourth Geneva Convention of 1949 within the rules and principles of international law which the Court is to consider in responding to the question placed before it; and

(vi) the General Assembly regards "relevant Security and General Assembly resolutions" as needing to be considered by the Court in responding to the question placed before it.

(b) Applicable legal principles

(i) The prohibition of the use of force, and the right of self-determination, are rules of ius cogens

5 .37 The circumstances which have given rise to the present request for an advisory opinion are underpinned by two rules of international law of overriding importance and significance. They are the rules which establish that the use of force by States is prohibited (save in very exceptional and tightly restricted circumstances), and that all peoples have the right to self-determination. In both respects these rules have such primordial importance that they have the character of rules of *ius cogens*.

5 .38 That category of rules of international law represents the highest level in the hierarchy of rules of international law, being rules which cannot be varied or departed from by other rules of international law but only by other rules having the same *ius cogens* character. The usual formulation of this category of rules of international law which is that adopted by Article 53 of the Vienna Convention on the Law of Treaties 1969, which uses the term *ius cogens* as coterminous with the term "peremptory norm of general international law", and defines that term as,

> "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

5 .39 While the existence of such a category of rules of international law is now universally accepted, the identification of the rules falling within that category is the subject of more dispute. Nevertheless, there is nowadays no discernible dissent from the classification of both the prohibition of resort to armed force and the right to self-determination as rules of *ius cogens*.

(a) The prohibition (save in very exceptional and tightly restricted circumstances) of the use of force by States is a well-established rule of international law. It is one of the Principles of the United Nations, set out in Article 2(4) of the Charter in the following terms:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

5 .40 That Charter prohibition applies not only to the threat or use of force, but also the threat or use of force "in any other manner" inconsistent with the Purposes of the United Nations. the threat or use of force in either of those circumstances (or, if intended as a means of self-defence, if it violates the principles of necessity and proportionality: see further below, paragraph 5.272), would be unlawful under the law of the Charter: *Legality of Nuclear Weapons*, ICJ *Reports* 1996, at p. 247, para 48.

5 .41 The Purposes of the United Nations are set out in Article 1 of the Charter. They include, in particular,

- the maintenance of international peace and security, to which end it is a purpose of the United Nations "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace" (Article 1.1);

- "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" (Article 1.2); and

- "to achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".

5.42 The prohibition of the use of force is also a rule of customary international law.

5.43 It has long been acknowledged that the rule prohibiting the use of force is a rule having the character of *ius cogens*. In paragraph (1) of its the Commentary on draft Article 50 on its 1966 final draft articles on the law of treaties (which was later, with amendments, to become Article 53 of the Vienna Convention) the International Law Commission

> "pointed out that the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*".

5.44 This statement was quoted with approval by the Court in *Military and Paramilitary Activities in and against Nicaragua*, ICJ *Reports* 1986, at p. 100 (para. 190), and the Court noted that both parties before the Court (Nicaragua and the United States of America) accepted the status of the prohibition of the use of force as *ius cogens* (at p. 101, para. 190).

5.45 There is no disposition in any quarter to doubt that the prohibition of the use of force is a rule of *ius cogens*.

(b) Acceptance of the right of self-determination as having the status of a rule of *ius cogens* has been a more recent development. The International Law Commission in its 1966 Commentary, in paragraph (3) of its Commentary on draft Article 50 of its final draft articles on the law of treaties, noted that the principle of self-determination had been mentioned as a possible example of a rule of *ius cogens*.

5.46 As early as 1970 Judge Amoun, in his separate opinion in *Barcelona Traction (Second Phase)*, ICJ *Reports* 1970, treated the right of self-determination as an "imperative rule of international law" (at p. 304, para. 11) – a term which would now be rendered as a rule of *ius cogens*.

5.47 In 1995 Judge Cassese, President of the International Criminal Tribunal for the Former Yugoslavia, considered the status of self-determination as part of *ius cogens*. In *Self-Determination of Peoples: A Legal Reappraisal* (1995) he carefully examined the issue (at pp. 134-140), and in the light of that examination considered that "the conclusion is justified that self-determination constitutes a peremptory norm of international law" (ibid., at p. 140).

5.48 His conclusion was borne out in the same year when the Court itself noted that "[t]he principle of self-determination of peoples... is one of the essential principles of contemporary international law", and accepted as "irreproachable" the view that the right of peoples to self-determination had an *erga omnes* character, with the consequence that it gave rise to an obligation to the international community as a whole to respect its exercise: *East Timor*, ICJ *Reports* 1995, at p. 102, para. 29.

5.49 In reliance on this view the International Law Commission, in its discussion of norms having the character of *ius cogens* in paragraph (5) of the Commentary to Article 40 of its 2001 Articles on State Responsibility,

observed that "the obligation to respect the right of self-determination deserves to be mentioned".

5 .50 It is thus clear that Israel is under an inescapable obligation to allow the right of self-determination to be exercised, the 'people' in question being the Palestinians.

(ii) The territory in which the wall has been or is planned to be constructed constitutes occupied territory for purposes of international law

5 .51 The wall built or planned by Israel runs almost entirely through the West Bank and parts of Jerusalem which were occupied by Israel after the 1967 conflict. The background to that conflict is therefore relevant to Israel's present rights and obligations in and in respect of the West Bank and East Jerusalem. That background has been set out above, in section II.

5 .52 It is evident from that background that before June 1967 the West Bank clearly *was not* territory in which Israel had any presence or which was administered or controlled by Israel, let alone territory under Israel's sovereignty. Contrariwise, the West Bank clearly *was* territory in which Jordan was peacefully present and which was administered and controlled by Jordan, and indeed was (and had been for 17 years) territory in respect of which Jordan was the lawful sovereign although its sovereignty was subject to safeguards for Palestinian rights in the final settlement of the Palestinian question. Jordan's position in respect of the West Bank was generally acknowledged by the international community, and as already noted (above, para 2.21) was the basis on which Jordan became a Member of the United Nations in 1955 without objection from any State and was accepted by the Security Council in Resolution 228 (1966).

5 .53 It follows from this that Israel's occupation of the West Bank after and as a direct part of the 1967 hostilities constituted a military occupation of that

non-Israeli territory. Where a State by armed force dispossesses another State from its peaceful exercise of governmental authority over territory and replaces it with its own authority, it thereby becomes the military occupant of that territory. The essence of military occupation is that it occurs where a State by force of arms extends the territorial scope of its authority into territory which is not its own. Typically, such a situation occurs where the extension of the State's territorial authority takes place at the expense of another State's sovereignty over the territory which has been militarily occupied, but this is not a necessary condition for the establishment of the international regime of military occupation. The law of military occupation operates with considerable flexibility in the range of situations which it covers, and is not limited to what may be regarded as the classic case of belligerent occupation by one State of the territory of another with which it is at war. Its operation is essentially determined by the *facts*; where the facts show that after hostilities a State's military forces are in occupation of territory not its own, then that occupation constitutes a "military occupation" for the purposes of international law.

5.54 This is consistent with common Articles 1 and 2 of the (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 (75 *UNTS*, p. 287). Article 1 provides that:

> "The High Contracting Parties undertake to respect and to ensure respect for the present Convention *in all circumstances*" (emphasis added)

5.55 The first two paragraphs of Article 2 provide:

> "1. In addition to the provisions which shall be implemented in peacetime, the present Conventions shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

> 2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

5 .56 The Convention thus applies to Israel's military occupation of the West Bank for at least two reasons. First, it applies to any armed conflict between two or more of the High Contracting Parties: at the time the 1967 hostilities broke out, both Jordan and Israel were parties to the Convention and the armed conflict was without question one which had arisen between them (and other States). Second, the Convention *additionally* ("also") applies to all cases of partial or total occupation of the territory of a High Contracting Party, and, for the reasons given above in Section V (b) (ii), the West Bank was such a territory either on the basis that the territory "of" a State comprises territory under its sovereignty (even though without prejudice to certain rights of others) or on the basis that "of" connotes at least a State's peaceful presence in, and exercise of jurisdiction, control and governmental authority over, territory. In short, the Convention applies to all cases in which territory is occupied in the course of an armed conflict, irrespective of the status of that territory.

5 .57 The emphasis on the factual situation as the basis for the Convention's application is reinforced by Article 4, which provides that

> "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

5 .58 No other conclusion is possible than that the West Bank became Israeli occupied territories as a result of the June 1967 hostilities. Nothing has happened since then to change that state of affairs.

5 .59 Many Security Council and General Assembly resolutions confirm that conclusion. From the earliest resolutions adopted in the immediate aftermath of the 1967 hostilities resolutions of both organs of the United Nations have characterised the resulting situation both as one of "occupation", and as one to which the Fourth Geneva Convention applied, and have designated Israel as the "occupying Power".

5 .60 In the immediate aftermath of the 1967 hostilities SC Res. 237(1967) (14 June 1967: adopted unanimously) recommended "scrupulous respect of the humanitarian principles governing the ... protection of civilian persons in time of war contained in the Geneva Conventions of 12 August 1949", and this was welcomed by the General Assembly a few days later in GA Res. 2252 (ES-V) (4 July 1967). In 1969 the Security Council became more specific, and in SC Res. 271(1969)(15 September 1969: adopted 11-0-4) called upon Israel "scrupulously to observe the provisions of the Geneva Conventions and international law governing military occupation". This express but general reference to the Geneva Conventions in the context of military occupation was made more specific still in the statement made in 1976 by the President of the Security Council that "The Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967" (UN Doc. S/PV.1922, 26 May 1976). This language was followed in SC Res. 446(1979)(22 March 1979: adopted 12-0-3), in which the Council "Affirm[ed] once more that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem" (preamble, para 3) and in other operative provisions repeated the applicability of the Fourth Geneva Convention (para 3), the status of the territories in question as "occupied" (paras 1, 3, 4), and Israel's status as "the occupying Power" (para 3). These points have been consistently repeated in many subsequent resolutions adopted, with large majorities, by the Security Council: see e.g.

SC Res 681(1990)(20 December 1990: adopted unanimously) and SC Res. 726(1992)(18 December 1992: adopted unanimously).

5 .61 In the General Assembly the view taken by the generality of the membership has been even more specific. After GA Res. 2252(ES-V)(4 July 1967: adopted 116-0-2) welcomed the Security Council's recommendation for "scrupulous respect of the humanitarian principles governing the ... protection of civilian persons in time of war contained in the Geneva Conventions of 12 August 1949", subsequent resolutions soon adopted even more specific language. Thus GA Res. 2727(XXV)(15 December 1970: adopted 52-20-43) called upon Israel "to comply with its obligations under the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 ...". From 1973 onwards relevant General Assembly resolutions have consistently upheld the applicability of the Fourth Geneva Convention, held the occupied Palestinian territory including in and around East Jerusalem to be "occupied" territory, and regarded Israel as the occupying Power. These resolutions have been adopted by overwhelming majorities, indeed sometimes with no negative vote, or with no more than one negative vote, that of Israel. Such resolutions include the following, selected so as to illustrate the consistency of the General Assembly's position in over a long period: GA Res. 3092A(XXVIII) (7 December 1973: adopted 120-0-5), GA Res. 3240B(XXIX) (29 November 1974: adopted 121-0-7), GA Res. 32/5 (28 October 1977: adopted 131-1-7), GA Res. 35/122A (11 December 1980: adopted 141-1-1), GA Res. 38/79B (15 December 1983: adopted 146-1-1), GA Res. 41/63B (3 December 1986: adopted 145-1-6), GA Res. 43/58B (6 December 1988: adopted 148-1-4), GA Res. 46/47A (9 December 1991: adopted96-5-52), GA Res. 49/36B (9 December 1994: adopted 155-3-5), GA Res. ES-10/2 (25 April 1997: adopted 134-3-11), and GA Res. 56/60 (10 December 2001: adopted 148-4-2).

5 .62 It is particularly noteworthy that GA Resolutions 32/20 (25 November 1977) and 33/29 (7 December 1978) specifically characterized the Israeli occupation of territories occupied since the 1967 hostilities as "illegal". The former resolution expressed concern "that the Arab territories occupied since 1967 have continued, for more than ten years, to be under illegal Israeli occupation"; the latter used the same language (with the replacement of "ten" by "eleven"). Those resolutions were adopted by huge majorities, the former by 102-4-29 and the latter by 100-4-33.

5 .63 Where the Security Council has decided or determined or declared that a situation is in violation of international law, and has thus considered it to be illegal, or where the General Assembly's consistent conduct over many years reflects an *opinio juris* to that effect, the Court cannot disregard such legal conclusions. As the Court said in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, ICJ *Reports* 1971),

> "It would be an untenable interpretation to maintain that, once such a declaration [that a certain situation was illegal] had been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it. When confronted with such an internationally unlawful situation, Members of the United Nations would be expected to act in consequence with the declaration made on their behalf." (at p. 52, para. 112)

5 .64 In addition to the overwhelming and consistent practice of the relevant organs of the United Nations, other international organizations have similarly held the view that the Fourth Geneva Convention applies to the occupied Palestinian territories including in and around East Jerusalem. This has, for example, consistently been the view of the International

Committee of the Red Cross, as reflected in its *Annual Reports* for 1968 and subsequent years, and its statement on the twentieth anniversary of the occupation (*ICRC Bulletin*, No. 137, June 1987, p. 1)

5 .65 Quite apart from their conduct in voting on relevant resolutions in the Security Council and General Assembly, many States have taken individual positions to the effect that the Fourth Geneva Convention applies to the occupied territories. These include the United States (*Digest of US Practice in International Law*, 1978, pp. 1575-1578) and the United Kingdom ("United Kingdom Materials in International Law", in *British Yearbook of International Law*, 69 (1998), p.592-600).

5 .66 Israel has on various grounds sought to deny that its presence in the occupied Palestinian territories including in and around East Jerusalem constitutes a military occupation to which the special legal regime of military occupation applies, and to deny that the Fourth Geneva Convention (to which Israel is a party) applies as a matter of law to that occupation. Israel's arguments to that effect have been explained at length in debates in the Security Council and General Assembly. In particular, in the debate in the Security Council on 13 March 1979 which led eventually to the adoption of SC Resolution 446(1979)(22 March 1979), Israel's representative, Mr Blum, delivered a lengthy statement of Israel's position (UN Doc. S/PV.2125, pp. 17-51). The Security Council decisively rejected those arguments, instead proceeding to adopt SC Resolution 446(1979) in which (as noted above) the Council affirmed the applicability of the Fourth Geneva Convention (preamble, para 3), determined that the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 "have no legal validity" (operative para 1), referred to the territories in question as "occupied" (ibid., and para 7) and characterized Israel as "the occupying Power" (operative para 3):

that Resolution was adopted by 12 votes in favour, 0 against, and with 3 abstentions.

(iii) The law applicable in respect of occupied territory limits the occupying State's powers

5 .67 Territory occupied during or in the aftermath of hostilities – "occupied territory" – is in international law subject to a special legal regime. That legal regime acknowledges such military occupation as an essentially temporary and provisional state of affairs, which may change as the tide of war flows back and forth, or may come to an end with new arrangements agreed by the interested parties at or after the end of active hostilities. Military occupation is not the result of a legally authorized process: it is the result of practical power involving the successful application of superior force which confers on the occupying State a degree of *de facto* control and jurisdiction without constituting a transfer of sovereignty, and the factual situation resulting from that extra-legal origin is then regulated by rules of international law.

5 .68 As important as the prohibition of the annexation of occupied territory is the requirement that the special legal regime which governs territory occupied during or in the aftermatch of hostilities subsists for so long as the occupation itself continues. The termination of hostilities does not make the occupation regime no longer applicable. Occupation is essentially a matter of fact; for so long as the fact of occupation exists, so too does the application to the occupation of the international legal regime governing that situation. Occupation lasts until brought to an end by the complete withdrawal of the occupying State's authorities or by whatever formal processes may accompany the eventual return to 'peace'. In relation to the occupied Palestinian territories including in and around Jerusalem, many

resolutions of the Security Council and General Assembly affirm the continued application of the occupation regime.

5 .69 The special legal regime is defined by the rules of international law which apply to occupied territory. Those rules seek to strike a balance between the military needs of the occupying State's forces and the rights of the population to continue so far as possible their peaceful and distinctive way of life. For the purposes of these present advisory proceedings the rules of international law defining the applicable regime are to be found in -

(a) the Charter of the United Nations;

(b) the Regulations annexed to the 1907 Hague Convention Respecting the Laws and Customs of War on Land ("the Hague Regulations"), now accepted as embodying customary international law;

(c) the Fourth Geneva Convention 1949, to which almost all States are now Parties (the total is now 191, and includes Jordan, and Israel) and which accordingly may be regarded as wholly or at least in substantial part declaratory of customary international law;

(d) the 1977 Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, which now has -- States Parties (including Jordan); it requires the Parties to respect and ensure respect for the Protocol "in all circumstances" (Article 1.1), and applies in the situations referred to in Article 2 common to the 1949 Geneva Conventions (Article 2.2) and to "armed conflicts in which peoples are fighting against ... alien occupation and against racist régimes in the exercise of their right of self-determination" (Article 1.4): some of the provisions of Protocol I are now recognised to have the character of customary international law;

(e) rules of customary international law (which quality many provisions of the previously mentioned instruments may also possess, in addition to their quality as treaty rules binding on parties to the treaty in question);

(f) relevant resolutions of the Security Council and General Assembly (which the question on which an advisory opinion is requested expressly requires the Court to consider).

(g) in addition, there are many rules of customary international law and of international treaties which, while not necessarily to be regarded as setting the framework of the general regime applicable to territory under foreign military occupation, nevertheless apply in that situation as well as in other situations (for which indeed they might have been more specifically designed). These include in particular -

(i) Universal Declaration of Human Rights 1948;

(ii) International Covenant on Civil and Political Rights 1966;

(iii) International Covenant on Economic, Social and Cultural Rights 1966 (these two Covenants were a development of the provisions originally set out in the Universal Declaration of Human Rights 1948 (GA Res. 217A(III)(1948), the terms and principles of which substantially influenced the provisions of the Geneva Conventions concluded in the following year).

5.70 In considering the customary and conventional legal provisions which the Court finds relevant to the situation which the General Assembly has placed before it, the Court is called upon to state and apply the law, in doing which "the Court necessarily has to specify its scope and sometimes note its general trend": *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (*supra*, p. 237, para. 18).

5.71 As regards the rules of international law applicable by virtue of sub-paragraphs (b), (c) and (d) above, it is important to recall that (with

reference to the Mandates system established by the Covenant of the League of Nations) the Court has drawn attention to the need to interpret institutions and instruments in the light of general international developments. The Court said:

> "[V]iewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, ICJ *Reports* 1971, pp. 31-32, para. 53)

5 .72 This is particularly important in respect of the Hague Regulations, which were adopted almost a century ago; and even the Geneva Conventions were adopted nearly half a century ago, and Protocol I a quarter of a century ago.

5 .73 As regards what the Court termed the "Hague Law" and the "Geneva Law", the Court said in *Legality of Nuclear Weapons*, ICJ *Reports* 1996):

> "These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law" (at p. 256, para. 75).

5 .74 The Court also drew attention to the provisions of Article 1, paragraph 2, of Additional Protocol I of 1977 which, building upon the earlier so-called Martens Clause, reads as follows:

> "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience" (at p. 257, para. 78).

5.75 The Court later confirmed that the "continuing existence and applicability [of the Martens Clause] is not to be doubted..." (at p. 260, para. 87).

5.76 The Court went on to observe that

> "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary principles of humanity' ... that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (at p. 257, para. 79).

5.77 The Court referred to the finding of the Nuremberg International Military Tribunal in 1945 that the Hague Regulations "were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war" (at p. 258, para 80), and to a report of the UN Secretary-General in 1993 which was unanimously approved by the Security Council in resolution 827(1993) and which included within that part of conventional international humanitarian law which has "beyond doubt become part of international customary law" the law applicable in armed conflict as embodied in, *inter alia*, the Geneva Conventions of 1949 for the Protection of War Victims and the Hague Regulations (at p. 258, para. 81).

5.78 The Court concluded by noting that the extensive codification of humanitarian law has

> "provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behaviour expected of States." (at p. 258, para. 82).

5.79 Since the Court expressed those conclusions, the trends in the development of international humanitarian law which the Court then recognized have been confirmed and extended further by subsequent developments, most notably in the Articles on State Responsibility which were taken note of and commended to Governments by the General Assembly in 2001 (GA Res. 56/83) and in the Rome Statute of the International Criminal Court adopted by the Rome Conference in 1998. There is moreover growing authority for the view that where conduct involves violation of a rule of *ius cogens*, particularly in the case of resort to armed force, certain rights and benefits which might otherwise accrue to the violating State will be curtailed and, at the least, subject to restrictive interpretation. See Brownlie, *Principles of Public International Law* (6th ed., 2003), p. 490, at n. 37); *Oppenheim's International Law* (Vol. I, 9th ed., 1992), p. 8.

5.80 It is a notable feature of international humanitarian law that it is expressly intended to apply to all situations covered by the instruments in questions, irrespective of potential legal technicalities which might otherwise be invoked to limit the protection afforded by those instruments. Thus if there is fighting or conflict, or in the case of the Fourth Geneva Convention occupation in the course of or following fighting or conflict, the clear intention of the relevant instruments is that the victims of that fighting should be protected notwithstanding possible technical legal arguments about the status of the territory in question prior to the occupation, or the status of parties to the conflict, or the legal nature of the "war" which was taking place, or of its lawfulness or otherwise: it is the *factual* situation

which is paramount for the purposes of humanitarian law. Thus the common Articles of the 1949 Geneva Conventions all provide that respect for each Convention is to be ensured "in all circumstances" (Article 1), and that they apply "to all cases of declared war *or any other armed conflict* ..., even if the state of war is not recognized by one of them" (Article 2: emphasis added); even where an Occupying Power purports to annex all or part of the occupied territory (which it is not permitted to do: see below, paragraph 5.98 FF), "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention, by" such annexation (Fourth Geneva Convention, Article 47).

5.81 So far as concerns the Covenant on Civil and Political Rights, that Covenant applies in respect of "all individuals within [each State Party's] territory and subject to its jurisdiction" (Article 2.1). The UN Human Rights Committee, and the UN Committee on Economic, Social and Cultural Rights, have disregarded questions of territorial sovereignty as prerequisite for compliance with, respectively, the Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights. As recently as July 2003 the Human Rights Committee rejected the arguments put forward by Israel to the effect that Israel's actions in the occupied Palestinian territories were not to be measured against the rules set out in the International Covenant on Civil and Political Rights (Report of the Special Rapporteur of the Commission on Human Rights, 8 September 2003, UN Doc. E/CN.4/2004/6, para. 2).

5.82 In the *Nuclear Weapons* Advisory Opinion the Court has stated "that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency" (para. 25). Such derogations cannot, however, be made to a

number of Articles, as specified in Article 4.2. There is of course a separate question whether any particular right protected by the Covenant is relevant, and the relevance of particular Articles will be addressed in the appropriate places in this statement. Israel ratified the Covenant on 3 January 1992, without making any reservation relevant to the present request.

5 .83 It has been noted (above, paragraph 5.69) that the general body of rules comprising the special regime of military occupation seeks to establish a balance between the military needs of the occupying State in prosecuting its hostilities against the enemy and the continuing rights of the local population of the territory which it has occupied. It follows that in interpreting and applying those rules the general level of active hostilities existing at the relevant time is a factor to be taken into account. The more active the general level of hostilities, the more credence may be given to claims by an occupying State that it must be allowed to do certain things in furtherance of its military needs; on the other hand, when (as now, in the occupied Palestinian territory including in and around East Jerusalem) the general level of hostilities has virtually diminished to vanishing point, the military needs of the occupying State are correspondingly reduced and provisions defining an its powers need to be interpreted more restrictively, and the local population has a correspondingly greater claim that its rights not be interfered with. In particular, in those circumstances there is a greater need and justification to supplement the provisions of the Fourth Geneva Convention (which was primarily designed to protect the civilian population during an essentially 'hostile' military occupation) with the provisions of general human rights instruments which serve to protect civilian populations, both individually and collectvely, at all times, including those when circumstances approximate to those of peace.

5 .84 In considering the body of applicable rules, some general observations must be made about the relevant Security Council and General Assembly resolutions, which, as already noted (above, paragraph 5.36), the General Assembly's request for an advisory opinion expressly requires the Court to consider.

5 .85 First, some at least of those resolutions, particularly some of those adopted by the Security Council, are binding on Member States of the United Nations by virtue of Article 25 of the Charter. In this connexion, the Court has already rejected the view that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter, pointing out that that Article applies without qualification to "the decisions of the Security Council" adopted in accordance with the Charter, and is placed not in Chapter VII but in that part of the Charter dealing generally with the powers and functions of the Security Council (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, ICJ *Reports* 1971, p. 17, para. 133). As to which Security Council resolutions do have binding effect, the Court went on to say:

> "The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council." (para. 114)

5 .86 In applying that test to the resolutions before it in those proceedings, the Court concluded that they

> "were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25. The decisions are consequently binding on all States Members of the United Nations, which are thus under obligation to carry them out.... thus when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council ... A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. Once the Court is faced with such a situation, it would be failing in the discharge of its judicial function if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end." (paras. 115-17)

5.87 In the context of these present advisory proceedings, Jordan is of the view that binding determinations of the Security Council under Article 25 of the Charter, have determined that

(i) the territory in which the wall is being constructed by Israel is "occupied territory", in relation to which Israel is the "occupying Power",

(ii) the Fourth Geneva Convention applies to that occupied territory,

(iii) Israel's conduct in that occupied territory is in violation of its obligations under that Convention and applicable principles and rules of international law, particularly in so far as it relates to the establishment in that occupied territory of settlements which it is in part the purpose of the wall being constructed by Israel to encourage and defend, and

(iv) actions taken by Israel to change the status and demographic composition of that occupied territory have no legal validity and are null and void.

5 .88 It is moreover relevant that when the Security Council debated the situation created by the construction of the wall at its 4841st and 4842nd meetings on 14 October 2003, it had before it a draft resolution which provided that the Council "*Decides* 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". That draft resolution failed to be adopted because of the negative vote of one permanent member of the Council, but the voting on the resolution (which as 10-1-4) showed that a large majority of members of the Council supported it; moreover it is well-established that the failure of a resolution to be adopted does not imply that the organ in question had made a pronouncement in the sense opposite to that proposed (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, ICJ *Reports* 1971, at para. 69). It was the failure of the Security Council to agree upon that draft resolution on 14 October 2003 which led to the request, the following day, for the resumption of the Tenth Emergency Special Session of the General Assembly which, after meeting on 20 October 2003 and again on 8 December, adopted the Resolution by which it sought the Court's advisory opinion. See Dossier of Materials Compiled Pursuant to Article 65, Paragraph 2, to the Statute of the International Court of Justice, 19 January 2004, at pp. 4-5, paras. 5-7.

5 .89 Second, even where a resolution is not formally binding by virtue of some express provision of the Charter, it may nevertheless acquire legally binding characteristics by virtue of the voting pattern of its adoption, or the fact that it is part of a consistent series of resolutions: either of those

circumstances, and especially where both operate together, may be evidence of an *opinio juris* with respect to the rule reflected in the resolution.

5.90 The possibility that General Assembly resolutions may make determinations or have operative design was accepted by the Court in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, ICJ *Reports* 71, where the Court explained that

> "it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design" (at p. 50, para. 105)

5.91 The legal weight to be attributed to General Assembly resolutions is, however, more extensive than even that statement suggests. As the Court said in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*:

> "The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule." (ICJ *Reports* 1996, p. 226, at pp. 254-255, para. 70)

5.92 The Court went to note that although numerous General Assembly resolutions put before the Court in those proceedings declared that the use

nuclear weapons would be contrary to the Charter, "several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions" and that as a result "they still fall short of establishing the existence fo an *opinio juris* on the illegality of the use of such weapons" (at p. 255, para. 71). By contrast, in the context of the present advisory proceedings Jordan draws attention to the overwhelming and often virtually unopposed majorities by which relevant resolutions were adopted.

5.93 The views expressed by the Court in *Military and Paramilitary Activities in and against Nicaragua* (ICJ *Reports* 1986) are to a similar effect. There the Court considered the extent to which the rule prohibiting recourse to force was binding as a matter of customary international law, and in particular whether there was an *opinio juris* to that effect. The Court said:

> "This *opinio juris* may, though with all due caution, be deduced from, *inter alia,* the attitude of the Parties and the attitude of States towards certain General Assembly resolutions... The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves... It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kine, to which it is subject on the treaty-law plane of the Charter" (at pp. 99-100, para. 188).

5.94 The Court went on, with reference to General Assembly Resolution 2625(XXV), to note that "the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question" (at p. 101, para. 191).

5.95 The numerous resolutions adopted, by large and even overwhelming majorities, by the General Assembly over a period of over 35 years have consistently demonstrated the international community's *opinio juris* that, like the Security Council's resolutions already referred to,

(i) the territory in which the wall is being constructed by Israel is "occupied territory", in relation to which Israel is the "occupying Power",

(ii) the Fourth Geneva Convention applies to that occupied territory,

(iii) Israel's conduct in that occupied territory is in violation of its obligations under that Convention and applicable principles and rules of international law, particularly in so far as it relates to the establishment in that occupied territory of settlements which it is in part the purpose of the wall being constructed by Israel to encourage and defend, and

(iv) actions taken by Israel to change the status and demographic composition of that occupied territory have no legal validity and are null and void.

5.96 Third, the Court is "constantly mindful of its responsibilities as 'the principal judicial organ of the United Nations'" - a consideration which has led it to the conclusion that it should not, in principle, refuse to give an advisory opinion requested by an organ of the United Nations (above, paragraph 5.23). The fact that the Court is part of the institutional structure of the United Nations requires it for that reason in particular, and in addition to reasons which flow from the authority possessed by the General Assembly and Security Council in the international community at

large, fully to respect resolutions adopted in accordance with the Charter by those organs with which it shares responsibilities entrusted to the United Nations by the international community. As it has been authoritatively said,

> "the Court, in exercising its judicial function of... rendering an advisory opinion... must co-operate in the attainment of the aims of the Organization and strive to give effect to the decisions of the principal organs, and not to achieve results which would render them inconsequential" (Rosenne, *The Law and Practice of the International Court 1920-1996*, (1997), p. 112)

5 .97 With these considerations in mind, the consistent position taken by the international community, and particularly by the Security Council and the General Assembly, to the effect that the Fourth Geneva Convention applies to the territories occupied by Israel in 1967, is especially significant and weighty.

(iv) Occupied territory cannot be annexed by the occupying State

5 .98 A particular and well-established limitation established by international law on the power and authority of the occupying State in respect of the occupied territory is that it is not subject to the sovereignty of the occupying State; nor does that State have the right to annex the occupied territory (at least pending whatever final 'peace' settlement may eventually be concluded). Any such annexation would be fundamentally inconsistent with the inherently temporary nature of the occupation, and would pre-empt whatever final settlement might be reached by precluding eventual withdrawal from the occupied territory: annexation and a regime of military occupation are mutually exclusive. Writing in 1968 Professor Schwarzenberger said of the view that wartime annexation was premature:

> "This has been the decisive factor in shaping the law on wartime annexation. It has produced a rule of customary law which prohibits the unilateral annexation of territories under belligerent occupation. Purported annexation constitutes, therefore, an illegal act of an Occupying Power in relation to the enemy State concerned. The same would be true of the recognition of such an annexation by a third State." (*International Law as Applied by International Courts and Tribunals*, vol. ii, 'The Law of Armed Conflicts', 1968), pp. 166-7)

5 .99 This has long been the accepted position in customary international law. That position is now reinforced by the more recent emergence of a rule of *ius cogens* prohibiting the use of force, for any annexation of territory as the result of military occupation would constitute an acquisition of territory in violation of that rule of *ius cogens*. The regime of occupation cannot, therefore, be brought to an end by annexation.

5 .100 The present position in this respect is reflected in the statement in General Assembly resolution 2625(XXV)(1970) that

> "the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal" (Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations).

5 .101 The Court has acknowledged the legal force of that resolution as an expression of an *opinio juris* regarding the rules set out in it: *Military and Paramilitary Activities in and against Nicaragua*, ICJ *Reports* 1986, pp. 99-100, para. 188.

5.102 Moreover, the Security Council and General Assembly have in many resolutions, relating not only to the territories occupied by Israel but also to occupied territories in other parts of the world, repeated again and again that the acquisition of territory by the use of force is unlawful, and null and void. Thus, by way of example in relation to the actions of Israel in respect of the territories occupied since 1967, SC Resolution 242(1967) "Emphasiz[es] the inadmissibility of the acquisition of territory by war"; SC Resolution 267(1969) "Reaffirm[s] the established principle that acquisition of territory by military conquest is inadmissible", as in substance (but with slight variations in wording) do SC Resolutions 271(1969), 298(1971), 478(1980), and 681(1990) and many others. Many resolutions of the General Assembly are to similar effect (e.g. GA Res. 2628(XXV)(4 November 1970), GA Res. 3414(XXX)(5 December 1975), GA Res. 37/86D (10 December 1982), GA Res. 42/160F (8 December 1987: adopted143-1-10), GA Res. 49/62D (14 December 1994: adopted 136-2-7), GA Res 49/132 (19 December 1994: adopted 133-2-23), GA Res. 53/42 (2 December 1998: adopted 154-2-3), and GA Res. 57/110(3 December 2002: adopted 160-4-3).

5.103 International law is not an overly-formalistic system. Its categories reflect substance rather than form, and reality rather than terminology. So it is with annexation. As a concept of municipal law it is often given a particular formal clothing by the provisions of that law. International law has 'borrowed' that concept and made it its own, for example in the rule *of international law* that a belligerent occupant may not annex occupied territory. But as Lord McNair warned in *International Status of South West Africa*, one must not import private law institutions "lock, stock and barrel" into the international field (ICJ *Reports* 1950, at p. 148); as a concept of international law, annexation represents a generalized view of the rules and practices adopted in the various municipal legal systems, and is not subject to the formal requirements which may apply in the domestic law of any particular State.

5.104 "Annexation", for the purposes of the rule of international law prohibiting it in relation to occupied territory, is not dependent upon there being (for example) some formal proclamation of annexation, or specific legislation using that term. For there to be an annexation in international law the substantive requirement is that one State should conduct itself in relation to territory which is not its own in such a way as to manifest an intention to extend to that territory, on a permanent basis, all essential elements of its own State authority, to the exclusion of the authority of any other State. This may be achieved by a formal act of annexation leaving no doubt as to that intention, but it may also be achieved indirectly where that intention is made apparent in other ways.

5.105 Moreover, annexation is in reality one aspect of a wider category of prohibited conduct, namely conduct which changes the status of occupied territory. Annexation is the clearest example of that category, since it involves the unlawful outright acquisition of territory by the occupying State, which manifestly involves a change in its status. But changes in status may occur in other ways. Such other forms of change of status are similarly prohibited during the period when the regime of military occupation applies, for they too are inconsistent with the inherently limited powers of the occupying State, whose authority is only temporary and must not prejudice or pre-empt the outcome of whatever final 'peace' settlement may eventually be made. In the context of Israel's occupation of Palestinian territory it is significant that Security Council and General Assembly resolutions have condemned Israel's conduct purporting to "change the status of" the territory in question: see e.g. the resolutions cited above, paragraph 2.32.

5.106 As an international law concept, annexation and other changes of status are not necessarily instantaneous events, taking effect, for example, upon the promulgation of a proclamation of annexation: they may occur as the final

outcome of a cumulation of occurrences, spread over time. In the field of expropriation of private property the notions of "creeping expropriation" or "indirect expropriation" are well-know, and have been treated by arbitral tribunals as no different from direct and formal expropriation of property. There is no reason in international law to treat the taking of territory by way of *de facto* annexation any differently.

5 .107 Annexation brings foreign territory within the sphere of application of the State's own domestic legal system. As such it is directly inconsistent with Article 43 of the Hague Regulations, which prohibits an Occupying Power from imposing its own legal system in an occupied zone and/or subjecting the occupied civilian population to its domestic laws.

(c) The construction of the wall in the light of applicable legal principles

(i) The occupying State does not have the right by constructing the wall effectively to annex occupied territory or otherwise to alter its status

5 .108 In very broad terms the route taken by the wall as so far constructed roughly follows the general direction of the Green Line (although in places it departs significantly from it) and several kilometres (in places up to 22 kilometres) into the occupied West Bank. That route is shown on Sketch Map No.6 following page 25. It results in a strip of land amounting to about 210,000 acres, or 14.5 percent of West Bank land excluding East Jerusalem, which will lie between the Wall and the Green Line; it will also enclose 54 Israeli settlements containing approximately 142,000 Israeli settlers (36% of the West Bank settler population). See United Nations, Office for the Coordination of Humanitarian Affairs, 'New Wall Projections', OPT, 9 November 2003.

5 .109 The physical nature of the wall, and the controls associated with it, effectively separate that strip of West Bank lands from the rest of the West

Bank, and at the same time link them closely to Israel's own territory lying to the west of the Green Line.

5.110 This result will be magnified many times over if the planned and contemplated sections of the wall are completed. The eastern route of the wall will move the effective western boundary of the West Bank a considerable further distance to the east: it will become a north-south line running just a few kilometres to the west of the River Jordan and the Dead Sea. The result will then be that an extensive swathe of West Bank lands will be effectively removed from occupied Palestinian territory and treated together with the territory of Israel.

5.111 There can be little doubt that the wall has the effect, both already and even more so when completed, of altering the status of the occupied territory and *de facto* annexing it to Israel. This is clear both from the route, nature and consequences of the wall, and from certain wider considerations.

5.112 The wall cannot be considered in isolation from the surrounding circumstances. Its construction and the expropriation of land for that purpose must be seen in the context of a consistent pattern of governmental practices since 1967, against an international legal background which (1) prohibits the acquisition of territory by the use of force; (2) prohibits the Occupying Power from changing the status of territory under occupation, whether directly through annexation or indirectly through colonization; (3) requires all States, including the Occupying Power, to recognize the right of the Palestinian people to self-determination; and (4) has set, through the decisions of the United Nations Security Council and General Assembly, the legal and territorial parameters for a permanent solution.

5.113 Israel clearly has exercised and continues to exercise effective control over the Occupied Palestinian Territories. Moreover, there can be no doubt that

the acts of the Israel Defence Forces are the acts of the State, as understood in the sense of Article 4 of the Articles on the Responsibility of States for Internationally Wrongful Acts. Thus, the expropriation of Arab Palestinian land engages the responsibility of the State of Israel through its legislative, executive, and judicial organs, (Article 4.1) the acts of which are not in conformity with what is required of it by the international obligations of the State, regardless of their origin or character (Article 12). See International Law Commission, 'Articles on the Responsibility of States for Internationally Wrongful Acts', annexed to UNGA resolution 56/83, 12 December 2001.

5.114 Although the Government of Israel may argue that expropriation effects no change in legal ownership and that any affected landowner may challenge or appeal against an order, administrative practice established in the evidence shows that such remedies are inadequate and ineffective. Cf. European Commission on Human Rights, The *Greek Case*, Report, Vol. II, part 1, p. 12, paras. 24-31.

5.115 The repeated practices of expropriation, non-existent or ineffective remedies, installation and expansion of settlements, and now the taking of property for the purpose of constructing a wall within Palestinian territory, closing off contiguous areas, and incorporating many Israeli settlements while dividing and segregating Palestinian communities, readily allows the inference that *de facto* annexation is being effected, with the aim of destroying the right of the Palestinian people to self-determination. Cf. *Ireland v. United Kingdom*, European Court of Human Rights, Series A: Judgments and Decisions, Vol. 25, Decision of 29 April 1976, Judgment of 18 January 1978, para. 159.

5.116 Particularly relevant to a true evaluation of the purpose and effect of the Wall is its relationship to the unlawful settlements which have been

constructed in the occupied West Bank including in and around Jerusalem (see section V(c)(ii) below: para 5:120 ff). The wall serves, and is clearly intended to serve, as a means of protecting Israel's settlements in the occupied territories. Those settlements are areas which are under the total control of Israel: to all intents and purposes they are Israeli territory. The wall seeks to protect those settlements and to consolidate, as Israel's, the territory in, around and between them. In this context the Special Rapporteur of the Commission on Human Rights (Mr John Dugard) in his Report of 8 September 2003 had this to say:

> "The Wall must be seen in the context of settlement activity [discussed later in section V(c)(ii)] and the unlawful annexation of East Jerusalem. Settlements in East Jerusalem and the West Bank are the principal beneficiaries of the Wall and it is estimated that approximately half of the 400,000 settler population will be incorporated on the Israeli side of the Wall..." UN Doc. E/CN.4/2004/6, para. 12.

5 .117 The annexationist intent and effect of the wall was noted in the following terms by the Special Rapporteur:

> "In politics euphemism is often preferred to accuracy in language. So it is with the Wall that Israel is presently constructing within the territory of the West Bank. It goes by the name of 'Seam Zone', 'Security Fence' or 'Separation Wall'. The word 'annexation' is avoided as it is too accurate a description and too unconcerned about the need to obfuscate the truth in the interests of anti-terrorism measures. However, the fact must be faced that what we are presently witnessing in the West Bank is a visible and clear act of territorial annexation under the guise of security. There may have been no official act of annexation of the Palestinian territory in effect transferred to Israel by the construction of the Wall, but it is impossible to avoid the conclusion that we are faced with annexation of Palestinian territory..." (Ibid., para. 6)

> "The Wall does not follow the Green Line, that is the 1967 boundary between Israel and Palestine which is generally accepted as the border between the two entities. Instead, it follows a route that incorporates substantial parts of Palestine within Israel..." (Ibid., para. 9)
>
> "Like the settlements it seeks to protect, the Wall is manifestly intended to create facts on the ground. It may lack an act of annexation, as occurred in the case of East Jerusalem and the Golan Heights. But its effect is the same: annexation. Annexation of this kind goes by another name in international law - conquest. Conquest, or the acquisition of territory by the use of force, has been outlawed by the prohibition on the use of force... The prohibition on the acquisition of territory by force applies irrespective of whether the territory is acquired as a result of an act of aggression or in self-defence..." (Ibid., para. 14)

5 .118 As regards the intended permanence of the Wall, and thus of the unlawful *de facto* annexation which it represents, the Special Rapporteur was in no doubt as to its intended permanence. After noting that the principal beneficiaries of the wall are the settlers, he continued: "The Wall will be built at great cost to Israel; it is projected that US$1.4 billion will be spent on its construction. This simply confirms the permanent nature of the Wall." (Ibid., para. 12).

5 .119 A State, by annexing territory which does not belong to it, is altering the boundaries of its existing sovereign territory so as to encompass the additional territory acquired by the annexation. The Special Rapporteur's conclusion in this respect is clear:

> "Israel's claim that the Wall is designed entirely as a security measure with no intention to alter political boundaries is simply not supported by the facts." (UN Doc. E/CN.4/2004/6, para. 16)

(ii) The occupying State does not have the right to alter the population balance in the occupied territory by establishing alien settlements

5.120 The wall being constructed by Israel in the occupied Palestinian territories including in and around East Jerusalem divides the West Bank into six sections not linked except by or through Israeli checkpoints and controls. As indicated above, it has the clear effect, and also the intention, of consolidating and protecting the civilian Jewish settlements constructed on the West Bank and in the East Jerusalem area with the active assistance of the Government of Israel. According to UN Commission of Human Rights Special Rapporteur Giogio Giaconnelli, the settlement policy has already had the effect of dividing the West Bank, 'into some sixty discontiguous zones' and 'segmented the Gaza Strip into four parts'. See UN Commission on Human Rights, 'Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine – Update to the Mission Report on Israel's Violations of Human Rights in the Palestinian Territories occupied since 1967, UN doc. E/CN.4/2001/30, para. 26.

5.121 Those settlements involve an unlawful alteration of the population balance in the West Bank. Consequently, the construction of the wall in such a way as to support that unlawful alteration of the population balance is itself unlawful.

5.122 The population balance of an occupied territory may be affected by the operation of two processes, either separately or taken together. On the one hand, the indigenous inhabitants may be removed from or compelled to leave the territory; on the other, persons from outside the territory, and particularly from the Occupying Power's own country, may be transferred into the occupied territory. In respect of the occupied Palestinian territories including in and around East Jerusalem, both processes have been at work; both are contrary to applicable international rules.

5.123 According to the traditional concept of occupation, as defined in Article 43 of the 1907 Hague Regulations, the occupying authority is to be considered merely as a temporary, *de facto* administrator; this is 'what distinguishes occupation from annexation' See Jean S. Pictet, ed., *Commentary: Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva: ICRC, 1958 ("The ICRC *Commentary*"), p. 275.

5.124 Thus, Article 47 of the Fourth Geneva Convention provides:

> "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."

5.125 The ICRC *Commentary* states that the purpose of this provision is to prevent measures taken by the Occupying Power, for the purpose of restoring or maintaining law and order, from harming protected persons. Occupation resulting from conflict does not imply any right to dispose of the territory: "an Occupying Power continues to be bound to apply the Convention as a whole even when, in disregard of the rules of international law, it claims during a conflict to have annexed all or part of an occupied territory" (The ICRC *Commentary*, pp. 275-6).

5.126 Article 49 of the Fourth Geneva Convention is directly relevant: that Article is one of those which is expressly stated by Article 6, paragraph 3, to continue in operation "for the duration of the occupation". Article 49 reads:

> "Individual or mass forcible transfers, as well as deportations of protected persons from occupied

territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of motive.

"Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

"The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

"The Protecting power shall be informed of any transfers and evacuations as soon as they have taken place.

"The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

"The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

5 .127 The prohibition on transfers thus applies to both internal and external transfers, except temporarily, "if the security of the population or imperative military reasons so demand" (Article 49, paragraph 2).

5 .128 The ICRC *Commentary* points out that this provision, "is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied

territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race" (The ICRC *Commentary* p. 283).

5 .129 Moreover, "unlawful deportation or transfer or unlawful confinement of a protected person" constitutes a grave breach of the Convention under Article 147 of the Fourth Convention. In addition, Article 8(2)(a)(vii) of the 1998 Rome Statute of the International Criminal Court makes "unlawful... transfer" a war crime under the general heading of "grave breaches of the Geneva Conventions of 12 August 1949", and Article 8(2)(b)(viii) similarly makes the following act a war crime included under the general heading of "other serious violations of the laws and customs applicable in international armed conflict":

> "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".

5 .130 While this Statute is not directly applicable in the present context (although Jordan is a party to the Statute), the inclusion of those offences in Article 8 as war crimes demonstrates the international community's acceptance of the prohibitions reflected in the provisions quoted as constituting, at least, prohibitions embodied in customary international law.

5 .131 The wall is an integral supporting part of Israel's unlawful settlement policies, and as such involves a clear breach of international law on the part of Israel.

5 .132 To take first the prohibition against the Occupying Power transferring its own civilian population into the occupied territory, there is no doubt that

Israel, the Occupying Power, has engaged in practices which involve the "transfer [of] parts of its own civilian population into the territory it occupies". The movement of settlers into the occupied territories has been a publicly proclaimed policy of the Government of Israel since the occupation began, and has taken place with the active support and encouragement of that Government.

5 .133 Between 1968 and 1979 Israeli military officials issued dozens of military orders for the temporary requisitioning of private land in the West Bank on grounds of urgent military necessity, to be used primarily for Israeli settlements. The Israeli High Court upheld these orders on the grounds that settlements performed key defence and military functions. Although the High Court in 1979 ordered the dismantling of a settlement and the return of the property to its owners because the settlers themselves by affidavit that the settlement was permanent, not temporary, in nature, military orders since then have continued to be used to requisition property, including for the construction of by-pass roads. In this way, it has been estimated that Israel has designated about 40 percent of the West Bank as state land. See 'The Impact of Israel's Separation Barrier on Affected West Bank Communities,' Report of the Mission to the Humanitarian and Emergency Policy Group (HEPG) of the Local Aid Coordination Committee (LACC), Update Number 3, 30 November 2003, paras. 52, 53. See also Economic and Social Council, 'Report prepared by the Economic and Social Commission for Western Asia on the economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the occupied Palestinian territory, including Jerusalem, and of the Arab population in the occupied Syrian Golan', UN doc. A/58/75-E/2003/21, 12 June 2003, para. 31 (41.9%).

5 .134 Israel had continued to expropriate Palestinian land notwithstanding its formal undertaking in Chapter 5, Article XXXI, paragraph 7 of the 1995

Interim Agreement on the West Bank and the Gaza Strip to refrain from initiating or taking, "any step that will change the status of the West Bank and Gaza Strip pending the outcome of the permanent status negotiations", and that "the integrity and status" of the West Bank and Gaza Strip "will be preserved during the interim period (Chapter 2, Article XI, paragraph 1 and Chapter 5, Article XXXI, paragraph 8). The Economic Commission for Western Asia concluded that "The confiscation of land and properties is a dominant feature of Israeli occupation and population transfer policy." Economic and Social Council, 'Report prepared by the Economic and Social Commission for Western Asia on the economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the occupied Palestinian territory, including Jerusalem, and of the Arab population in the occupied Syrian Golan', UN doc. A/58/75-E/2003/21, 12 June 2003, para. 37.

5.135 Such movements into the Occupied Palestinian Territory have been intended to effect basic demographic change. The numbers of settlers have steadily increased. In 1972, there were some 8,400 Jewish settlers in the OPT, but had increased to some 250,000 by 1992. In 2003, it was reported that the settler population in the West Bank (excluding East Jerusalem) and Gaza Strip had grown by 5.7 percent during 2002, to 220,100, while Israel's overall growth was only 1.9 percent. When added to the 180,000 Israelis residing in East Jerusalem, the 400,000 settler population comprises almost 8 per cent of Israel's Jewish population of 5.1 million. Settlers in the West Bank, Gaza Strip, and the Golan Heights received government mortgages during 2000 at a rate more than twice the national average. See Foundation for Middle East Peace, *Israeli Settlements in the Occupied Territories: A Guide*, A Special Report of the Foundation for Middle East Peace, March 2002; Economic and Social Council, 'Report prepared by the Economic and Social Commission for Western Asia on the economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in

the occupied Palestinian territory, including Jerusalem, and of the Arab population in the occupied Syrian Golan', UN doc. A/58/75-E/2003/21, 12 June 2003, paras. 30, 32; Foundation for Middle East Peace, *Report on Israeli Settlement in the Occupied Territories*, Vol. 13, No. 6, November-December 2003; ICRC, *Annual Report for 2002*, 302; Dugard Report, paras. 36-40.

5.136 The other element in changes to an occupied territory's population balance - the removal of the indigenous local inhabitants - has been equally apparent in Israel's practices in the occupied Palestinian territories including in and around East Jerusalem. These general practices and policies are well-established and a matter of public record, but they serve only as background to the further application of those practices and policies resulting from the construction of the wall, which is the immediate concern of the present advisory proceedings.

5.137 In order for there to be "individual or mass forcible transfers... of protected persons from occupied territory" in breach of Article 49 it is not necessary that the Occupying Power should, in a formal way, promulgate orders for the transfer of local populations (although clearly such orders would fall within the prohibition contained in Article 49 of the Fourth Geneva Convention): it is sufficient that the Occupying Power should adopt practices which are intended to drive the local inhabitants from their territory, or which may be reasonably foreseen to have that result. Given the nature of recent dispossession and displacement practices, as well as the concerted policy of forcible acquisition, recent observers have expressed concern about possible future refugee flows, as is described below.

5.138 Prohibited transfers may involve individuals as much as large numbers ("mass transfers"), and a transfer will be "forcible" if the measures adopted by the Occupying Power are such as in practice to leave the affected local

population no realistic alternative but to leave the territory. Even if such a movement of the local inhabitants is not the purpose behind the construction of the wall it is nevertheless a clear consequence, and Article 49 makes it clear that transfers of the local population are prohibited "regardless of their motive". The implications of the wall and Israel's related policies and practices for forced displacement and refugee movement are considered further below in section v (c) (iv).

5 .139 It should be recalled that the international community has consistently opposed Israel's settlement and transfer policies. In Resolution 446 (1979), the Security Council called,

> "once more upon Israel, as the occupying Power, to abide scrupulously by the Geneva Convention..., to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem, and, in particular, not to transfer parts of its civilian own population into the occupied Arab territories."

5 .140 In Resolution 465, adopted unanimously in 1980, the Security Council *'Determine[d]* 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, [had] no legal validity and that Israel's policy and practices of settling parts of its population and new immigrants in these territories constitute a flagrant violation of the Fourth Geneva Convention...' It called for existing settlements to be dismantled, for construction of new settlements to cease, and for all States not to provide Israel with any assistance to be used in connection with settlements. The basic legal position has been maintained through recent resolutions. See SC res. 465 (1980), paras. 5, 6, 7, adopted on 1 March 1980; SC res. 904 (1994),

18 March 1994; SC res. 1322 (2000), 7 October 2000; SC res. 1397 (2002); see also, among many others, the following General Assembly resolutions: UNGA res. 3240 (XXIX), 29 November 1974; UNGA res. 36/15, 28 October 1981; UNGA res. 55/132, 8 December 2000; UNGA res. 56/61, 10 December 2001; UNGA res. 57/126, 11 December 2002; UNGA res. 58/98, 9 December 2003.

5.141 In Resolution 2003/7, the UN Commission on Human Rights also expressed its grave concern,

> "At the continuing Israeli settlement activities, including the illegal installation of settlers in the occupied territories and related activities, such as the expansion of settlements, the expropriation of land, the demolition of houses, the confiscation and destruction of property, the expulsion of Palestinians and the construction of bypass roads, which change the physical character and demographic composition of the occupied territories, including East Jerusalem, and constitute a violation of the [Fourth] Geneva Convention..." E/CN.4/RES/2003/7, 15 April 2003, adopted by a recorded vote of 50-1-2.

5.142 These resolutions by United Nations bodies, particularly the Security Council, cannot be ignored. This is clear from certain statements by the Court in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, (IC] *Reports* 1971). Faced with declarations by the Security Council that the situation before the Court was illegal, the Court said that

> "It would be an untenable interpretation to maintain that, once such a declaration has been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it... [W]hen the Security Council adopts a decision under Article

> 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.
>
> "117. ... A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. Once the Court is faced with such a situation, it would be failing in the discharge of its judicial function if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end...
>
> "118. South Africa, being responsible for having created and maintained a situation which the Court has found to have been validly declared illegal, has the obligation to put an end to it..." (at paras. 112, 117-118).

5.143 In the face of repeated declarations by competent organs of the United Nations that Israel's settlement policies and practices are illegal, the construction of the wall by Israel in the occupied Palestinian territory including in and around East Jerusalem with the clear intent and effect of consolidating and protecting those settlements is the very opposite of what Israel's obligations require.

(iii) The occupying State is not entitled in occupied territory to construct a wall which serves to establish, underpin or increase its unlawful control over and de facto *annexation of that territory or any part thereof*

5.144 Article 43 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land of 1907 provides that the occupant, 'shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, *while respecting, unless absolutely prevented, the laws in force*

in the country.' (Emphasis supplied) The inhabitants of occupied territory may not be compelled to swear allegiance to the occupying Power (Article 44), and 'the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated' (Article 45).

5.145 The necessarily temporary character of occupation is underlined by Article 55 of the Hague Regulations; it provides that,

> "The occupying State shall be regarded only as *administrator and usufructuary* of public buildings, real estate, forests, and agricultural estates... situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct." (Emphasis added)

5.146 Article 56 states further that,

> "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. *All seizure of, destruction or wilful damage done to institutions of this character,* historic monuments, works of art and science, *is forbidden,* and should be made the subject of legal proceedings." (Emphasis added)

5.147 Article 47 of the Fourth Geneva Convention also emphasizes the temporary, *de facto* nature of occupation; it provides that Protected persons who are in occupied territory shall not be deprived, in any manner whatsoever, of the benefits of the Convention,

> "*by any change* introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor *by any agreement* concluded between the authorities of the occupied territories and the Occupying Power, nor *by any*

annexation by the latter of the whole or part of the occupied territory." (Emphasis added)

5.148 The ICRC *Commentary* recalls that, 'The legislative power of the occupant as the Power responsible for applying the Convention and the *temporary* holder of authority is limited to the matters set out...' (The ICRC *Commentary*, p. 336, emphasis added); and, in relation to Article 70 of the Fourth Convention, that, 'The rule limiting the jurisdiction of the Occupying Power to the period during which it is in actual occupation of the territory is based on the fact that occupation is in principle of a temporary nature' (Ibid., p. 349).

5.149 Immediately following the end of the 1967 hostilities, the Israeli government extended its laws to occupied East Jerusalem, expanding the city's 6.5 square kilometre land area to include 71 square kilometres of expropriated Palestinian land. During the succeeding years, it has expropriated without compensation more than 60,000 dunums of Palestinian land in occupied East Jerusalem and assigned it exclusively to Jewish use. See UN Division for Palestinian Rights, 'The Status of Jerusalem', 97-24262 (1997), 22-3.

5.150 The Occupying Power has also imposed its domestic legal regime in occupied Jerusalem by an act of the Knesset in 1981, contrary to Article 64 of the Fourth Geneva Convention. In the other occupied zones, Israel selectively has replaced existing laws with its own domestic laws and military orders, including through the application of its municipal law to Israeli citizens and Israeli institutions settling in the occupied territories. Practices of discrimination are addressed further below in section (iv).

5.151 In considering the lawfulness of the wall in terms of the applicable international legal regime, it is necessary to have regard not only to its immediate physical characteristics and consequences, but also to the whole

administrative apparatus of control which accompanies the system's practical operation. The wall is not just a physical construct. Its principal features have been described above, including a barrier with an average depth of 50-70 metres, a "closed area" in the north west part of the West Bank, and a new, discriminatory system of residency status. Moreover, as its route and effects demonstrate, the wall is intended to complement the fragmentation of the Palestinian community, already continuously divided by illegal settlements and settler access roads. The wall, far from being a simple self-standing security measure, is thus to be understood as a regime serving Israeli policy towards the annexation of the West Bank or substantial parts thereof.

5.152 At least three distinct aspects of the construction and operation of the barrier system call for consideration: (a) The construction of the barrier system requires the acquisition of a substantial area of land by the Israeli military authorities; (b) the wall has certain immediate consequences for the inhabitants living and working in its vicinity; and (c) the wall has certain broader consequences affecting the whole of the West Bank. The legal implications of the barrier system in respect of each of these three aspects are examined in the next following sections.

(iv) The occupying State is not entitled in occupied territory to construct a wall which seriously and disproportionally impairs the enjoyment by the inhabitants of that territory of their human rights

(a) The protection due under international humanitarian law

5 .153 Article 42 of the Hague Regulations states that, "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Article 46 provides that, "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected".

5 .154 Under the Fourth Geneva Convention, the Occupying Power has specific responsibilities towards the population under its control. Article 27 provides:

> "Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.
>
> Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.
>
> Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.
>
> However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war."

5 .155 In the view of the International Committee of the Red Cross, Article 27 "is the basis of the Convention, proclaiming as it does the principles on which the whole of 'Geneva law' is based" (The ICRC *Commentary*, pp. 199-200).

5 .156 The right of respect for the person includes, in particular, the right to physical, moral and intellectual integrity. While the right to liberty and to move about freely can be subject to limitation in wartime, "that in no wise means that it is suspended in a general manner... the regulations concerning occupation... are based on the idea of the person freedom of civilians remaining in general unimpaired" (The ICRC *Commentary*, p. 202).

5 .157 As Article 27 paragraph 3 states, all protected persons are to receive the same standard of treatment and shall not be the subject of adverse discrimination. Though the Occupying Power may have a measure of discretion in taking security measures, "What is essential is that the measures of constraint they adopt should not affect the fundamental rights of the persons concerned... [T]hese rights must be respected even when measures of constraint are justified" (The ICRC *Commentary*, pp. 206-7).

5 .158 Article 29 of the Fourth Geneva Convention underlines the responsibility of the State:

> "The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred."

5 .159 As the ICRC *Commentary* concludes, compensation for damage resulting from the unlawful act is undoubtedly implied. Moreover, the term "agent" is sufficiently broad to include everyone in the service of a Contracting Party, such as "civil servants, members of the armed forces, members of para-military police organizations, etc." (The ICRC *Commentary*, pp. 210-11).

5.160 Article 31 prohibits the use of "physical or moral coercion" against protected persons, for any purpose or motive whatever (The ICRC *Commentary*, p. 220).

5.161 Under Article 32, the Parties,

> "specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments... but also to any other measures of brutality whether applied by civilian or military agents."

5.162 The ICRC *Commentary* recalls that the Diplomatic Conference deliberately chose to use the term, "of such a character as to cause", instead of "likely to cause". In thus substituting "a causal criterion for one of intention, the Conference aimed at extending the scope of the Article" (The ICRC *Commentary*, pp. 222-4).

5.163 The ICRC *Commentary* also states that the prohibition of "other measures of brutality" is similar to that relating to "acts of violence" in Article 27(8), and

> "is intended to cover cases which, while they are not among the specifically prohibited acts, nevertheless cause suffering to protected persons. There is no need to make any distinction between such practices carried out by civilians or by military personnel; in both cases and in respect of all the acts covered by this Article, the agent and the Power for whom he acts must both bear responsibility in accordance with the provisions of Article 29..." (The ICRC *Commentary*, p. 224)

5.164 Under Article 33 of the Fourth Geneva Convention, "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited." The ICRC *Commentary* points out that the prohibition does not refer to punishments under penal law and according to due process, but to "penalties of any kind inflicted on persons or entire groups of persons, in defiance of the most elementary principles of humanity, for acts that these persons have not committed" (The ICRC *Commentary*, p. 225).

5.165 With respect to the prohibition of "measures of intimidation or of terrorism", the ICRC *Commentary* recalls that in past conflicts,

> "the infliction of collective penalties has been intended to forestall breaches of the law rather than to repress them; in resorting to intimidatory measures to terrorise the population, the belligerents hoped to prevent hostile acts. Far from achieving the desired effect, however, such practices, by reason of their excessive severity and cruelty, kept alive and strengthened the spirit of resistance. They strike at guilty and innocent alike. They are opposed to all principles based on humanity and justice and it is for that reason that the prohibition of collective penalties is followed formally by the prohibition of all measures of intimidation or terrorism with regard to protected persons, wherever they may be..." (The ICRC *Commentary*, pp. 225-6)

5.166 In so far as it may be contended that the construction of the wall is a response to unlawful activities which prejudice the interests of Israel and that the unfortunate consequences of that response must rest with the inhabitants affected, Article 50 of the Hague Regulations nonetheless provides that,

> "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly or severally responsible".

5.167 Article 147 of the Fourth Geneva Convention prohibits wilfully causing great suffering or serious injury to body or health of protected persons, which it classifies as "grave breach". Article 8(2)(a)(iii) of the Statute of the International Criminal Court similarly characterises the act of "wilfully causing great suffering or serious injury to body or health" of protected persons in occupied territory as a war crime.

5.168 Article 75 of Additional Protocol I, which is entitled "Fundamental Guarantees" and is generally considered to represent customary international law, reads as follows, so far as relevant to the present request for an Advisory Opinion:

> "1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.
>
> 2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
>
> (a) violence to the life, health, or physical or mental well-being of persons, in particular:
>
> (i) murder;

(ii) torture of all kinds, whether physical or mental;

(iii) corporal punishment; and

(iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form or indecent assault;

(c) the taking of hostages;

(d) collective punishments; and

(e) threats to commit any of the foregoing acts."

5.169 The ICRC *Commentary* notes that the prohibition on collective punishments was added by the Conference, as it was afraid that collective punishments might be inflicted by processes other than proper judicial procedures and that in that case they would not be covered by other paragraphs of Article 75. It notes further that the concept of collective punishment must be understood in the broadest sense: "it covers not only legal sentences but sanctions and harassment of any sort, administrative, by police action or otherwise" (The ICRC *Commentary*, paras. 3054, 3055).

(b) The protection due under international human rights law

5.170 The applicability of the Fourth Geneva Convention, and the corresponding obligations of the Occupying Power, arise by reason of the fact of occupation (Article 2) and the fact of being in occupied territory under the control and thus in the power or 'hands' of the Occupying Power (Article 4; The ICRC *Commentary*, p. 47).

5.171 The fact of effective control is relevant also to the responsibility of Israel for violations of the human rights obligations by which it is bound, by reason of both customary international law and conventions.

5.172 The principal general legal instruments in this context are the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, and the 1966 International Covenant on Economic, Social and Cultural Rights. In addition, certain instruments deal with specific aspects of human rights, such as the 1966 Convention on the Elimination of All Forms of Racial Discrimination, the 1979 Convention on the Elimination of All Forms of Discrimination against Women, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the 1989 Convention on the Rights of the Child. All of these instruments, except the Universal Declaration, are 'treaties', to which Israel is in fact party and in respect of which it has entered no reservations relevant to the present issues.

5.173 Jordan is also party to the same body of treaties and has a manifest legal interest in their effective implementation by Israel.

5.174 The continuing applicability of the 1966 International Covenant on Civil and Political Rights (ICCPR66) in circumstances of military occupation and military rule has been recognized by the Court:

> "The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency." *Legality of the Threat of Use of Nuclear Weapons,* Advisory Opinion, ICJ *Reports,* 1996, 226, 240, para. 25.

5.175 The Human Rights Committee, in its Concluding Observations on the periodic report submitted by Israel under the Covenant in 1998, observed similarly:

> "10. ... the Committee emphasizes that the applicability of rules of humanitarian law does not by itself impede the application of the Covenant or the accountability of the State under article 2, paragraph 1, for the actions of its authorities. The Committee is therefore of the view that, under the circumstances, the Covenant must be held applicable to the occupied territories and those areas of southern Lebanon and West Bekaa where Israel exercises *effective control...*" UN doc. CCPR/C/79/Add.93, 18 August 1998, emphasis added.

5 .176 In his 2002 report, the Special Rapporteur on the question of the violation of human rights in the occupied Arab territories, Mr. John Dugard, addressed the connection between international humanitarian and human rights law. He referred to Article 27 of the Fourth Geneva Convention, which obliges the Occupying Power to respect the fundamental rights of protected persons, and noted:

> "The 'rights of the individual' have been proclaimed, described and interpreted in international human rights instruments, particularly the international covenants on civil and political rights, and economic, social and cultural rights of 1966, and in the jurisprudence of their monitoring bodies. These human rights instruments therefore complement the Fourth Geneva Convention by defining and giving content to the rights protected in article 27. This is borne out by repeated resolutions of the General Assembly...": 'Report of the Special Rapporteur of the Commission on Human Rights, Mr. John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967': UN doc. E/CN.4/2002/32, 6 March 2002, para. 9; see also UN doc. E/CN.4/2004/6, 8 September 2003, para. 2.

(c) *The impact of the wall on human rights: relevant provisions of international conventions*

5 .177 As indicated above, Israel is party to international conventions protecting human rights. The following list of relevant provisions is necessarily illustrative, rather than exhaustive, by reason of the obvious difficulties in obtaining information on the scope and impact of the wall. The selection below is nonetheless drawn up in the light of published reports and projections.

5 .178 In its November 2003 analysis of the actual and likely impact of the wall, based on information published by the Israeli Government, the UN Office for the Coordination of Humanitarian Affairs noted that only 11 per cent of the wall's length runs along the Green Line, and that its planned path includes deep cuts (up to 22 kms) into the West Bank. Approximately 210,000 acres, or 14.5 per cent, of West Bank land excluding East Jerusalem will lie between the wall and the Green Line. This land, some of the most fertile in the West Bank, is currently the home for more than 274,000 Palestinians living in 122 villages and towns. They will either live in closed areas between the wall and the Green Line, or in enclaves totally surrounded by the wall. Also between the wall and the Green Line will lie 54 Israeli settlements containing approximately 142,000 Israeli settlers (36% of the West Bank settler population). See OCHA, 'New Wall Projections', OPT, 9 November 2003; also UNRWA, Reports on the West Bank Barrier, 'Town Profile: Impact of the Jerusalem Barrier', January 2004

5 .179 More than 400,000 other Palestinians living to the East of the wall will have to cross it to get to farms, jobs and services; those in enclaves or closed areas will have to cross the wall to access markets, schools and hospitals, or to maintain family links. The Secretary-General's Report of 24 November 2003 noted that so far the wall, "has separated 30 localities from health services, 22 from schools, 8 from primary water sources and 3 from electricity networks" (para. 23). The town of Qalqiliya is totally surrounded, with the only exit and entry point controlled by an Israeli

military checkpoint, thus isolating it from almost all its agricultural land and separating surrounding villages from its markets and services ([para. 24). In OCHA's estimation, therefore, some 680,000 Palestinians, or 30% of the population in the West Bank, will be directly harmed by the wall.

Non-discrimination

5 .180 The 1966 International Convention for the Elimination of All Forms of Racial Discrimination was ratified by Israel on 2 February 1979, without reservation relevant to this request for an Advisory Opinion. It provides as follows:

> *"Article 1*
>
> 1. In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
>
> 2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
>
> *"Article 3*
>
> States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction...
>
> *"Article 5*
>
> In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race,

> colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights..."

5.181 The 1966 International Covenant on Civil and Political Rights was ratified by Israel on 3 January 1992, without reservation relevant to these proceedings. It provides as follows:

> *"Article 2*
>
> 1. 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 recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> *"Article 16*
>
> Everyone shall have the right to recognition everywhere as a person before the law.
>
> *"Article 26*
>
> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

5.182 The 1966 International Covenant on Economic, Social and Cultural Rights was ratified by Israel on 3 January 1992, without reservation relevant to these proceedings. It provides as follows:

"Article 2

...

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status..."

5.183 The 1989 Convention on the Rights of the Child was ratified by Israel on 2 November 1991, without reservation relevant to these proceedings. It provides as follows:

"Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

5.184 The discrimination against Palestinian residents of walled off areas is described below. In addition, the Economic and Social Commission for Western Asia considers that patterns of Israeli military and settler land use coincide with "severe discrimination" against Palestinians in access to water throughout the Occupied Palestinian Territory. See Economic and Social Council, 'Report prepared by the Economic and Social Commission for Western Asia on the economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the

occupied Palestinian territory, including Jerusalem, and of the Arab population in the occupied Syrian Golan', UN doc. A/58/75-E/2003/21, 12 June 2003, para. 39.

Proportionality

5 .185 Article 4 of the International Covenant on Civil and Political Rights reads as follows:

> *"Article 4*
>
> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
>
> 2. No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
>
> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."

5 .186 Article 4 of the International Covenant on Economic, Social and Cultural Rights reads as follows:

> *"Article 4*
>
> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

5.187 The rule of proportionality is also inherent in the provisions of international humanitarian law, including the principle of distinction between combatants and non-combatants, and the notion that the choice of means is not unlimited. Article 57(3) of Additional Protocol I provides an illustration of the rule in context:

> "When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects."

5.188 In addition, Article 57(2)(a) requires that those who plan or decide upon an attack shall "take all feasible precautions" in the choice of means and methods of attack with a view to avoiding and in any event minimizing civilian casualties.

5.189 In international human rights law, as shown by the extracts from applicable conventions above, the equivalent principle requires that restrictions on the exercise of human rights be in accordance with the law and necessary in a democratic society. In time of emergency, measures of derogation must be "strictly required" by the situation, not incompatible with a State's other obligations under international law, and non-discriminatory.

5.190 Alternatives to the wall which would result in effective protection against terrorist attack while minimizing the violation of human rights and international humanitarian law, do not appear to have been considered. Similar lack of consideration appears to have governed the choice of route. See B'tselem, 'Behind the Barrier: Human Rights Violations as a Result of Israel's Separation Barrier', Jerusalem, March 2003 pp. 26-7, 29-30.

Freedom of movement and the right not to be displaced

5.191 Article 12 of the International Covenant on Civil and Political Rights provides:

> *"Article 12*
>
> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
>
> 4. No one shall be arbitrarily deprived of the right to enter his own country."

5.192 So far as this right is expressed in terms of the 'State' and the Palestinian territories remain under the occupation of Israel, it is nonetheless submitted the fundamental principle of freedom of movement is applicable, particularly given the necessary nexus between exercise of this right and the realisation of other protected rights.

5 .193 The Israeli Government has so far given little or no information about future 'access gates' (Secretary-General's Report, para. 27; Humanitarian Mission Report, Update No. 1, para. 6). With respect to existing gates, "erratic operating hours and arbitrary procedures" have been reported: Humanitarian Mission Report, Update No. 3, paras. 12, 18-29.

5 .194 On the other hand, the Israeli Defence Forces issued military orders on 2 October 2003 requiring residents in the currently existing 'closed zone' in Jenin, Qalqiliya and Tulkarm districts to apply for permits to carry on living there. At the same time, the IDF opened the area to alien settlement, by excusing from the permit regime Israeli citizens, Israeli residents, and persons entitled to emigrate to Israel under the Law of Return. See Israeli Defence Forces, Order concerning Security Directives (Judea and Samaria) (Number 378), 1970 Declaration concerning the Closure of Area Number s/2/03 (Seam Area). On 'closed military areas', see Humanitarian Mission Report, para. 16; Humanitarian Mission Report, Update No. 3, paras. 45-9.

5 .195 Restrictions on freedom of movement are not only imposed for security reasons, but as collective punishment; where permits are required, the process "entails repeated harassment of the residents and is based on arbitrary criteria". See B'tselem, 'Behind the Barrier: Human Rights violations as a Result of Israel's Separation Barrier', Jerusalem, March 2003, pp. 13, 14.

5 .196 Concern has been expressed that families cut off from livelihood and services may have to migrate east to the West Bank (and possibly beyond, to other States). See Humanitarian Mission Report, paras. 8, 28; Annex II, paras. II-21-II.22; Humanitarian Mission Report, Update No. 1, paras. 26-44, 'Impact of the Barrier on Population Migration'. See also the Dugard Report: "The wall will therefore create a new generation of refugees or internally displaced persons" (para. 10).

5.197 As the Office for the Coordination of Humanitarian Affairs has put it, "If the military orders that restrict entry into the closed areas between the Green Line and the wall are applied to the new parts of the wall, then many thousands of Palestinians are likely to be forced from their homes and land": United Nations, Office for the Coordination of Humanitarian Assistance, OPT, 'New Wall Projections', 9 November 2003, p. 3.

5.198 The right to freedom of movement, however, entails also the right *not* to be displaced, not to become a refugee. See Article 13, 1948 Universal Declaration of Human Rights:

> "1. Everyone has the right to freedom of movement and residence within the borders of each State.
>
> 2. Everyone has the right to leave any country, including his own, and to return to his country."

5.199 Although "Everyone has the right to seek and to enjoy in other countries asylum from persecution" (Article 14(1), 1948 Universal Declaration of Human Rights), none should be compelled to do so.

5.200 In 1997, a set of Guiding Principles on Internal Displacement were included in the 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted to the United Nations Commission on Human Rights, pursuant to Commission resolution 1997/39, Addendum': UN doc. E/CN.4/1998/53/Add.2. They have since been noted by the Commission, referred to on several occasions by the General Assembly, and have been widely distributed by United Nations agencies, including the Office of the Coordinator for Humanitarian Affairs. Although not formally binding, they draw on the existing body of international humanitarian law and international human rights law. Principles 5 and 6 deal with protection against displacement:

"Principle 5

All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.

"Principle 6

1. Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.

2. The prohibition of arbitrary displacement includes displacement:

(a) When it is based on policies of apartheid, "ethnic cleansing" or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population;

(b) In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;

(c) In cases of large-scale development projects, which are not justified by compelling and overriding public interests;

(d) In cases of disasters, unless the safety and health of those affected requires their evacuation; and

(e) When it is used as a collective punishment.

3. Displacement shall last no longer than required by the circumstances."

5 .201 That the right to seek asylum is "protected" does not imply any freedom or discretion on the part of the State in effective control of territory, either to expel or displace the local inhabitants, or to create conditions on the ground which are foreseeably likely to result in internal or external forced migration. The "right to remain" is thus consequential upon the sufficient and effective protection of the human rights of those within the territory

and/or subject to the jurisdiction of the *de jure* sovereign or *de facto* power. See Article 2(1), 1966 International Covenant on Civil and Political Rights:

> "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 recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

5.202 The policy and practice of displacement resulting from the construction of the wall, considered in historical context and in the light of consistent patterns of expropriation, destruction of agricultural land, orchards and olive groves, designate of Palestinian land as "state land", refusal of return of refugees, promotion of and assistance to non-indigenous settlers, allow an inference of permanent forcible transfers attributable to Israel. Such transfers are contrary to any exception permitted under the Fourth Geneva Convention.

5.203 Moreover, deportation and transfer incur individual criminal responsibility in international law. Under its Statute adopted by the Security Council in SC resolution 827 (1993) of 25 May 1993 (amended by UNSC resolution 1166 (1998) of 13 May 1998), the International Tribunal for Former Yugoslavia has "the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991". Article 5 provides for the prosecution of crimes against humanity, as follows:

> "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
>
> (a) murder;

(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts."

5 .204 In its Judgment of 17 September 2003, the Appeals Chamber in *Prosecutor v. Milorad Krnojelac* said:

> "218. The Appeals Chamber holds that acts of forcible displacement underlying the crime of persecution punishable under Article 5(h) of the Statute are not limited to displacements across a national border. The prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference. The forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent..."

5 .205 The Appeals Chamber took account of Article 49 of the Fourth Geneva Convention, Article 85 of Additional Protocol I and Article 17 of Additional Protocol II, and found that "the Geneva Conventions and their Additional Protocols prohibit forced movement within the context of both internal and international armed conflicts" (para. 220).

> "221. ... The Security Council was... particularly concerned about acts of ethnic cleansing and wished to confer jurisdiction on the Tribunal to judge such crimes, regardless of whether they had been committed in an internal or an international armed conflict. Forcible displacements, taken separately or cumulatively, can constitute a crime of persecution of

> equal gravity to other crimes listed in Article 5 of the Statute. This analysis is also supported by recent state practice, as reflected in the Rome Statute, which provides that displacements both within a state and across national borders can constitute a crime against humanity and a war crime."

5 .206 The Appeals Chamber thereupon concluded that,

> "222. ... displacements within a state or across a national border, for reasons not permitted under international law, are crimes punishable under customary international law, and these acts, if committed with the requisite discriminatory intent, constitute the crime of persecution under Article 5(h) of the Statute...
>
> "223. ... at the time of the conflict in the former Yugoslavia, [that is, during the early 1990s] displacements both within a state and across a national border were crimes under customary international law."

5 .207 The constituent elements of the crime of forced displacement were considered further by Trial Chamber I in *Simic et al.* IT-95-9 "Bosanski Samac", Judgment of 17 October 2003. The Court found that "displacement of persons is only illegal where it is forced, i.e. not voluntary" (para. 125). However, it continued

> "125. ... The term 'forced' is not limited to physical force; it may also include the 'threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment'. The essential element is that the displacement be involuntary in nature, that 'the relevant persons had no real choice'. In other words, a civilian is involuntarily displaced if he is 'not faced with a genuine choice as to whether to leave or to remain in the area'...

> "126. The Trial Chamber is of the view that in assessing whether the displacement of a person was voluntary or not, it should look beyond formalities to all the circumstances surrounding the person's displacement, to ascertain that person's genuine intention... A lack of genuine choice may be inferred from, *inter alia*, threatening and intimidating acts that are calculated to deprive the civilian population of exercising its free will, such as the shelling of civilian objects, the burning of civilian property, and the commission of – or the threat to commit – other crimes 'calculated to terrify the population and make them flee the area with no hope of return'...
>
> "130. ... [T]he Trial Chamber notes that among the legal values protected by deportation and forcible transfer are the right of the victim to stay in his or her home and community and the right not to be deprived of his or her property by being forcibly displaced to another location. Therefore, the Trial Chamber finds that the location to which the victim is forcibly displaced is sufficiently distant if the victim is prevented from effectively exercising these rights." (Citations omitted)

5.208 In *Stakic,* the Trial Chamber also rejected the argument that illegal deportation or transfer required removal to a particular destination:

> "677. The protected interests behind the prohibition of deportation are the right and expectation of individuals to be able to remain in their homes and communities without interference by an aggressor, whether from the same or another State. The Trial Chamber is therefore of the view that it is the *actus reus* of forcibly removing, essentially uprooting, individuals from the territory and the environment in which they have been lawfully present, in many cases for decades and generations, which is the rationale for imposing criminal responsibility and not the destination resulting from such a removal...
>
> "681. ... Any forced displacement of population involves "abandoning one's home, losing property and being displaced under duress to another

> location." In essence, the prohibition against deportation serves to provide civilians with a legal safeguard against forcible removals in time of armed conflict and the uprooting and destruction of communities by an aggressor or occupant of the territory in which they reside..." *Prosecutor v. Milomir Stakic*, Case No. IT-97-24-T, Trial Chamber II, 31 July 2003.

5 .209 In the words of the Trial Chamber in *Simic*, both deportation and forcible transfer are closely linked to the concept of 'ethnic cleansing' (para. 133), a crime under customary international law, the effects of which the Security Council has also condemned. See, for example, SC/Res/819 (1993), 16 April 1993, para. 5, in which the Security Council, " *Reaffirms* that any taking or acquisition of territory by threat or use of force, including through the practice of 'ethnic cleansing', is unlawful and unacceptable; and para. 7, in which it "*Reaffirms* its condemnation of all violations of international humanitarian law, in particular the practice of 'ethnic cleansing' and reaffirms that those who commit or order the commission of such acts shall be held individually responsible in respect of such acts..."

The right to food

5 .210 Article 11 of the International Covenant on Economic, Social and Cultural Rights provides:

> *"Article 11*
>
> 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent..."

5 .211 Article 27 of the Convention on the Rights of the Child provides:

> *"Article 27*
>
> 1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development..."

5 .212 Article 55 of the Fourth Geneva Convention states that,

> "To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate."

If it cannot do so, then it must allow access for humanitarian organizations (Articles 23 and 59 of the Fourth Geneva Convention).

5 .213 The Special Rapporteur on the right to food, Jean Ziegler, found that, "although the Government of Israel, as the Occupying Power in the Territories, has the legal obligation under international law to ensure the right to food of the civilian population, it is failing to meet this responsibility." Moreover, the "continued confiscation and destruction of Palestinian land and water resources... amounts to the gradual dispossession of the Palestinian people. While recognizing the security needs of Israel, he considered that current security measures are "totally disproportionate and counterproductive because they are provoking hunger and malnutrition among Palestinian civilians... in a way that amounts to collective punishment..." Commission on Human Rights, 'The Right to Food', Report by the Special Rapporteur, Jean Ziegler, Addendum, 'Mission to the Occupied Palestinian Territories', UN doc. E/CN.4/2004/10/Add.2, 31 October 2003, paras. 38-9.

5 .214 The right to food is violated (1) by the level of restrictions on freedom of movement; in addition, the inability to feed their families is leading to a loss of human dignity for Palestinians, often heightened by bullying and humiliation at checkpoints: 'The Right to Food', paras. 11, 42-43; see also the Dugard Report: "Accounts of rudeness, humiliation and brutality at checkpoints are legion" (para. 17); internal checkpoints "do not protect settlements which are already well protected by the IDF. Instead, internal checkpoints restrict internal trade within the OPT and restrict the entire population from travelling from village to village or town to town. They must therefore be seen as a form of collective punishment" (para. 19). (2) By the expropriation and confiscation of "vast swathes" agricultural land and water sources: 'The Right to Food', paras. 16, 44-48); and (3) by restrictions on the provision of humanitarian aid ('The Right to Food', para. 20).

5 .215 Although the Occupying Power may take measures necessary for its own security, they must be absolutely necessary, proportional, and not prevent the Occupying Power from fulfilling its obligations. The construction of the wall in no way relieves the Occupying Power of its responsibilities.

Livelihood

5 .216 Article 6 of the International Covenant on Economic, Social and Cultural Rights provides:

> *"Article 6*
>
> 1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right..."

5 .217 Article 52 of the Fourth Geneva Convention provides that "All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited".

5 .218 The actual process of construction of the wall has a direct impact upon local communities. The first update report, reviewing impact in the north Jenin Governorate, identified the intensification of external closure as the primary economic impact of the barrier. It suggested that, unless its effects were mitigated by well-managed access points, "the virtual elimination of employment prospects for West Bank Palestinians from this area in Israel will persist"and business losses will continue. Poverty increased significantly in 2002-2003. See Humanitarian Mission Report, para. 20; Update 2, 31 July 2003, para. 21; World Bank Group, 'Twenty-Seven Months - Intifada, Closures and Palestinian Economic Crisis: An Assessment', April-June 2003.

5 .219 The evidence gathered so far of the economic impact of closures permits well-founded inferences to be drawn as to the actual and likely impact of the wall on, among others, per capita real income.

Family and social rights

5 .220 Article 23 of the International Covenant on Civil and Political Rights provides as follows:

> *"Article 23*
>
> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

5 .221 Article 17 provides:

> *"Article 17*
>
> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks."

5 .222 In relation to the impact of the construction of the wall in Jerusalem, the Second Update to the Humanitarian Mission Report noted:

> "Existing sections of the Jerusalem area separation barrier and the land that has been requisitioned for its construction are located across the Green Line, and in some places, outside Israel's Jerusalem municipal boundary. As a consequence, Palestinian families and communities will be separated from each other – at times affecting members of the same village and/or family. The barrier will separate children from their schools, women from modern obstetric facilities, workers from their places of employment and communities from their cemeteries. A degree of population displacement appears to have occurred already as a result of barrier construction." Humanitarian Mission Report, Update 2, 30 September 2003, para. 8; as was noted in the Third Update, "Permits are not issued for social purposes": Humanitarian Mission Report, Update 3, 30 November 2003, para. 37.

Health and medical services

5 .223 Article 12 of the International Covenant on Economic, Social and Cultural Rights reads:

> *"Article 12*
>
> 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health..."

5 .224 Article 24 of the Convention on the Rights of the Child provides:

> *"Article 24*
>
> 1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services..."

5 .225 In the view of the Economic and Social Commission for Western Asia, closures and curfews have resulted in Palestinian health facilities operating at only 30 percent capacity, and that on most days 75 percent of UNRWA health services personnel "cannot reach their workplace": Economic and Social Council, 'Report prepared by the Economic and Social Commission for Western Asia on the economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the occupied Palestinian territory, including Jerusalem, and of the Arab population in the occupied Syrian Golan', UN doc. A/58/75-E/2003/21, 12 June 2003, paras. 48, 49.

Education

5 .226 Article 13 of the International Covenant on Economic, Social and Cultural Rights reads:

"Article 13

> 1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace..."

5 .227 In its January 2004 Report on the impact of the Jerusalem barrier, the UN Relief and Works Agency anticipates "major problems of access of pupils and teachers" to both UNRWA and PA schools, and "a strong deterioration in the possibility to attend courses at Al-Quds and Bir Zeit Universities": UNRWA, Reports on the West Bank Barrier, 'Town Profile: Impact of the Jerusalem Barrier', January 2004

Self-determination

5 .228 Article 1 of each of the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights recognize the right of self-determination in the following terms:

> "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

5 .229 The overall impact of the wall, taken together with other policies and practices of settlement and fragmentation described above, appears likely to result in the destruction of the potential for a viable Palestinian State, which is the goal of the international community, and in the violation of the right of the Palestinian people to self-determination.

(v) The occupying State is not entitled in occupied territory to construct a wall which seriously and disproportionally impairs the rights of the inhabitants of that territory to the effective ownership of their land and property

5 .230 The construction of the wall has two major impacts on the rights of the inhabitants of the occupied Palestinian territories including in and around East Jerusalem to enjoy the *effective* ownership of their land and property. First, the construction of the wall requires that a strip of land, on average some 50-70 metres wide, be taken away from its owners and put at the disposal of the occupying authorities; second, the existence of the wall prevents the inhabitants of the area being able to attend to their properties which lie on the other side of the wall from that on which they reside.

5 .231 These consequences fall to be assessed in the light of the Hague Regulations and the Fourth Geneva Convention, considered also with the general principles of international law governing the expropriation of property.

5 .232 Article 23(g) of the Hague Regulations makes it

> "especially forbidden ... (g) to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war".

5 .233 If this rule is applicable during the conduct of armed conflict, it will apply *a fortiori* in times of occupation; nor can it be used to *justify* the seizure or destruction of property by the Israeli authorities, for the occupation has not yet ended and the Article in question appears in Chapter 2 of the Regulations, under the heading "Hostilities". Moreover, Article 46 of the Hague Regulations provides that "... private property ... must be respected. Private property cannot be confiscated"; while Article 56 requires that the property of municipalities and of certain religious, charitable and artistic institutions be treated as private property, even when it is State property.

5 .234 Article 52 of the Hague Regulations provides further that,

> "Requisitions in kind and services shall not be demanded from... inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country... Such requisitions shall only be demanded on the authority of the commander of the locality occupied. Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible".

5 .235 Article 53 of the Fourth Geneva Convention provides that,

> "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is deemed *absolutely necessary* by military operations".

5.236 Under Article 147 of the Fourth Geneva Convention, "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly", constitutes a "grave breach". The ICRC *Commentary* confirms that the criterion of "absolutely necessary" applies also to this article (p. 601).

5.237 Notwithstanding the clear content and purport of the applicable rules of international law, the Government of Israel has engaged and continues to engage in policies and practices of expropriation and destruction of property, both generally and in relation to the wall.

5.238 After the occupation of the West Bank in 1967, the Israeli authorities amended existing legislation and enacted new regulations to allow for the expropriation of property. In the case of land other that within occupied Jerusalem, the Israeli authorities have used military orders to effect expropriation. Thus, Military Order Number 58 (1967) enables the authorities to confiscate the land of those absent during the 1967 census; Military Order Number S/1/96 allows the authorities unilaterally to declare Palestinian land a 'closed military area', preventing all but state use; and Military Order Number T/27/96 permits the authorities to expropriate Palestinian land for 'public purposes'. See UN ECOSOC, 'Report on the Economic and Social Repercussions of the Israeli Settlements on the Palestinian People in the Palestinian Territory, including Jerusalem, occupied since 1967, and on the Arab Population of the Syrian Golan Heights', UN doc. A/52/172, (1997), paras. 14, 15; Humanitarian Mission Report, Update 3, 30 September 2003, paras. 51, 55.

5.239 Land in the West Bank has also been acquired pursuant to the Order Regarding Abandoned Property, which has been applied to the property of "absentees". Although theoretically the land is managed pending the return of the owner, in practice returns have been prevented by restrictions

on freedom of movement. See Humanitarian Mission Report, Update 3, 30 November 2003, para. 54.

The process of requisitioning land

5 .240 In order to obtain the land necessary for the construction of the Wall and its accompanying zones, private property in the West Bank is requisitioned under military orders signed by the local Military Commander. These orders provide that the property will be requisitioned through 31 December 2005, although they are renewable without limitation. During this period, the owners of the property theoretically remain the legal owners of the property and are entitled to request rental fees or compensation: Humanitarian Mission Report, paras. 34-45; Update 2, 30 September 2003, paras. 50-60, Annex 1.

5 .241 Owners have one week in which to file an objection, but the procedures are problematic. Notification of owners appears to be arbitrary, and the Humanitarian Mission Report refers to "an absence of consistent, clear communication by the Israeli authorities" (Update 2, 20 September 2003, para. 53. OCHA Field Officers reported one instance in which, "Only one out of the twenty farmers appears to have received a military confiscation order: It was written in Hebrew, not dated and made reference to a map which was not attached": Report of OCHA field officers, OCHA Humanitarian Update, Occupied Palestinian Territories, 1-15 December 2003.

5 .242 Obtaining the necessary documentation can be difficult, and filing appeals can be expensive. The military appeals committee is not independent or impartial, and its recommendations can be reversed by the Military Commander. The number of rejected appeals is estimated in the hundreds and all the very few cases submitted to the Israeli High Court have been

rejected. Basing themselves on earlier experience, landowners also fear that denial of access to land will be used against them, under legislation which has enabled the authorities to expropriate so-called unused agricultural property. See Humanitarian Mission Report, para. 45; Update 2, 30 September 2003, para. 42; Update 3, 30 November 2003, paras. 39-44.

5.243 Military orders provide that land owners can request compensation, but no formal procedures have been established; the compensation only covers property requisitioned or damaged for the construction of the Wall and the 'depth barriers', and owners of property damaged by restrictions on access or inability to cultivate are not entitled to compensation. See Humanitarian Mission Report, Update 2, 30 September 2003, para. 43.

5.244 Notwithstanding the formal contention by the Israeli Government that no change in ownership is effected by the requisition of land, the history of previous expropriations cannot be disregarded. "Taking into account such past practices, and the fact that a legal framework exists in the West Bank for requisition and confiscation of property, there is considerable concern land could be *de facto* or *de jure* confiscated on a permanent basis" (Humanitarian Mission Report, Update 3, 30 November 2003, para. 50). As the Special Rapporteur, Mr Dugard has noted: "what we are presently witnessing in the West Bank is a visible and clear act of territorial annexation under the guise of security": Dugard Report, para. 8.

Damage to property and environs

5.245 It is apparent from the physical nature of the wall as so far constructed and as planned and contemplated that it imposes a direct and serious blight upon the land through which it runs. The UN Secretary-General's Report records that the wall will extend eventually for some 720 kilometres along the West Bank with an average depth of 50-70 metres (paragraphs 6, 9).

This land will be rendered barren; even if the wall proves only to be temporary, the nature of the work being done in constructing the wall (as described in the Secretary-General's Report) will ensure that that land remains barren for many years to come. Moreover, the consequences of the existence of the wall will inevitably be (again as recorded in the Secretary-General's Report) that regular access by the local inhabitants to their farmlands will be seriously affected, with serious consequences for the cultivation of those lands which will be very likely quickly to revert to an infertile state.

5 .246 The natural and acquired economic advantages of this region have been steadily eroded since late 2000. The World Bank has estimated that through August 2002 physical damage totalling US$110 million was inflicted upon Jenin, Tulkarm, and Qalqiliya governorates. Globally, about 58 percent of this damage occurred to infrastructure, 23 percent to private property, and about 21 percent to agricultural land and assets. See Humanitarian Mission Report, Annex I, paras. 19, 22.

5 .247 The UN Office for the Coordination of Humanitarian Affairs has projected that,

> "More people, unable to reach their land to harvest crops, graze animals or to reach work to earn the money to buy food, will be hungry. The damage caused by the destruction of land and property for the Wall's construction is irreversible and undermines Palestinians' ability to ever recover even if the political situation allows conditions to improve": United Nations, Office for the Coordination of Humanitarian Assistance, OPT, 'New Wall Projections', 9 November 2003.

5 .248 The process of construction has had major and immediate effects, including the destruction of agricultural land and assets and water resources;

inaccessibility to agricultural land and assets, including water resources; added limitations on the mobility of people and goods, and therefore higher transaction costs; and uncertainty about the future and a consequent dampening of investment in economic activities including agriculture. See Humanitarian Mission Report, para. 23.

5 .249 Moreover, the land on which the Wall is being built,

> "sits over some of the best well-fields in the West Bank... it is already seriously affecting local access to water and could have long-term implications for water use... Water access problems already observed are likely to worsen as the Wall is completed, and will result in a considerable *de facto* reduction in the availability of irrigation water by West Bank Palestinians": Humanitarian Mission Report, paras. 29, 30 and Annex III.

5 .250 In its June 2003 report, the Economic and Social Commission for Western Asia recalled that in November 2001, the Committee against Torture had concluded that Israeli policies of closure and house demolition may, in certain circumstances, amount to cruel, inhuman or degrading treatment or punishment, and called on Israel to desist from the practice. It noted, however, that the Israeli forces had "escalated their acts of forced eviction, seizure, demolition and closure of Palestinian structures throughout the occupied Palestinian territory in 2002 and 2003." See Economic and Social Council, 'Report prepared by the Economic and Social Commission for Western Asia on the economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the occupied Palestinian territory, including Jerusalem, and of the Arab population in the occupied Syrian Golan', UN doc. A/58/75-E/2003/21, 12 June 2003, para. 17. The destruction included family homes, buildings, equipment and inventory, physical infrastructure, cultural heritage, Palestinian Authority assets, private and public cars, water, electricity

generation facilities and grids, solid waste disposal stations, and road networks: ibid., para. 23. On the levelling of land and destruction, see Humanitarian Mission Report, Annex I, paras. I-23-I-24.

5 .251 The expropriation of Palestinian land is not only unlawful according to international humanitarian law and the regime applicable to occupation, but also by reference to international standards protecting the rights and interests of property owners.

5 .252 The responsibility of the State of Israel for expropriation and denial of effective ownership arises from the fact that it exercises control over Palestinian territory. Although Israel has at times stated that its actions in respect to property have resulted in no change of ownership, in practice the consequences are equivalent to a denial of all the proprietary rights normally incidental to ownership.

5 .253 This is clear, when Israeli actions are compared with international standards governing liability for expropriation, whether under general international law, or within specific treaty regimes.

Expropriation in general international law

5 .254 Expropriation in international law connotes the deprivation of a person's use and enjoyment of his property, either as the result of a formal act having that consequence, or as the result of other actions which *de facto* have that effect. Expropriation involves "'the deprivation by State organs of a right of property either as such, or by permanent transfer of the power of management and control": Brownlie, *Principles of Public International Law*, 6th ed., 2003, pp. 508-9; also *Oppenheim's International Law*, (9th ed., Vol. I, pp. 916-17: expropriation takes many forms, including "the imposition of extensive restrictions on an alien's effective control of property or on the exercise of the normal rights of ownership"; Christie, *British Year Book of*

International Law, Vol. 38 (1962), pp. 307-38. As a NAFTA Tribunal put it in *S.D. Myers v. Canada*, "expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights": Partial Award, 13 November 2000, para. 283.

5 .255 According to the Iran-United States Claims Tribunal in the *Amoco* case, expropriation is defined as "a compulsory transfer of property rights": Award no. 310-56-3, 14 July 1987, *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran*, 15 *Iran-U.S. C.T.R.* 189, 220. As defined in the *Dames and Moore* case, "[t]he unilateral taking of possession of property and the denial of its use to the rightful owners may amount to an expropriation": Award no. 97-54-3, 20 December 1983, *Dames and Moore v. The Islamic Republic of Iran*, 4 *Iran-U.S. C.T.R.* 212, 223.

5 .256 Israel has suggested that there is no change of ownership of the land, that compensation is available for use of the land, crop yield or damage to the land, and that residents can petition the Supreme Court to halt or alter construction (Secretary-General's Report, UN doc. A/ES-10, 248, 24 November 2003, Annex 1, para. 8). The evidence does not support these suggestions. Land required for the building of the wall is requisitioned by military orders (Secretary-General's Report, paras. 16-17). Moreover, Palestinians are denied access to the Palestinian land lying between the wall and the Green Line if not in possession of the necessary permit or ID card issued by the Israeli Defence forces, by contrast with the preferential treatment granted to Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel under the Law of Return (Secretary-General's Report, paras. 19-22). Even Palestinians with a permit or ID card are commonly denied access by reason of the limited operation of access gates.

5 .257 The fact that there may have been no formal expropriation, that Israeli administrative measures do not describe the taking of property as a 'taking'

or as involving a change of ownership does not mean that no expropriation has taken place in the sense of international law. The Iran-United States Claims Tribunal has recognized that,

> "In the absence of a formal act of expropriation, the possibility of the occurrence of a deprivation or taking is not excluded. It is well settled in this Tribunal's practice 'that a taking of property may occur under international law, even in the absence of a formal nationalization or expropriation, if a government has interfered unreasonably with the use of property'." Award no. 569-419-2, 6 March 1996, *Rouhollah Karubian v. The Government of the Islamic Republic of Iran*, para. 105, citing Award no. 18-98-2, 30 December 1982, *Harza Engineering Co. v. The Islamic Republic of Iran*, 1 *Iran-U.S. C.T.R.* 499, 504.

5 .258 A finding of expropriation may be made without any formal annulment or interference in relation to the legal title to property. See Award no. 97-54-3, 20 December 1983, *Dames and Moore v. The Islamic Republic of Iran*, 4 *Iran-U.S. C.T.R.* 212, 223. See also Article 10(3)(a), Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens: "A 'taking of property' includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time' (Sohn, L. B. & Baxter, R. R., 'Responsibility of States for Injuries to the Economic Interests of Aliens', 55 *American Journal of International Law* 545, 553 (1961)).

5 .259 What is relevant is the effect and impact of the measures taken, so that if the interference with property rights is so extensive that they are rendered useless, then they must be deemed to have been expropriated. Property rights become 'useless' when the owner is deprived of the effective use, control and benefit of the property. See Award no. 258-43-1, 8 October 1986,

Oil Fields of Texas, Inc. v. The Government of the Islamic Republic of Iran, 12 *Iran-U.S. C.T.R.* 308, 318; Interlocutory Award no. ITL 32-24-1, 19 December 1983, *Starrett Housing Corporation v. The Islamic Republic of Iran,* 4 *Iran-U.S. C.T.R.* 122, 154; Award no. 220-37/231-1, 10 April 1986, *Foremost Tehran, Inc. v. Government of the Islamic Republic of Iran,* 10 Iran-U.S. C.T.R. 228, 248; Award no. 519-394-1, 19 August 1991, *Merrill Lynch & Co. Inc. v. Government of the Islamic Republic of Iran,* 27 *Iran-U.S. C.T.R.* 122, 148.

5.260 *De facto* expropriation may also take many forms, as analogous findings in other fora have found when relying on international case-law; see, for example, *The Former King of Greece & Others v. Greece,* Application no. 25701/94, European Court of Human Rights, Judgment, 28 November 2002, paras. 75-76. In *Elia S.r.l. v. Italy,* Application no. 37710/97, the same Court emphasized that, in the absence of transfer of property, "the Court must look behind the appearances and investigate the realities of the situation..." (Judgment, 2 August 2001, para. 55). In *Papamichalopoulos and Others v. Greece,* the Court took account of an irregular *de facto* expropriation (occupation of land by the Greek Navy since 1967), which had lasted more than twenty-five years at the relevant time. The Court held,

> "...the *unlawfulness* of such a dispossession inevitably affects the criteria to be used for determining the reparation owed by the respondent State, since the pecuniary consequences of a lawful expropriation cannot be assimilated to those of an unlawful dispossession...
>
> "45. The Court considers that the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants *de facto* to have been expropriated in a manner incompatible with their right to the peaceful enjoyment of their possessions" (Judgment, 24 June 1993, Series A no. 260-B, p. 59, paras. 36, 45; emphasis added in para. 36).

5 .261 In *Loizidou v. Turkey,* the Court found that "as a consequence of the fact that the applicant *has been refused access* to the land..., she has effectively lost all control over, as well as all possibilities to use and enjoy, her property": *Loizidou v. Turkey,* Application number 15318/89, Judgment, 18 December 1996, para. 63.

5 .262 The injury to Palestinian property rights arises not merely in a purely 'civil' context, such as the expropriation of property without compensation, but in a context which is *delictual;* in particular, the context involve illegal occupation and the use of force in breach of the United Nations Charter and general international law.

5 .263 In the *Chorzow Factory* case (1927) P.C.I.J., Ser. A, No. 9, the act of expropriation was illegal because it violated a treaty provision; in the case of Palestinian land, the dispossession is illegal, among others, because it violates the rights of individuals and groups, including a recognized 'self-determination unit', to property and territory.

(vi) A State's right of self-defence in respect of its own sovereign territory does not entitle it to exercise that right by building a wall (a) constituting unnecessary and disproportionate action in territory which is not its own, such as occupied territory, or (b) to protect settlements which it has unlawfully introduced into occupied territory

5 .264 For the reasons set out in this written statement, it is apparent that the construction of the wall involves conduct on the part of Israel within occupied territory, which conduct involves a violation of Israel's international obligations as an occupying State.

5 .265 Certain special circumstances which might be argued to render Israel's conduct lawful have been addressed in the course of this written statement and have been shown not to provide any lawful justification for the

construction of the wall. In addition, Israel has made known publicly that it considers that its actions in relation to wall are a justifiable security measure and a lawful exercise of Israel's right of self-defence: see paragraph 6 of Annex I to the UN Secretary-General's Report of 24 November 2003. While Israel's detailed presentation of this line of argument in these proceedings is as yet unknown, certain preliminary observations may nevertheless be made.

5.266 States have a right of self-defence, both as a matter of customary international law, and as a matter of conventional international law under Article 51 of the United Nations Charter. While these two aspects of the right of self-defence overlap, they are not identical. For present purposes it is only the right of individual self-defence which needs to be considered.

5.267 Article 51 of the Charter is a derogation from the obligations imposed by other provisions of the Charter: "Nothing in the present Charter shall impair the inherent right of individual ... self-defence". Practically speaking, therefore, Article 51 only comes into play when there is some other provision of the Charter which, but for Article 51, would prohibit the action being taken in self-defence.

5.268 Moreover, Article 51 only applies in a particular situation: "if an armed attack occurs against a Member of the United Nations".

5.269 Finally, Article 51 imposes two limitations upon recourse to the right of self-defence under that Article: first, the right of self-defence is only preserved "until the Security Council has taken measures necessary to maintain international peace and security", and second, "[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council".

5 .270 In the present situation involving the construction of the wall in occupied Palestinian territory including in and around Jerusalem, it is doubtful if Article 51, *stricto sensu*, has any application. There has been no "armed attack" against Israel of the kind contemplated in that Article; and in any event Israel has not reported to the Security Council its construction of the wall as a measure taken by it in exercise of its right of self-defence.

5 .271 That does not, however, exhaust the possible relevance of the right of self-defence, since there is also the parallel right of self-defence in customary international law to be considered. The essential elements of that right are also included in the exercise of self-defence under Article 51, since that Article refers to the "inherent" right of self-defence, thereby invoking a pre-existing right outside the framework of the Charter.

5 .272 The Court has emphasised that the two essential elements of the right of self-defence are that action taken in exercise of that right must, in order to be lawful, be necessary, and must be proportional: *Military and Paramilitary Activities in and against Nicaragua*, ICJ *Reports* 1986, at p.94); *Legality of the Threat or Use of Nuclear Weapons*, ICJ *Reports* 1996 at p.245); *Case Concerning Oil Platforms*, ICJ *Reports* 2003, Judgment of 6 November 2003). In that last case the Court said (at para 76):

> "The conditions for the exercise of the right of self-defence are well settled: as the Court observed in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, 'The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law' (ICJ *Reports* 1996(I), p. 245, para. 41); and in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court referred to a specific rule 'whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it' as 'a rule well

> established in customary international law'. (ICJ *Reports* 1986, p. 94, para. 176)."

5 .273 In that case the Court held that the United States had failed to establish that its actions were either necessary (at para 76) or proportionate (at para 77).

5 .274 Moreover, the Court held in the *Oil Platforms* case that

> "the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion" [i.e. on the part of the State taking the action]" (at para 73).

There is no reason to doubt that the same consideration applies to the requirement of proportionality.

5 .275 Those "strict and objective" tests need to be applied to the construction of the wall (a) in the locations where it is being constructed, and (b) in the circumstances concomitant with its construction. When that is done, the construction of the wall is seen to be

- neither necessary for the purposes of self-defence of the State of Israel (since the wall could be constructed along or in the vicinity of the Green Line and within Israel's territory, without extending many kilometres beyond that territory and without creating enclaves around certain localities or enclosing large areas of land far to the east of Israel's territory),

- nor, given the consequences and implications of the construction of the wall, is it a proportionate response to the dangers to which Israel perceives itself to be subject. The Special Rapporteur of the Commission on Human Rights, writing in his Report of 8 September 2003 (UN Doc. E/CN.4/2004/6) suggested that, even if allowance

were to be made for some Israeli margin of discretion in its response to violence,

> "on the basis of the evidence provided in this report... Israel's response to terror is disproportionate. On occasion, Israel's action in the OPT is so remote from the interests of security that it assumes the character of punishment, humiliation and conquest." (para. 5).

5 .276 His report was written before the Court delivered its Judgment in the *Oil Platforms* case which rejected the relevance of the notion of a margin of discretion: in the light of the Court's finding in that case, the conclusions of the Special Rapporteur apply with even greater force.

5 .277 Moreover, even if (which is denied) a wall of some kind (and even a wall with the physical characteristics of the wall now being constructed) were to be regarded as a necessary act of self-defence, its construction in occupied Palestinian territory including in and around East Jerusalem - i.e. in territory which is outside the territory belonging to the State of Israel - is unlawful. Israel is in principle (and subject to any applicable legal requirements) free to take action in self-defence *within* the confines of its own boundaries; Israel is not free to construct, by way of alleged self-defence, a permanent (or even a semi-permanent) structure such as the wall in territory beyond Israel's boundaries. As shown above (paragraphs ----), the wall in places extends many kilometres beyond Israel's boundaries: that degree of encroachment into non-Israeli territory renders Israel's actions in constructing and planning the wall manifestly unlawful.

5 .278 Associated with arguments of self-defence are somewhat similar arguments which seek to justify the construction of the wall as an act of military necessity in the face of the requirements of security. Such arguments afford no justification for the construction of the wall. They fail for much the same reasons as do arguments which invoke the right of self-defence: they are

neither necessary, nor are they a proportionate response. And they would elevate the security of the occupying Power's own 'home' territory (not just its presence in the occupied territory) to a position over and above the humanitarian requirements of the inhabitants of the occupied territory, which is the complete antithesis of the essential features of the regime of military occupation.

5 .279 In so far as such arguments are nevertheless to be considered, in modern humanitarian law exceptions such as military necessity are subject to strict interpretation; as the Court has recently held in the *Oil Platforms* case (cited above), "necessity" is a strict and objective consideration, and leaves no measure of discretion to the State taking the action in question. When general military operations have ceased, military necessities must inevitably be less demanding.

5 .280 Considerations of necessity have to be assessed, of course, in regard to the particular wall which is being constructed, in the particular places where it is being constructed, and with the particular consequences which that wall, in those places, involve. There can be no military necessity for the particular wall now being constructed in territory subject to the special international regime of military occupation. It is noteworthy that where a similar wall is being constructed in the region of the Gaza Strip, the wall is being built wholly in Israel's own territory: if it can be done in that way there, there is no 'necessity' for it to be done differently in the occupied West Bank territory.

5 .281 Moreover, military necessity can only be invoked as an exception to the application of a rule of humanitarian law if the possibility of that exception is itself written in to the formulation of the rule (such military-related express exceptions are, e.g., included in Articles 49, 53, 55 and 143 of the Fourth Geneva Convention): only in that way would an exception of

military necessity be consistent with the stipulation in common Article 1 of the four 1949 Geneva Conventions that respect for their provisions shall be ensured "in all circumstances", since that expression leaves no room for military necessity unless it is expressly provided for. The authoritative commentary on the Geneva Conventions by Pictet, pp. 106-107, is clear on this.

5 .282 The foregoing observations are made in respect of claims that the construction of the wall is a measure of self-defence against what are considered to be armed attacks against Israel, or at least a measure dictated by military necessity in the face of threats to Israel's own security. There is, however, a further dimension to be taken into account, and which accentuates the impossibility of regarding the wall as a legitimate measure of self-defence or military necessity.

5 .283 Assuming (but not accepting) certain facts which might tend to show that Israel has a need to defend itself from what it sees as wrongful incursions by the construction of a wall of the kind now being constructed and planned, the configuration of the route to be followed by the wall gives the lie to any such defence for its construction. As the Sketch Map No. 6 following page 25 shows, there is no need for a wall intended to defend Israel from any such allegedly wrongful incursions to create enclaves around places such as Qalqiliya; or to extend, by way of long 'fingers', so as to embrace large tracts of land many kilometres into the West Bank; or to run southwards parallel to the River Jordan, so as to form an extra eastern barrier wall several kilometres to the east of the barrier wall already being constructed along the western areas of the West Bank. As the UN Special Rapporteur of the Commission on Human Rights said in his Report of 8 September 2003

> "Israel's claim that the Wall is designed entirely as a security measure with no intention to alter political boundaries is simply not supported by the facts." (para. 16)

5 .284 In fact, those elements of the wall serve a purpose quite other than any purported defence of Israel. They serve, and are clearly intended to serve, as a means of protecting Israel's settlements in the occupied Palestinian territories including in and around East Jerusalem. The route of the wall in relation to the location of the settlements shows this to be the case. However, as already shown, those settlements are unlawful: not only are they unlawful, but the settlers are themselves not beneficiaries of protection under the Fourth Geneva Convention, Article 4 of which defines persons protected by the Convention as those who "find themselves, in case of ... occupation, in the hands of a ... Occupying Power of which they are not nationals". No right of self-defence, even if otherwise lawful (which in the present circumstances it is not), can be invoked in order to defend that which is itself unlawful, especially where, as is the situation with these settlements, their establishment involves a grave breach of the Fourth Geneva Convention and a war crime under the 1998 Statute of the International Criminal Court.

(vii) Any violations of international obligations as a result of the construction and planning of the wall require reparation to be made.

5 .285 For the reasons set out above, the sequence of events which has led to the planning and construction of the wall by Israel has involved the violation by Israel of a number of the obligations incumbent upon it under international law.

5 .286 In giving advisory opinions in other cases the Court has not refrained in appropriate cases from reaching conclusions as to the lawfulness or

otherwise of some State's conduct. Thus in the Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, ICJ *Reports* 1971, p. 17, the Court held South Africa's continued presence in that territory to be illegal (at paras 117-118, 133(1).

5 .287 It would be appropriate for the Court to follow a similar course in the present proceedings. Indeed, it is implicit in the formulation of the question to the Court by the General Assembly that the Court should include in its advice to the General Assembly its assessment of the legality or otherwise of the conduct in question (i.e. "the construction of the wall built by Israel...etc."), for only in the light of such an assessment can the Court go on, as requested, to address the legal consequences arising from that conduct.From the conclusion that the construction of the wall by Israel is unlawful, certain legal consequences follow, and it is necessary that the Court should not fail to address them. Even if, in an advisory opinion, the Court is not called upon to uphold or dismiss specific claims as to the occurrence of some violation of international law, it is appropriate for the Court to address certain issues of principle which are raised by the possibility that violations of international law might have occurred, or could in future occur.

5 .288 There is no doubt that in international law the breach of an international obligation carries with it the obligation to make adequate reparation.

5 .289 Where the breaches of international law are not merely breaches occurring in what may be termed a 'civil' context (such as the expropriation of property without compensation) but occur in a context which is delictual, involving, in particular, the use of force in breach of the United Nations Charter and rules of international law having the character of *ius cogens*, the nature of the reparation to be made will need to reflect this more serious basis of liability.

5 .290 Moreover, where a breach of international law has been accompanied by a deliberate intention to cause harm to those affected, the normal rule that reparation is only due in respect of the normal and reasonably foreseeable consequences of an unlawful act is extended so as to cover also those deliberately intended consequences. Thus, writing of exceptional consequences intended by the author of an act, Professor Bin Cheng has observed:

> "If intended by the author, such consequences are regarded as consequences of the act for which reparation has to be made, irrespective of whether such consequences are normal, or reasonably foreseeable ... [T]he duty to make reparation extends only to those damages which are legally regarded as the consequences of an unlawful act. These are damages which would normally flow from such an act, or which a reasonable man in the position of the wrongdoer at the time would have foreseen as likely to result, as well as all intended damages." (*General Principles of Law as applied by International Courts and Tribunals* (1953; reprinted 1987), at pp. 252, 253).

5 .291 The governing principle of effective reparation may be given effect in many ways. Thus paragraph 1 of Article 31 of the Articles on State Responsibility adopted by the International Law Commission in 2001 and annexed to GA Res. 56/83 of 12 December 2001 provides:

> "The responsible State is under an obligation to make *full* reparation for the injury caused by the internationally wrongful act."

5 .292 Article 34 of those Articles provides:

> "*Full* reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the

> provisions of this Chapter." (emphasis added in both cases)

5 .293 In the *Chorzow Factory* case in 1928 (PCIJ, Ser. A, No. 17), the Permanent Court of International Justice, on an issue involving expropriation, emphasized that reparation

> "must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed". (at p.47).

5 .294 The Court went on to make it clear that this could be achieved by way of restitution in kind, or, if that is not possible, "payment of a sum corresponding to the value which a restitution in kind would bear", or the payment of damages for loss sustained which would not be covered by restitution in kind. The Court in this case thus gave priority to restitution (*restitutio in integrum*); only if this is not possible does the obligation become that of paying the value of the property and compensation for resulting loss. Moreover, central to the Court's reasoning was the distinction between a lawful expropriation, which required fair compensation, and the "seizure of property, rights and interests which could not be expropriated even against compensation": the act of expropriation with which the Court was dealing was illegal because it violated a treaty provision. The present advisory proceedings concern conduct of this latter kind, involving acts which violate *inter alia* rules of *ius cogens*.

5 .295 Specifically in relation to restitution, Article 35 of the International Law Commission's Articles of State Responsibility provides:

> "A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the

> wrongful act was committed, provided and to the extent that restitution:
>
> (a) is not materially impossible;
>
> (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."

5.296 Where the primary remedy for the unlawful act (restitution) is not available, the principle of effective reparation requires extensive compensation. Against the background of the requirement that reparation must be "full" and that the injury for which reparation is due "includes *any* damage, whether material or moral, caused by the internationally wrongful act of a State" (Article 31.2), Article 36 of the Articles on State Responsibility provides:

> "1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
>
> 2. The compensation shall cover *any* financially assessable damage including loss of profits insofar as it is established".

5.297 In the words of the Permanent Court of International Justice in the *Chorzow Factory* case, compensation means the "payment of a sum corresponding to the value which a restitution in kind would bear" (at p. 47).

5.298 As to the possible heads of compensable damage, these vary with the scope of the international obligation which has been breached. But in principle they include *any* matter capable of being evaluated in financial terms. This includes, preeminently death or personal injury caused by the internationally wrongful act, as well as mental pain and anguish. The taking of movable or immovable property is another leading example of

damage for which compensation is payable, and even where there is no direct taking of property, but only such an interference with property rights as to render them useless (including deprivation of the effective use, control and benefits of property), that interference is compensable as being tantamount to a taking: *Tippets v. TAMS-ATTA* (1985) 6 Iran-US CTR 219, 225. Compensation is also due in respect of loss or injury to intangible property, loss of business profits, and loss or damage to a person's livelihood. The all-embracing character of the possible heads of compensable damage is illustrated by the terms of Article 31.2 of the Articles on State Responsibility which provide that the injury for which reparation is due

> "includes *any* damage, *whether material or moral,* caused by the internationally wrongful act of a State"(emphasis added).

5 .299 As the International Law Commission made clear in paragraph (5) of its Commentary to that Article, this formulation was intended to cover "both material and moral damage broadly understood". The Commentary continued:

> "'Material' damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. "Moral" damage includes such things as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life.'

5 .300 Where conduct is found to have been illegal, and particularly where such a finding is based upon decisions of competent organs of the United Nations, the legal consequences arising from that conduct must include those which follow for Members of the United Nations. A determination to the effect that a situation is illegal cannot remain without consequence. In particular, Members of the United Nations are under an obligation to

comply with binding decisions of competent organs, even if they voted against them or abstained, and are also under an obligation to bring that illegal situation to an end: cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, ICJ *Reports* 1971, para 117 (quoted above, paragraph 5,..) Those obligations involve both positive and negative aspects: Members of the United Nations are both under a positive obligation to recognize the illegality of the situation in question and take all lawful measures open to them to bring about an end of the illegal situation, and under a negative obligation to do nothing to imply recognition of the situation which has been found to be illegal.

VI. Summary of Jordan's Statement

6.1 For the reasons which have been set out in this written statement, Jordan believes that it would be appropriate for the Court to base its response to the General Assembly's request for an advisory opinion on the following grounds.

6.2 First, the Court has jurisdiction to give an advisory opinion on the legal question which has been put to the Court, and there are no compelling reasons why the Court should not exercise that jurisdiction.

6.3 The Court is invited to base its response to the legal question on which an advisory opinion is requested on the considerations that the prohibition on recourse to force and the right of self-determination are rules of *ius cogens*, that the territory on which the wall is being constructed is occupied territory, and that the occupying State's rights and powers in occupied territory are limited by the rules and principles of international law, most notably those contained in the Hague Regulations and the Fourth Geneva Convention. A particular limitation on the occupying State's rights and powers is the impermissibility of that State annexing or otherwise altering the status of occupied territory.

6.4 In the light of those considerations, and taking account of relevant Security Council and General Assembly resolutions, the Court is invited to conclude that "the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem" entails the legal consequence that in several respects Israel is in breach of its international obligations. This is so, in particular, in respect of the annexation (*de jure* or *de facto*) or other unlawful control of parts of that occupied territory, the establishment in that occupied territory of settlements which the wall is designed to protect, and the impairment of

the human rights of the inhabitants including the effective ownership of their land and property. Those breaches are not justified by considerations of self-defence or by regarding the wall as a security measure adopted as a military necessity.

6 .5 That legal consequence (that the construction of the wall entails breaches of international law) carries with it the further legal consequences that appropriate reparation has to be made, and that nothing must be done by the international community to recognize the situation which has given rise to those breaches.

VII. Submissions

7.1 For the reasons set out above, Jordan (while reserving its right to make further oral or written statements as may be appropriate in the further course of the present proceedings) has the honour to submit that the Court should

(i) decide that it has jurisdiction to respond to the request for an advisory opinion which the General Assembly has put to it, and that it should exercise that jurisdiction; and

(ii) convey to the General Assembly its advisory opinion that the construction of the wall by Israel in the Occupied Palestinian Territory including in and around East Jerusalem involves the following legal consequences, namely:

(a) that the construction of that wall involves in several respects breaches by Israel of its obligations under international law, and is to that extent unlawful;

(b) that, the construction by Israel of the wall in occupied territory being contrary to international law, Israel is under obligation to demolish those parts of the wall which it has so far constructed, to restore the land on which the wall has been constructed to its former state, to discontinue its efforts to construct further sections of the wall planned or contemplated but as yet unbuilt, and to refrain from any repetition of its illegal acts;

(c) that Israel is further under obligation to restore to the inhabitants of the occupied territory such personal and property rights as have been prejudiced by the construction

of the wall, and to compensate the inhabitants for any loss, damage or other the prejudice they have thereby suffered; and

(d) that States Members of the United Nations are under obligation to recognize the illegality of the wall constructed or planned by Israel and of Israel's acts in that connexion, to refrain from any acts and in particular any dealings with the Government of Israel implying recognition of the legality of, or lending support or assistance to, the existence of the wall, or to Israel's Control over Palestinian territory enclosed by the wall.

Ambassador of the Hashemite
Kingdom of Jordan
at The Hague

30 January 2004

Annex (I)

ANNEX 1
ORIGINS AND EARLY PHASES OF ISRAEL'S POLICY OF EXPULSION AND DISPLACEMENT OF PALESTINIANS

1. Political and historical background

1. Apart from the period of Ottoman rule (1517-1917), Palestine was an Arab populated region until 1948. In the last days of the First World War, when the majority of the population was Arab, the Ottoman Empire lost the territory of Palestine to British troops.
2. During the latter part of the 19th century, the Ottoman Empire had permitted a small number of Jewish immigrants into the country. By 1918 their numbers had risen to 56,000, out of a total population of 680,000.[1]
3. Britain had conflicting aims or goals in the period 1915-1918, and thereafter during the mandate period. In 1915-1916, the British authorities assured Sherif Hussain, the Emir of Mecca, that it would 'support the independence of the Arabs in all the regions within the limits demanded by the Sherif of Mecca.' Yet shortly thereafter, the British Foreign Secretary, Mr Balfour, stated that Britain favoured the establishment in Palestine of a 'homeland' for the Jewish people, which would not 'prejudice the civil and religious rights of existing non-Jewish communities'.[2]
4. Balfour's words were incorporated into the League of Nations Mandate for Palestine, which was signed in London on 24 July 1922 and entered into force on 29 September 1922.[3] Arab protest against increased Jewish immigration (and the Balfour Declaration) erupted in the 1920s. In 1936, the British Government's Peel Commission recommended the partitioning of Palestine into Arab and Jewish States. This recommendation was accepted by the Zionists as a basis for negotiations with the British Government,[4] but rejected

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[1] British census figures – the Israeli government puts the number of Jews living in Palestine in 1914 at 85,000; see Minority Rights Group Report (MRG): *The Palestinians*, Report No.24, London, 1984 (hereinafter, Minority Rights Group 1984).

[2] See United Nations, *The Origins and Evolution of the Palestine Problem: 1917-1988*, New York, 1990, (hereinafter UN, *Origins*), 8, for the full text of the Balfour Declaration. See also Cassese, A, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge University Press, 1995, 232-3 and sources there cited.

[3] Mandate for Palestine. Text: UN, *Origins*, 1990, 48.

[4] Avi Schlaim, *The Iron Wall*, W.W. Norton & Company, 2000, 19.

by Palestinian leaders.[5] Avi Schlaim has explained why the then Chairman of the Jewish Agency Executive, David Ben Gurion, accepted the Peel Commission Plan:

> Although Ben Gurion accepted partition, he did not view the borders of the Peel Commission plan as permanent. He saw no contradiction between accepting a Jewish state in part of Palestine and hoping to expand the borders of this state to the whole land of Israel.[6]

5. In a letter to his son Amos on 5 October 1937, Ben Gurion wrote: 'I am certain we will be able to settle in all other parts of the country, whether through agreement and mutual understanding with our neighbours or in another way. Erect a Jewish state at once, even if it is not in the whole land. The rest will come in the course of time.'[7]

6. In 1939, the British Government published a 'White Paper' proposing a maximum of 17,000 Jewish immigrants into Palestine over a five-year period, with future numbers to be decided in co-operation with the Arabs.[8] After the issue of the White Paper and as a result of increased immigration pressure, hostilities erupted again. During the first part of the Second World War, a truce was initially agreed between the Zionists and the British security forces, but because of the increased volume of Jewish migration into Palestine, conflict continued between Palestinian Arabs and Jews. Soon, however, two Zionist guerrilla groups, *Irgun Zvai Le'umi* and *Loahamei Herut Yisrael*, began systematically attacking British security forces and Palestinian civilians in retaliation for, amongst other things, the 1939 'White Paper'. The relationship of these groups to the *Haganah* (the 'official' military forces of the emergent State) and to the State of Israel is described below (paragraphs 11-23). As the Second World War progressed and moved to its conclusion, immigration pressure increased once more, particularly as a result of the Holocaust and political developments in Europe.

7. With the end of the war, Britain continued as the responsible mandatory power for Palestine. However, faced with an apparently irresoluble conflict, in 1947 Britain requested that a special session of the General Assembly prepare a study on the question of Palestine, to be deliberated at its next

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5 See Minority Rights Group 1984, 3 and n.12.

6 Avi Schlaim, *The Iron Wall*, 21.

7 Ben-Gurion, David, *Letters to Paula*, New York: University of Pittsburgh Press, n.d.

8 For the 'White Paper', see UN, *Origins*, 53.

session.[9] Formed in April of that year, the United Nations Special Commission for Palestine (UNSCOP) completed its work on 31 August 1947. Co-operation with the Commission was uneven, with the Jewish organisations generally assisting and the Palestinian leaders refusing to participate on the basis that the natural rights of the Palestinian Arabs were self-evident and should be recognized, not investigated.

8. The Commission's report contained a majority recommendation for partition with economic union, and for Jerusalem to be placed under the administrative authority of the United Nations.[10] The Partition Plan recommended that fifty-four per cent of the land area of the former Palestine be allocated to the proposed Jewish State and the rest to the proposed Arab State, despite the fact that the Jewish population was less than one third of the whole population and that Arab lands accounted for over 80% of the land area of Israel.[11] The Jewish Agency accepted the Plan, but the Arabs did not and they protested that it violated the provisions of the United Nations Charter, which granted people the right to decide their own destiny.[12]

9. On 29 November 1947, the General Assembly adopted Resolution 181(II) which, with some slight changes, endorsed the Commission's majority recommendation for the adoption and implementation of the 'Plan of Partition with Economic Union'.[13] With the resulting impasse, violence broke out in several parts of Palestine, accompanied by rising death tolls. Such was the intractable nature of the conflict that when the British withdrew in May 1948, the first Arab-Israeli war began .

10. When a formal armistice was finally declared just over a year later, the emergent Israeli State had control over most of the territory of the former Mandate Palestine with the exception of the areas known as the West Bank and the Gaza Strip, which were respectively under the control of Jordan and

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[9] UN, Department of Public Information, *The United Nations and the Question of Palestine*, New York, 1994, 3.

[10] 'Report of the United Nations Special Commission on Palestine', 31 August 1947, United Nations, General Assembly Official Records (*UNGAOR*), 2nd Session, supplement 11, UN doc. A/353, vols i-iv.

[11] See Minority Rights Group 1984, 6.

[12] Lex Takkenberg, *The Status of Palestinian Refugees in International Law*, Oxford: Clarendon Press, Oxford, 1998.

[13] UNGA res. 181(II) was adopted with 33 votes in favour, 13 against, (including Lebanon, Saudi Arabia, Syria and Yemen) and 10 abstentions. See UN, Department of Public Information, above note 7, 5.

Egypt. As a direct result of the war, there were 6,000 reported Jewish deaths, but no accurate figure of Arab deaths.[14] An estimated 750,000 Palestinians fled and/or were forced to leave their homes or were expelled and were living in refugee camps in the Gaza Strip, the West Bank, Jordan, Lebanon and Syria.[15]

The emergence of the State of Israel

11. The political goal of a State to be called Israel was continuously supported not only in the rhetoric of the Zionist movement, but also in military preparations on the ground which significantly pre-date the founding of the State of Israel.

12. The most well-known military organization is the *Haganah*, which was founded in 1920 and operated until 1948. Originally a loose network of 'defence' groups, it expanded its membership in the late 1920s, initiated military and officers' training, established arms depots, imported weapons from Europe, and laid the basis for the underground production of arms.

13. In the period 1936-39, the *Haganah* evolved from militia to military body, and was active during the disturbances of this period, supporting illegal immigration and anti-British demonstrations.

14. In 1938, the Jewish Agency Executive decided to appoint a nationwide leader for the *Haganah*, and in September 1939 it was decided to appoint a professional Military General Staff. From 1941 onwards, the *Haganah* emphasized its national and Zionist character; it identified its basic principles to include responsibility to the World Zionist Organization, and its functions to include defending the Jewish community, defending the Zionist enterprise in the 'Land of Israel', and resisting 'enemy action' from outside. In this period, it stated that it served the entire *yishuv*, (that is, the Jewish community in Palestine, especially the Zionists), and saw itself as 'absolved' from the laws of the non-Jewish government (i.e. the British Mandatory authorities).

15. During the Second World War, however, the *Haganah* co-operated with the British war effort, and supplied volunteers for the British army. Simultaneously, it strengthened its own base, setting up the *Palmach* - or 'strike force', an abbreviation of *Pelugot HaMachatz* - in 1941. One of the founders of the *Palmach* was Yigal Allon, later Minister of Labour (1961-1968), and appointed Deputy Prime Minister and Minister of Education and Culture after the 1969 General Election. The so-called 'Allon Plan' was an unofficial

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[14] See Minority Rights Group 1984, 4.

[15] Ibid.

plan for a solution to Israel's border problems after the 1967 War; it proposed new border lines to combine 'maximum security... with a minimum of Arab population'.[16]

16. Yitzhak Rabin was another member of the *Palmach*, and took part in armed action against the British Mandatory authorities from 1944 onwards. He was appointed Deputy Commander in 1947 and commanded the 'Harel Brigade' in the 1948-49 war. Ariel Sharon was also a member of the Haganah, which he joined at the age of fourteen in 1942; he commanded an infantry company in the Alexandroni Brigade during 1948. The brigade participated in the occupation, depopulation and destruction of, among others, the Palestinian coastal village of Tantura on 22-23 May 1948, during which large numbers of civilians are reported to have been killed.

17. At the end of the Second World War, the *Haganah* again involved itself in the anti-British struggle, in association with terrorist groups such as *Irgun Zevai Le'umi* and *Lohamei Herut Yisrael*.

18. The *Irgun Zevai Le'umi* was an armed Jewish underground organization founded in 1931 by a group of *Haganah* commanders who had quit in protest at the *Haganah's* defensive mandate. In April 1937, the group itself split, with half of its members returning to the *Haganah*. The new *Irgun Zevai Le'umi*, known by its abbreviation, *Etzel*, was ideologically linked to the 'Revisionist Zionist Movement' and accepted the authority of its leader, Vladimir Jabotinsky; it also received support from factions of the right-wing General Zionists and the Mizrachi.

19. The *Irgun* rejected the 'restraint' policy of the *Haganah*, and adopted a policy of intimidation and terror against the Arab population and, after the British White Paper in 1939, also against the Mandatory authorities. A truce was called at the outbreak of the Second World War, leading to another split and the emergence of the *Lohamei Herut Yisrael*. From 1943, *Irgun* was led by Menachem Begin (later to be Prime Minister of Israel from 1977-1984), and in February 1944 it began armed attacks against the British administration, including government offices and police stations. It joined the Jewish Resistance Movement and when this disintegrated in August 1946, *Irgun*

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[16] Cf. *The Book of the Palmach*, vol. 2, 286.

continued its terrorist activities against the British. The *Irgun*, the *Lehi* and the *Palmach* were responsible, in various degrees, for the massacre at Deir Yassin.[17]

20. *Lohamei Herut Yisrael*, or *Lehi*, its acronym, was an underground organization which operated from 1940 to 1948. Also known as the 'Stern Gang' (and as 'Etzel in Israel'), from its leader, Abraham 'Yair' Stern, it broke away from the *Irgun* in 1940. The reasons for the split were the group's insistence that the armed struggle against the British should be continued, notwithstanding the war with Nazi Germany, its opposition to service with the British army, and its readiness to collaborate with anyone who supported the fight against the British Government. Its objectives included, among others, a 'Hebrew kingdom from the Euphrates to the Nile'.

21. After Stern was killed in February 1942, the new leaders of the group (Natan Yellin-Mor, Yitshak Shamir and Yisrael Eldad) reorganized the movement. Because of its relatively limited strength, *Lehi* engaged in full-scale terrorism, including the assassination in Cairo on 6 November 1944 of Lord Moyne, the British Minister for Middle East Affairs. *Lehi* was briefly a part of the Jewish Resistance Movement (from November 1945 to mid-1946); when this broke up following the *Irgun* bombing of the King David Hotel, *Lehi* continued its terrorist campaign, particularly in Jerusalem in 1947, where it sought to prevent implementation of the partition plan and the internationalization of the city.

22. On 14 May 1948 the independent State of Israel was proclaimed by a Provisional State Council. It was recognized immediately by the USA, but only gradually by other States, with Arab States in particular withholding recognition for many years (and some still refusing recognition to this day). Israel was admitted to membership of the United Nations on 11 May 1949, and a permanent Government was established following elections held in that year.

23. On 26 May 1948, the Provisional Government of Israel transformed the *Haganah* into the regular armed forces, known as *Zeva Haganah Le-Yisrael* – the Israel Defence Force. *Irgun* offered to disband and to integrate its members into the Israeli Defence Force, and this was achieved in September 1948. *Lehi* mostly disbanded and its members also enlisted in the IDF. It continued to be active in Jerusalem, however, and its members are considered responsible for

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[17] See Ami Isseroff, 'Coming to Terms with Deir Yassin', www.ariga.com/peacewatch/dy. Also, Uri Milstein 'The War of Independence Vol. IV: Out of Crisis Came Decision', Zmora - Bitan, Tel-Aviv 1991, 255-76, translated by Ami Isseroff: www.ariga.com/peacewatch/dy/umilst.htm.

the murder of Count Folke Bernadotte, the United Nations Mediator, in Jerusalem on 17 September 1948. Although the leaders of *Lehi* were sentenced to long jail terms by an Israeli military court, they were released in a general amnesty.

24. Thus, the military and other armed elements engaged in the fighting and expulsion of the Palestinian population were subsequently incorporated into the official organs of the State of Israel,[18] and the actions of those units were subsequently adopted by the State of Israel, in the sense understood by the International Court of Justice in the *Hostages Case* in 1979.[19]

2. Causes of the expulsions

2.1 The 1947-1949 Conflict

25. The reasons behind the expulsions have been disputed. Israel's official position has been that the Arabs fled voluntarily, not as a result of compulsion, coercion or threat on the part of the Israelis, but because of the combination of requests by Arab leaders for the population to seek safety and the collapse of Arab institutions with the departure of the Arab elite.[20] Count Bernadotte, United Nations Mediator for Palestine, reported differently in September 1948: 'the exodus of Palestinian Arabs resulted from panic created by fighting in

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[18] Official Israeli Government publications explicitly recognize the continuity between armed elements which engaged in activity before the founding of the State of Israel and the organs of the State: 'Before the establishment of the State of Israel, a number of armed Jewish defence organizations operated. In addition to the *Haganah* and *Palmach*, which answered to the elected leadership of the Jewish national institutions, other armed defense groups, namely the *Lehi*... and the [*Irgun*] operated independently. It was only natural that when the independence of the State of Israel was declared the new, legal Government would decide to establish a single, unified armed force loyal to the Government of the State of Israel: The Israel Defence Forces': http://www.idf.il/english/history/history.stm.

[19] *Case concerning United States Diplomatic and Consular Staff in Tehran*, ICJ *Reports*, 1980, 3, 34-6. The Court, after taking note of various statements and acts by the Iranian authorities, stated as follows: 'The approval given... by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible.' (Paragraph 74).

[20] State of Israel, 'The Refugee Issue: A Background Paper', Government Press Office, Oct. 1994, 3.

their communities, by rumours concerning real or alleged acts of terrorism, or expulsion'.[21]

26. The most detailed account of the expulsion of the Palestinians is provided by Israeli historian Benny Morris in his 1987 study, *The Birth of the Palestinian Refugee Problem, 1947-1949*, which was based on the then recent declassification and opening of most Israeli state and private political papers from 1947.[22] The Arab flight from the countryside began with a trickle from a handful of villages in 1947, and became a steady though still small-scale emigration over the period December 1947- March 1948 with the departure of many of the country's elite, especially from Haifa and Jaffa.[23] This wave is estimated in the several tens of thousands. Between April and August 1948, the rural emigration turned into a massive displacement. According to Morris:

> Jewish pressure on the Arab villages of the Coastal Plain, and the Haganah conquest of parts of Arab Jerusalem and the Jewish Corridor, Tiberias, Haifa, the Hula Valley in Galilee Panhandle, Jaffa and its environs, Beisan and Safad sent some 200,000-300,000 urban and rural Palestinian Arabs fleeing to the safety of the surrounding Arab States (Lebanon, Syria, Egypt, and Transjordan) and the Arab population centres of Gaza, Nablus, Ramallah and Hebron.[24]

27. In general, the displacements were a direct response to attacks and retaliatory strikes by the Zionist settlers' defence force (the *Haganah*, see above, paragraphs 11-23) and to fears of such attacks.[25]

28. Reference should be made, in particular, to the *Haganah's* Plan D, the objective of which was to secure all areas allocated to Israel under the UN partition resolution, as well as Jewish settlements *outside* these areas and corridors leading to them. Avi Schlaim notes:

> Although the wording of Plan D was vague, its objective was to clear the interior of the country of hostile and potentially hostile Arab elements, and in this sense provided a warrant for expelling civilians. By

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[21] 'Progress Report of the UN Mediator for Palestine', UNGAOR, 3rd session, Supp. 11, UN doc. A/648, 14.

[22] Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949*, Cambridge: Cambridge University Press, 1987 (hereinafter, Morris, *Birth of the Palestinian Refugee Problem*).

[23] See Minority Rights Group 1984, 4.

[24] See Morris, *Birth of the Palestinian Refugee Problem*, 254.

[25] Ibid.

> implementing Plan D in April and May (1948) the Haganah thus directly contributed to the Birth of the Palestinian refugee problem.[26]

29. The above indicates clearly that there was a policy of expulsion. Benny Morris writes:

> Plan D was not a political blueprint for the expulsion of Palestine's Arabs: it was a military plan with military and territorial objectives. However, by ordering the capture of Arab cities and the destruction of villages, it both permitted and justified the forcible expulsion of Arab civilians.[27]

30. In January 1948, the Zionist forces began an organized expulsion of Arab communities,[28] and the potential boost which this displacement represented to the goal of 'Eretz Israel... without Arabs' was not lost on Israel's leaders. On 31 March 1948, Weitz, the director of the Jewish National Fund's Lands Department, noted that '[t]here is a tendency among our neighbours... to leave their villages'. In fact, however, and contrary to Israeli claims that Arab Leaders urged the population to flee for their own safety, Benny Morris reports many instances of Palestinian leaders and Arab States urging the population to remain in their towns and villages.[29] This 'tendency' to leave, or rather, the pressure to leave, was promoted and expanded in part by Weitz himself, who was responsible for the land acquisition and, in great measure, for the establishment of new settlements. The conditions of war and anarchy of early 1948 enabled the *yishuv*, the Jewish community in Palestine, to take physical possession of these tracts of land.[30]

31. Benny Morris further observes that 'clear traces of an expulsion policy on both national and local levels' existed from the beginning of April 1948.[31] Sometime between 8-10 April, orders went out from the *Haganah* General Staff to the

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[26] Avi Schlaim, *The Iron Wall*, 31

[27] Morris, *Birth of the Palestinian Refugee Problem*, 62-3.

[28] Ibid., 54 (quoting HHA. 66.10, protocol of the meeting of the Mapam Political Committee, statement by Galili, 5 Feb. 1948). Mapam (United Workers' Party), a socialist-zionist party, was the second largest political party in the early years of the State. Mapam joined the labour alignment from 1969-1984, ran independently in 1988, and returned to Labour in 1992.

[29] Ibid.

[30] Ibid.

[31] Ibid., 64.

Haganah units involved to clear away and, if necessary, expel most of the remaining Arab rural communities.

32. According to historian and researcher Arieh Yitzhaqi, *Haganah* and *Palmach* troops carried out dozens of operations against Palestinians by raiding their villages and blowing up as many houses as possible. 'In the course of these operations, many old people, women and children were killed wherever there was resistance.'[32]

33. Yitzhaki cites some ten major massacres committed by Jewish forces in 1948-49, and many more smaller ones. 'Major massacres' are described as involving an assault by Zionist troops resulting in more than fifty victims. Among those cited by Yitzhaki and others are: the *Deir Yassin* massacre, 9 April 1948, in which over 250 unarmed villagers were murdered;[33] the expulsions from *Lydda* and *Ramle* on 12-13 July 1948, in which over 60,000 Palestinians were expelled from the two towns in an operation approved by Ben-Gurion and carried out by senior army officers, including Yigal Allon, Yitzhak Rabin, and Moshe Dayan;[34] and the massacre at *Al-Dawayma*, an unarmed village captured on 29 October 1948, in which 80-100 villagers were killed *after* the capture.

34. In an analysis of these events, *Haganah's* intelligence branch explained that 'British withdrawal freed our hands' to resolve the Arab question. In Jerusalem on 15 May 1948, *Haganah* loudspeaker vans urged the Arab population to flee. 'Take pity on your wives and children and get out of this bloodbath', they proclaimed. 'Surrender to us with your arms. No harm will come to you. If you stay, you invite disaster'. 'The Jericho road leads to Jordan.' 'The evacuation of Arab civilians had become a war aim,' observed Haganah officer Uri Avnery, who would later become a member of Israel's parliament.[35]

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[32] Arieh Yitzhaqi, *The Journal of Palestine Studies*, Vol. 1, n.4, Summer 1972, 144, citing Yediot Aharanot; S. Hadawi, *Palestine Rights and Losses in 1948: A Comprehensive Study*, London: Saqi Books, 1988.

[33] See above, paragraph 19, n. 17.

[34] Both towns were intended to be in the Arab State called for in the UN partition plan, and were defended by small contingents of the Arab Legion. These were withdrawn on 9-10 July, as being too small to stand against the large Jewish force, which attacked on 12 July. Substantial civilian casualties resulted in the resulting expulsion, which had the express approval of Ben-Gurion. *The Rabin Memoirs*, University of California Press, 1996, 383-4.

[35] J. Quigley, 'The Palestinian Question in International Law: A Historical Perspective', 10 *Arab Studies Quarterly* 44, 82 (1988).

35. The Palestinians were 'ejected and forced to flee into Arab territory'.[36] 'Wherever the Israeli troops advanced into Arab country, the Arab population was bulldozed out in front of them'. It typically sufficed, recalled Avnery, 'to fire a few shots in the direction of Arab villages to see the inhabitants, who had not fought for generations, take flight'.[37]

36. Massacres of Arab populations continued even after the 1947-1949 expulsions. Other similar incidents after the end of the 1948 war include the expulsion of the *Negev Bedouin* in the period 1949-1959; the *'Azazme Tribe* massacre in March 1955; and the massacre at *Kafr Qassim*, an Israeli Arab village in the little triangle bordering the West Bank on 29 October 1956.

3. Policy and practice post-flight and/or expulsion: Preventing return of the refugees

37. The flight and/or the expulsion of the Arab inhabitants from Palestine was seen as a great triumph for Zionism, the Jewish Agency and other Jewish organizations, and within their overall political aims.

3.1 The evidence of historical intent

38. It is not seriously disputed that the policy of conquest and/or possession of Palestinian lands has long historical roots, and that it did not begin with the events of 1948-1949.[38]

39. Writing in 1885, Theodor Herzl, the founder of political Zionism, though publicly promoting a future Jewish country in which Arabs and Jews would live as equals, indicated privately his endorsement of expropriation and removal.[39]

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[36] Ibid., 82-3.

[37] Ibid., quoting Uri Averny, 'Les réfugiés arabes-obstacle à la paix', *Le Monde*, 9 May 1964, 2

[38] See, for example, letters from Ben Yehuda, 1882, cited in Eliezer Be'eri, *The Beginnings of the Israeli-Arab Conflicts*, Sifriat Po'alim, Haifa University Press, 1985, 38-9.

[39] 'We must expropriate gently the private property on the estates assigned to us. We shall try to spirit the penniless population across the border by procuring employment for it in the transit countries, while denying it any employment in our own country': diary entry for 12 June 1895; see Raphael Patai, ed., *The Complete Diaries of Theodor Herzl*, vol. 1, Harry Zohn, trans., New York: Herzl Press and T. Yoseloff, 1960, 88-9. See also the views of another founder of political Zionism, Israel Zangwill, cited in various places, including Flapan, S., *Zionism and the Palestinians*, 56; Gorny, *Zionism*

40. The same views were maintained through the twentieth century. Thus, Moshe Sharett, Ben-Gurion's chief deputy, Israel's first Foreign Minister and later Prime Minister, wrote from Istanbul to friends in Tel Aviv on **12 February 1914** that, despite newspaper stories that Arabs and Jews might live together in peace in Palestine,

> 'we must not be deluded by such illusive hopes... for if we cease to look upon our land, the Land of Israel, as ours alone and we allow a partner into our estate, all content and meaning will be lost to our enterprise.'[40]

41. 'Transfer', 'force', and 'expulsion', appear repeatedly in the writing of Zionist politicians and activists. In the words of Vladimir Jabotinsky, founder of the Revisionist Zionist party and ideologue both of *Irgun* (see above, paragraph 18), and of the Likud Party, 'The Islamic soul must be broomed out of Eretz Yisrael'.[41] Menahem Ussishkin, chairman of the Jewish National Fund and member of the Jewish Agency Executive, put it thus in 1930: 'We must continuously raise the demand that our land be returned to our possession... If there are other inhabitants there, they must be transferred to some other place. We must take over the land. We have a greater and nobler ideal than preserving several hundred thousands of Arab fellahin'.[42]

42. David Ben-Gurion, leader of the Zionist movement and head of the MAPI party during the 1930s, favoured various forms of 'transfer' at various times. In June **1938**, he wrote:

> 'The Hebrew State will discuss with the neighbouring Arab States the matter of voluntarily transferring Arab tenant farmers, workers and fellahin from the Jewish State to neighbouring states. For that purpose the Jewish State, or a special company... will purchase lands in neighbouring States for the resettlement of all those workers and fellahin'.[43]

43. Three years later, in **1941**, he wrote:

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and the Arabs, 1882-1948, 217; Paul Alsberg, 'The Arab Question in the Policy of the Zionist Executive before the First World War', (Hebrew), Shivat Tzion, Jerusalem, (1955-56), 206-7; Nur Masalka, *'Expulsion of the Palestinians: The Concept of 'Transfer' in Zionist Political Thought, 1882-1948'*, Washington, D.C., Institute for Palestinian Studies, 1992.

[40] Quoted in *Haaretz*, Friday Supplement, 1 Dec. 1995.

[41] Cited in Ya'acov Shavit, 'The Attitude of Zionist Revisionism towards the Arabs', in *Zionism and the Arab Question*, Hebrew, 74.

[42] *Daor Hayom*, Jerusalem, 28 April 1930.

[43] Protocol of the Jewish Agency Executive, Meeting, 7 June 1938, Jerusalem, confidential, no. 51, Central Zionist Archives, vol. 28, Jerusalem.

> 'We have to examine, first, if this transfer is practical and secondly, if it is necessary. It is impossible to imagine general evacuation without compulsion, and brutal compulsion... The possibility of a large-scale transfer of a population by force was demonstrated when the Greeks and the Turks were transferred [after the First World War]. In the present war [Second World War] the idea of transferring a population is gaining more sympathy as a practical and the most secure means of solving the dangerous and painful problem of national minorities. The war has already brought the resettlement of many people in eastern and southern Europe, and in the plans for post-war settlements the idea of a large-scale population transfer in central, eastern, and southern Europe increasingly occupies a respectable place'.[44]

44. Yosef Weitz, who was to become head of the Israeli government's official Transfer Committee in 1948 and Director of the Jewish National Fund's Settlement Department noted the following in his diary in 1940:

> 'Amongst ourselves it must be clear that there is no room for both peoples in this country. No "development" will bring us closer to our aim to be an independent people in this small country. After the Arabs are transferred, the country will be wide open for us; with the Arabs staying the country will remain narrow and restricted... There is no room for compromise on this point... land purchasing... will not bring about the State... The only way is to transfer the Arabs from here to neighbouring countries, all of them, except perhaps Bethlehem, Nazareth, and Old Jerusalem. Not a single village or a single tribe must be left. And the transfer must be done through their absorption in Iraq and Syria and even in Transjordan. For that goal, money will be found – even a lot of money. And only then will the country be able to absorb millions of Jews... There is no other solution'.[45]

45. It is also clear that what might have been described as political or idealistic rhetoric was in fact translated into military policy on the ground:

> '[W]e [the *Haganah*] adopt the system of aggressive defence; during the assault we must respond with a decisive blow: the destruction of the [Arab] place or the

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[44] David Ben-Gurion, 'Lines for Zionist Policy', 15 Oct. 1941.

[45] Weitz Diary, A246/7, entry for 20 Dec. 1940, 1090-1, Central Zionist Archives, Jerusalem; see also entries for 20 Feb. 1948, 17 Jul. 1941, ibid. 1204.

> expulsion of the residents along with the seizure of the place'.[46]

3.2 The intention to expel: From words to actions - 1948 and after

46. It is clear from the evidence that expulsions of Palestinian populations were intentionally undertaken, and that they were not dictated by military necessity, but by policy decisions taken at the highest levels of the Israeli government in waiting and the Israeli State after 14 May 1948.

47. In a Memorandum dated 10 May 1948, Aharon Cohen wrote:

> 'There is reason to believe that what is being done... is being done out of certain political objectives and not only out of military necessities... In fact, the "transfer" of the Arabs from the boundaries of the Jewish State is being implemented... the evacuation/clearing out of Arab villages is not always done out of military necessity. The complete destruction of villages is not always done because there are "no sufficient forces to maintain garrison".'[47]

48. These political/military objectives appear repeatedly in the statements of those responsible for the development and implementation of Zionist and later Israel policy. In the words of David Ben-Gurion again, in April 1948:

> 'We will not be able to win the war if we do not, during the war, populate upper and lower, eastern and western Galilee, the Negev and Jerusalem area... I believe that war will also bring in its wake a great change in the distribution of the Arab population'.[48]

49. Moshe Sharett, Foreign Minister of Israel from 1948 onwards, was similarly insistent, stating in August 1948:

> 'As for the future, we are equally determined... to explore all possibilities of getting rid, once and for all, of the huge Arab minority, which originally threaten us. What can be achieved in this period of storm and stress will be quite unattainable once conditions get stabilised. A group of people from among our senior officers [i.e.,

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[46] Ben-Gurion's advice on 19 Dec. 1947, on the eve of the 1948 war, cited in Simha Flapan, *The Birth of Israel: Myths and Reality*, New York: Pantheon Books; London, Croom Helm, 1987, 90.

[47] Aharon Cohen, Memorandum, 'Our Arab Policy During the War', 10 May 1948, in Giva'at Haviva, Hashomer Hatza'ir Archives, 10.10.95 (4).

[48] David Ben-Gurion to the Zionist Actions Committee, 6 Apr. 1948, Ben-Gurion, *Behilahem Yisrael* [*As Israel Fought*], Tel Aviv: Mapai Press, 1952, 86-7.

the Transfer Committee] has already started working on the study of resettlement possibilities in other lands'.[49]

50. As the Palestinian population was forcibly removed, special measures were considered necessary in order to preserve this new *status quo*. During **March and April 1948**, Josef Weitz oversaw the implementation of a policy which mainly focused on measures to ensure that there could and would be no return.[50]

51. The first unofficial Transfer Committee - composed of Weitz, Ezra Danin and Elias Sasson,[51] later to become the head of the Middle East Affairs Department of the Foreign Ministry - came into being at the end of May, following Danin's agreement to come in on the scheme in mid-May and the Foreign Minister's (Moshe Sharett) unofficial sanction of the Committee's existence and goals on 28 May 1948.[52] Danin suggested that as a matter of policy, they should destroy Arab houses, 'settle Jews in all the areas evacuated', and expropriate Arab property.[53]

52. On 5 June 1948, Weitz presented Ben-Gurion with a three page memorandum, signed by himself, Danin and Sasson, and entitled, 'Retroactive Transfer, A Scheme for the Solution of the Arab Question in the State of Israel'. The memorandum stated that the war had brought about 'the uprooting of masses [of Arabs] from their towns and villages and their flight out of the area of Israel... This process may continue as the war continues and [the Israeli army] advances'. The war and the expulsions had so deepened Arab enmity 'as perhaps to make possible the existence of hundreds of thousands of inhabitants who bear that hatred'. Israel therefore must be inhabited largely by Jews so that there will be in it very few non-Jews, and that 'the uprooting of the Arabs should be seen as a solution to the Arab question in the State of Israel and, in line with this, it must from now on be directed according to a calculated plan geared towards the goal of 'retroactive transfer'.

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[49] Moshe Sharett to Chaim Weizmann, President of the Provisional Council of the State of Israel, 18 Aug. 1948, cited in Benny Morris, *The Birth of the Palestinian Refugee Problem*, 1947-49, 149-50.

[50] See Morris, *Birth of the Palestinian Refugee Problem*, 254.

[51] Sasson was the director of the Arab Division of the Jewish Agency's Political Department. Danin was a senior Intelligence Service Officer. Morris, *Birth of the Palestinian Refugee Problem*, 30.

[52] Weitz Diary A246/13, entry for 28 May 1948, 2403.

[53] Ibid.

53. To consolidate and amplify the transfer, the Committee proposed that action be taken to prevent the Arabs from returning to their places of origin, and to extend help to the Arabs to be absorbed in other places. To prevent Arab return, the Committee further proposed the destruction of villages as much as possible during military operations; prevention of any cultivation of land, including reaping and harvesting of crops, picking olives and so on, also during times of cease-fire; the settlement of Jews in a number of towns and villages so that no 'vacuum' was created; legislation to prohibit return; and propaganda to discourage return.[54]

54. The Committee proposed that it oversee the destruction of Arab villages and the renovation of other sites for Jewish settlement, negotiate the purchase of Arab land, prepare legislation for expropriation, and negotiate the resettlement of the Arabs in Arab countries. According to Weitz, Ben-Gurion 'agreed to the whole line'.[55] Ben-Gurion also approved the Committee's start of organized destruction of the Arab villages, about which Weitz informed him. Using his Jewish National Fund (JNF) apparatus and network of land-purchasing agents and intelligence operatives, Weitz immediately set in motion the levelling of Arab villages. His agents toured the countryside to determine which villages should be destroyed and which should be preserved as suitable for Jewish settlement.[56]

55. Morris recounts that on **18 August 1948**, Ben-Gurion called a meeting to review Israeli policy on the issue of return, which was attended by the country's senior political leaders and senior political and Arab affairs officials. According to one official who was present, 'The view of the participants was unanimous, and the will to do everything possible to prevent the return of the refugees was shared by all'. Renewed orders went out to all IDF units to prevent the return of refugees.[57]

56. The political decision to bar return was repeatedly reaffirmed at various levels of government over the following months, as successive communities of exiles

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[54] Ibid., 136.

[55] However, Ben-Gurion thought that the Yishuv should first take care of the destruction of the Arab villages, establish Jewish settlements and prevent Arab cultivation and only later worry about plans for the organized resettlement of the refugees in Arab countries.

[56] Morris, *Birth of the Palestinian Refugee Problem*, 137.

[57] Ibid., 148-9.

asked to be allowed back.[58] In January 1949, the Israeli Cabinet voted 'to encourage introducing *olim* (new Jewish immigrants) into all abandoned villages in the Galilee'.[59]

57. Archival evidence confirms the impact of policy at ground level. In April 1949, for example, in regard to villages which had come under Israeli rule as a result of the Armistice Agreement with Jordan (3 April 1949) and which were specifically protected by Article VI, paragraph 6, Ben-Gurion called a meeting to discuss whether the Arab inhabitants should be allowed to remain.[60] Later the same month, Foreign Minister Sharett indicated at a meeting of the MAPAI members of the Knesset that, 'the intention is to get rid of them. The interests of security demand that we get rid of them.'[61]

58. The right to return has been consistently rejected by Israeli representatives in the Knesset (Moshe Sharett, 15 June 1949), the UN General Assembly (Abba Eban, 17 November 1958; Tekoah, 13 December 1972), and the UN Special Political Committee (Comaj, 9 December 1968).

59. The official Israeli position on the origins of the Palestinian refugee problem (above, paragraph 24) thus fails to accord with the historical record set out by Benny Morris and other Israeli scholars, such as Avi Schlaim and Ilan Pappe, who recognise Israel's responsibility for the flight of the Palestinians.[62]

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[58] Ibid., 154.

[59] David Ben-Gurion, *'The War Diary, 1948-1949*, entry for 9 Jan. 1949, 926.

[60] Political Consultations, 4/12/49, State Archives, Foreign Ministry, 2447/3.

[61] MAPAI party Members of Knesset meeting, Labor Party Archive, section 2, 11/1/1. MAPAI (Mifleget Poalei Eretz Israel -- Land of Israel Worker's Party) was established in 1930 as a Zionist-socialist party and served as the dominant political party in the pre-State and early post-State years.

[62] See, among others, Simha Flapan, *The Birth of Israel: Myths and Reality*, London: Croom Helm, 1987; Tom Segev, *1949: The First Israelis*, New York: The Free Press, 1986; Ilan Pappe, *The Making of the Arab-Israeli Conflict, 1947-1951*, London: I. B. Tauris, 1992.

4. Policy and practice post-flight and/or expulsion: Changing the demographic and physical character of Palestine

60. During 1948 and the first half of 1949, a number of processes definitively changed the physical and demographic character of Palestine. Taken collectively, they steadily rendered the practical possibility of an Arab return more and more remote. These processes were the gradual destruction of the abandoned Arab villages, the cultivation and destruction of Arab fields, the share-out of 'abandoned' Arab lands to Jewish settlements, and the settlement of Jewish immigrants in empty Arab housing in the countryside and in urban neighbourhoods. Together, these events ensured that there would be nowhere and nothing to which the refugees could return.[63]

4.1 Destruction of villages

61. The General Assembly's Resolution 181 (II) of 29 November 1947 gave the proposed Jewish State some 54 per cent of Palestine land (see above, paragraph 8). Then a minority, largely urban population owning no more than 6-7 per cent of the land, it made tactical sense for the Zionists to accept partition, just as much as it did for the Palestinian majority to reject it. They resisted from the next day, and so began Israel's 'war of independence' and the Palestinian *nakba* (catastrophe). The Zionists were comparatively ready, well-organized and equipped for the resistance and the war that was to come; the Palestinian community, however, was not. It lacked cohesion, was subject to clan rivalries, various external pressures, and lack of military training and expertise.

62. While the Palestinians resisted partition, Zionist defence and retaliation operations began to merge into an offensive strategy by early 1948. After December 1947, the dynamiting of Arab houses and parts of villages became a major component of most *Haganah* retaliatory strikes.[64] About 350 Arab villages and towns were depopulated in the course of the 1948-49 war and during its immediate aftermath. By mid-1949, the majority of these sites were either completely or partly in ruins and uninhabitable. The destruction in the 350 villages was due to vandalism and looting, and to deliberate demolition,

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[63] Morris, *Birth of the Palestinian Refugee Problem*, 155.

[64] Ibid., 155-6.

with explosives, bulldozers and, occasionally, hand tools, by *Haganah* and IDF units or neighbouring Jewish settlements in the months after their conquest.

63. The destruction of villages became a major political enterprise.[65] During the second half of 1948, and through 1949 and the early 1950s, the destruction of forcefully abandoned Arab sites, usually already half-destroyed, continued.[66]

4.2 Takeover and allocation of Palestinian lands

64. The takeover of Arab property in Palestine began with the *ad hoc*, more or less spontaneous, reaping of crops in forcefully abandoned Arab lands by Jewish settlements in the Spring of 1948. This was encouraged by the entry into Palestine of Oriental Jews and Jewish immigrants. The summer crop ripened first in the Negev, which is where Jewish reaping of Arab fields began. As the summer crops ripened and as the Arab evacuation gained momentum, Jewish harvesting of Arab fields spread to other parts of the country.

65. During late April and early May, as requests from settlements and regional councils to harvest abandoned fields poured into the Committee for Abandoned (Arab) Property, headed by Gad Machnes, the Committee's Yitzak Gvirtz began to organize the cultivation. The Committee for Abandoned Property–which soon became the Arab Property Department and then the Villages Department in the Office of the Custodian for Abandoned Property–regarded the forcibly abandoned crop as Israeli state property and sold the right to reap it to Jewish farmers and settlements. By 10 October 1948, the Ministry of Agriculture had formally leased or approved the leasing for cultivation of 320,000 dunums (a dunum is approximately equal to a quarter acre) of 'abandoned' land, and Ministry Secretary Avarham Hanuki expected that another 80,000 would soon be approved for Jewish cultivation. The ministry anticipated leasing a further one million dunums during the second half of 1949.[67]

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[65] Ibid., 160.

[66] Ibid.

[67] Ibid., 179.

4.3 Establishment of new settlements

66. There were 279 Jewish settlements in Palestine on 29 November 1947. Between the start of Arab-Jewish hostilities and the beginning of March 1949, 53 new Jewish settlements were established, followed by 80 more at the end of August 1949. Almost all these settlements were established on Arab-owned lands and dozens were established on territory earmarked in the 1947 United Nations Partition Resolution for the Palestine Arab State. As Foreign Minister Sharett noted in a statement to the Knesset on 15 June 1949, 'a flood of immigration had set in and a large part of the geographical and economic vacuum created by the exodus was filled.'[68] The settlements, mostly kibbutzim, expanded and deepened the Jewish hold on parts of Palestine.[69]

67. The accommodation of new immigrants in abandoned Arab housing began in the towns in 1948, starting almost immediately with the forced flight of Arab families from mixed Jewish-Arab districts in the mixed cities. An early trace of the policy can be found in Ben-Gurion's instructions to the newly-appointed *Haganah* commander in Jerusalem, David Shaltiel, at the end of January 1948. Some Arab districts in western Jerusalem had already been abandoned, and Ben-Gurion ordered Shaltiel 'to settle Jews in every house in abandoned, half-Arab neighbourhoods...'

68. The Transfer Committee first proposed that the government adopt the settlement of new immigrants in abandoned Arab houses as part of a coherent and multi-faceted programme to bar return of the refugees.[70] In April 1949, Yoseftal reported that of 190,000 immigrants who had arrived since the establishment of the State, 110,000 had been settled in abandoned Arab houses.[71]

4.4 Palestinian/Israeli Citizenship

69. The Palestinian refugees were not only barred from returning to their homes, but were also effectively and retroactively deprived of their citizenship. Under

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[68] He added, '[W]e shall help in the resettlement of these displaced persons. We shall not follow the example of other nations in every respect. We shall pay compensation for abandoned lands...' http://www.israel.org/mfa/go.asp?MDAH01at0.

[69] Morris, *Birth of the Palestinian Refugee Problem*, 179.

[70] Ibid., 190.

[71] Ibid., 195.

Ottoman rule, the inhabitants of Palestine were considered Turkish nationals. Under the British mandate, and pursuant to League of Nations policy, the inhabitants of such territories were not considered nationals of the administering powers, although they benefited from the exercise of diplomatic protection.[72] Accordingly, Palestinian citizens were treated in Great Britain as British Protected Persons, although not as British Subjects.[73] Mandate citizenship was regulated by the Palestinian Citizenship Order 1925-41[74] and included acquisition by birth.[75] Palestinian citizens were eligible for a British passport issued by the government of Palestine. The passport referred to the national status of its holder as 'Palestinian citizen under Article One or Three of the Palestinian Citizenship Order, 1925-41'.[76]

70. Palestinian citizenship as a construct of British legislation terminated with the mandate, and with the proclamation of the State of Israel on 15 May 1948. Under international law, citizenship and other laws *can* continue to apply, even after a territory has been annexed or abandoned; this is generally a matter for the 'new' sovereign, or is settled by agreement between the States. However, only one (Israeli) court has come to such a conclusion in the Palestinian context, and that was soon overtaken by municipal legislation.[77]

71. Thus, the Palestinians' nationality status fell within a legal lacuna. Although Israel had no nationality legislation until 1952, Israeli courts held that on the termination of the mandate, former citizens of Palestine lost their citizenship

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[72] See League Council Resolution of 22 April 1923, Official Journal, 604, quoted in Paul Weis, *Nationality and Statelessness in International Law*, 20 (2nd edn., 1979).

[73] Weis, *Nationality and Statelessness*, above n. 54, 18-20, 22. See *R v. Ketter* [1940] 1 KB 787, where it was held that the appellant, a native of Palestine born when that territory was under Turkish sovereignty, but holding a passport marked 'British Passport–Palestine', had not become a British subject by virtue of art. 30 of the Treaty of Lausanne of 24 July 1923 (UKTS, No. 16/1923), or under the terms of the Mandate agreement of 24 July 1922, since Palestine was not transferred to and, consequently, was not annexed by Great Britain by either Treaty or Mandate. See also, Goodwin-Gill, G. S., 'A note on nationality issues affecting Palestinians', in *The Refugee in International Law*, (2nd edn., 1996), 241-6.

[74] S.R. & O., 1925, No. 25.

[75] Art. 3, Palestinian Citizenship Order.

[76] See Takkenberg, *Palestinian Refugees*, 180, note 35, citing a copy of a passport on file.

[77] *A.B. v. M.B.*, 17 *ILR* 110 (1950), (holding that 'So long as no law has been enacted providing otherwise, my view is that every individual who, on the date of the establishment of the State of Israel, was resident in the territory which today constitutes the State of Israel, is also a national of Israel.')

without acquiring any other.[78] For purposes of Israeli municipal law, the issue was resolved by a Supreme Court decision[79] and by the Nationality Law.[80] The 1952 Law confirmed repeal of the Palestinian Citizenship Orders 1925-41, retroactively to the day of the establishment of the State of Israel.[81] It declared itself the exclusive law on citizenship, which was available by way of return, residence, birth and naturalization.[82] Former Palestinian citizens of Arab origin were eligible for Israeli nationality provided that they met the conditions of section 3:

> (a) A person who immediately before the establishment of the State, was a Palestinian citizen and who does not become an Israeli national under section 2, shall become an Israeli national with effect from the day of the establishment of the State if:
>
> (1) he was registered on the 4th Adar, 5712 (1 March 1952) as an inhabitant under the Registration of Inhabitants Ordinance, 5709-1949; and
>
> (2) he is an inhabitant of Israel on the day of the coming into force of this Law; and
>
> (3) he was in Israel, or in an area which became Israeli territory after the establishment of the State to the day of the coming into force of this Law, or entered Israel legally during that period.
>
> (b) A person born after the establishment of the State who is an inhabitant of Israel on the day of the coming into force of this Law, and whose father or mother becomes an Israeli national under subsection (a), shall become an Israeli national with effect from the day of his birth.

72. These strict requirements meant that the vast majority of those who, as a result of the 1948 war, left the territory of what became Israel, were effectively denied Israeli citizenship.

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[78] See *Oseri v. Oseri* (1953) 8 PM 76; 17 ILR (1950); *Estate of Shifris* (1950-51) 3 PM 222.

[79] *Hussein v. Governor of Acre Prison*, (1952) 6 PD 897, 901; 17 *ILR* 111 (1950), holding that Palestinian citizenship ceased to exist, in the territory of Israel and in other parts of the former mandated territory of Palestine, after the establishment of the State of Israel and the annexation of the other parts to neighbouring States. See also *Nakara v. Minister of the Interior* (1953) 7 PD 955; 20 *ILR* 49 (1953).

[80] Nationality Law, 5712/1952, 93 *Official Gazette* 22 (1952).

[81] Section 18(A).

[82] Section 1.

Annex (II)

55. Address by Prime Minister Begin at the National Defense College, 8 August 1982.

In a lengthy address to the graduating class of the IRE National Defense College, the Prime Minister explained his views on wars of no choice and wars of alternatives. The war in Lebanon, he argued, was a war of no choice. He ennumerated the conditions for such a war to take place. In the course of his speech he revealed the contents of a letter he sent to Secretary of State Shultz, stating Israel's conditions for the removal of the P.L.O. from Beirut. Israel now agreed to a multinational force moving to West Beirut following the withdrawal of "most" of the P.L.O. personnel there. He implied that Israel had now changed its previous stand. Heretofore it insisted that the multinational force enter Beirut only after the total P.L.O. withdrawal. Excerpts:

A classic war of no alternative was the Second World War waged by the Allies. On August 23, 1939, Great Britain stood helpless. Although she still had an empire embracing an area of 40 million square kilometres, on which the sun never set, her prestige had sunk deep in the seven seas over which it still ruled, though no longer exclusively.

Britain and France disavowed the assurance given to Czechoslovakia and together forced that small and courageous nation to bend its knee before Hitler...

On August 23, 1939, the German Ribbentrop and the Soviet Molotov signed a treaty. Behind them stood the blood tyrant named Joseph Vissarionovich Stalin...

And so war broke out on September 1, 1939, when the Nazi German army crossed the Polish-German border.

Poland fought because she had no alternative. Within three day the Polish army was crushed and the Polish state ceased to exist.

In those days the Bolshevik propagandists told everyone who would listen that there was a supreme genius sitting in the Kremlin, but in international relations, he understood nothing... On June 22, 1941, the German army attacked the Soviet army...

This was, then, a war of no alternative for Poland, a war without option for France and a war without choice for Russia.

What price did humanity pay for this war of no alternative? Between 30 and 40 million killed, three times this number wounded, among them six million Jews - the only people against whom the Nazi Germans used gas. (Hitler had a very large stock of gas, but he did not use it against other peoples, for fear of the reaction).

This is the terrible consequence of a war of no alternative. Humanity was placed on the edge of the abyss, when Nazi Germany was not far from total victory. In 1944, Germany was close to developing the atom bomb.

Was it possible to prevent the Second World War?

Today, thanks to research and the facts known to us, there is no longer any doubt about the answer: Yes, indeed, it was possible to prevent it.

On March 7, 1936, Hitler announced that he was abrogating the Treaty of Versailles. In order to implement his decision, he introduced two battalions of the German army into the demilitarized Rhineland. At that time, two French divisions would have sufficed to capture all the German soldiers who entered the Rhineland. As a result of that, Hitler would have fallen.

His prestige would have crumbled. At that time, he did not yet have an army worthy of the name, only gangs of SS, SA and Gestapo. Two French divisions, with their tanks, and with the air force at their disposal, would have blasted this entire German armed force to the four winds.

If this had happened, the Second World War would have been prevented, more than 30 million people would have remained alive, tens of millions of others would not have been wounded and the tragedy of Hiroshima would have been averted. Humanity would have looked different today. The six million Jews slaughtered then would today be more than 12 million, and the whole of Eretz Yisrael would be in our hands.

The Second World War, which broke out on September 1, 1939, actually began on March 7, 1936. If only France, without Britain (which had some excellent combat divisions) had attacked the aggressor, there would have remained no trace of Nazi German power and war which, in three years, changed the whole of human history, would have been prevented.

This, therefore, is the international example that explains what is a war without choice, or a war of one's choosing.

Let us turn from the international example to ourselves. Operation Peace for Galilee is not a military operation resulting from the lack of an alternative. The terrorists did not threaten the existence of the State of Israel; they "only" threatened the lives of Israel's citizens and members of the Jewish people. There are those who find fault with the second part of that sentence. If there was no danger to the existence of the state, why did you go to war?

I will explain why. We had three wars which we fought without alternative. The first was the War of Independence, which began on November 30, 1947, and lasted until January 1949. It is worthwhile remembering these dates, because there are also those who try to deceive concerning the nine weeks which have already passed since the beginning of Operation Peace for Galilee. This was a war without alternative, after the Arab armies invaded Eretz Israel. If not for our ability, none of us would have remained alive.

What happened in that war, which we went off to fight with no alternative?

Six thousand of our fighters were killed. We were then 650,000 Jews in Eretz Israel, and the number of fallen amounted to about 1 percent of the Jewish population. In proportion to our population today, about 1 percent would mean 30,000 killed and about 90,000 wounded. Could we live with

those who say, "Follow me! "

We carried on our lives then by a miracle, with a clear recognition of life's imperative: to win, to establish a state, a government, a parliament, a democracy, an army - a force to defend Israel and the entire Jewish people.

The second war of no alternative was the Yom Kippur War and the War of Attrition that preceded it. What was the situation on that Yom Kippur day [October 6, 1973]? We had 177 tanks deployed on the Golan Heights against 1,400 Soviet Syrian tanks; and fewer than 500 of our soldiers manned positions along the Suez Canal against five divisions sent to the front by the Egyptians.

Is it any wonder that the first days of that war were hard to bear? I remember Aluf Avraham Yaffe came to us, to the Knesset Foreign Affairs and Defence Committee, and said: "Oy, it's so hard! Our boys, 18- and 19-year-olds, are falling like flies and are defending our nation with their very bodies."

In the Golan Heights there was a moment when the O/C Northern Command - today our chief of staff - heard his deputy say, "This is it." What that meant was "We've lost; we have to come down off the Golan Heights. And the then OIC said, "Give me another five minutes".

Sometimes five minutes can decide a nation's fate. During those five minutes, several dozen tanks arrived, which changed the entire situation on the Golan Heights.

If this had not happened, if the Syrian enemy had -come down from the heights to the valley, he would have reached Haifa - for there was not a single tank to obstruct his armoured column's route to Haifa. Yes, we would even have fought with knives - as one of our esteemed wives has said - with knives against tanks. Many more would have fallen, and in every settlement there would have been the kind of slaughter at which the Syrians are experts.

In the south, our boys in the outposts were taken prisoner, and we know what happened to them afterwards. Dozens of tanks were destroyed, because tanks were sent in piecemeal, since we could not organize them in a large formation. And dozens of planes were shot down by missiles which were not destroyed in time, so that we had to submit to their advances.

Woe to the ears that still ring with the words of one of the nation's heroes, the then defence minister, in whose veins flowed the blood of the Maccabees: "We are losing the Third Commonwealth."

Our total casualties in that war of no alternative were 2,297 killed, 6,067 wounded. Together with the War of Attrition -which was also a war of no alternative - 2,659 killed, 7,251 wounded. The terrible total: almost 10,00 casualties.

Our other wars were not without an alternative. In November 1956 we had a choice. The reason for going to war then was the need to destroy the fedayeen, who did not represent a danger to the existence of the state.

However, the political leadership of the time thought it was necessary to do this. As one who served in the parliamentary opposition, I was summoned to David Ben-Gurion before the cabinet received information of the plan, and he found it necessary to give my colleagues and myself these details: We are going to meet the enemy before it absorbs the

Soviet weapons which began to flow to it from Czechoslovakia in 1955.

I said: "We shall stand together, with no reservations. This is a holy war." And indeed, we stood together until the withdrawal, without a peace treaty and without the demilitarization of Sinai.

Thus we went off to the Sinai Campaign. At that time we conquered most of the Sinai peninsula and reached Sharm e-Sheikh. Actually, we accepted and submitted to an American dictate, mainly regarding the Gaza Strip (which David Ben-Gurion called "the liberated portion of the homeland'). John Foster Dulles, the then secretary of state, promised Ben-Gurion that an Egyptian army would not return to Gaza.

The Egyptian army did enter Gaza. David Ben-Gurion sent Mrs. Meir to Washington to ask Foster Dulles: "What happened? Where are the promises?" And he replied: "Would you resume the war for this?"

After 1957, Israel had to wait 10 full years for its flag to fly again over that liberated portion of the homeland.

In June 1967 we again had a choice. The Egyptian army concentrations in the Sinai approaches do not prove that Nasser was really about to attack us. We must be honest with ourselves. We decided to attack him.

This was a war of self-defence in the noblest sense of the term. The government of national unity then established decided unanimously: We will take the initiative and attack the enemy, drive him back, and thus assure the security of Israel and the future of the nation.

We did not do this for lack of an alternative. We could have gone on waiting. We could have sent the army home. Who knows if there would have been an attack against us? There is no proof of it. There are several arguments to the contrary. While it is indeed true that the closing of the Straits of Tiran was an act of aggression, a *causus belli*, there is always room for a great deal of consideration as to whether it is necessary to make a *causus* into a *bellum*.

And so there were three wars with no alternative - the War of Independence, the War of Attrition and the Yom Kippur War - and it is our misfortunate that our wars have been so. If in the two other wars, the wars of choice - the Sinai Campaign and the Six Day War - we had losses like those in the no alternative wars, we would have been left today with few of our best youth, without the strength to withstand the Arab world.

As for Operation Peace for Galilee, it does not really belong to the category of wars of no alternative. We could have gone on seeing our civilians injured in Metulla or Kiryat Shmona or Nahariya. We could have gone on counting those killed by explosive charges left in a Jerusalem supermarket, or a Petah Tikva bus stop.

All the orders to carry out these acts of murder and sabotage came from Beirut. Should we have reconciled ourselves to the ceaseless killing of civilians, even after the agreement ending hostilities reached last summer, which the terrorists interpreted as an agreement permitting them to strike at us from every side, besides southern Lebanon? They tried to infiltrate gangs of murderers via Syria and Jordan, and by a miracle we captured them. We might also not have captured them. There was a gang of four terrorists which infiltrated from Jordan, whose members admitted they had been about to commandeer a bus (and we remember the bus on the coastal road).

And in the Diaspora? Even Philip Habib interpreted the agreement

ending acts of hostility as giving them freedom to attack targets beyond Israel's borders. We have never accepted this interpretation. Shall we permit Jewish blood to be spilled in the Diaspora? Shall we permit bombs to be planted against Jews in Paris, Rome, Athens or London? Shall we permit our ambassadors to be attacked?

There are slanderers who say that a full year of quiet has passed between us and the terrorists. Nonsense. There was not even one month of quiet. The newspapers and communications media, including The New York Times and The Washington Post, did not publish even one line about our capturing the gang of murderers that crossed the Jordan in order to commandeer a bus and murder its passengers.

True, such actions were not a threat to the existence of the state. But they did threaten the lives of civilians, whose number we cannot estimate, day after day, week after week, month after month.

During the past nine weeks, we have in effect destroyed the combat potential of 20,000 -terrorists. We hold 9,000 in a prison camp. Between 2,000 and 3,000 were killed and between 7,000 and 9,000 have been captured and cut off in Beirut. They have decided to leave there only because they have no possibility of remaining there. They will leave soon. We made a second condition: after the exit of most of the terrorists, an integrated multi-national force will enter. But if the minority refuse to leave, you - the U.S., Italy and France - must promise us in writing that you, together with the Lebanese army, will force them, the terrorists, to leave Beirut and Lebanon. They have the possibility of forcing 2,000-2,500 terrorists who will remain after the majority leaves.

And one more condition: if you aren't willing to force them, then, please, leave Beirut and Lebanon, and the I.D.F. will solve the problem.

This is what I wrote the Secretary of State today, and I want you and all the citizens of Israel and the U.S. to know it.

The problem will be solved. We can already now look beyond the fighting. It will end, as we hope, shortly. And then, as I believe, recognize and logically assume, we will have a protracted period of peace. There is no other country around us that is capable of attacking us.

We have destroyed the best tanks and planes the Syrians had. We have destroyed 24 of their ground-to-air missile batteries. After everything that happened, Syria did not go to war against us, not in Lebanon and not in the Golan Heights.

Jordan cannot attack us. We have learned that Jordan is sending telegrams to the Americans, warning that Israel is about to invade across the Jordan and capture Amman.

For our part, we will not initiate any attack against any Arab country. We have proved that we do not want wars. We made many painful sacrifices for a peace treaty with Egypt. That treaty stood the test of the fighting in Lebanon; in other words, it stood the test.

The demilitarized zone of 150 kilometres in Sinai exists and no Egyptian soldier has been placed there. From the experience of the 1930s, I have to say that if ever the other side violated the agreement about the demilitarized zone, Israel would be obliged to introduce, without delay, a force stronger than that violating the international commitment; not in order to wage war, but to achieve one of two results: restoration of the previous situation, i.e., resumed demilitarization, and the removal of both armies from the demilitarized zone; or attainment of strategic depth, in case the other side has taken the first step towards a war of aggression,

demilitarized zone in the Rhineland.

Because the other Arab countries are completely incapable of attacking the State of Israel, there is reason to expect that we are facing a historic period of peace. It is obviously impossible to set a date.

It may well be that "The land shall be still for 40 years." Perhaps less, perhaps more. But from the facts before us, it is clear that, with the end of the fighting in Lebanon, we have ahead of us many years of establishing peace treaties and peaceful relations with the various Arab countries.

The conclusion - both on the basis of the relations between states and on the basis of our national experience - is that there is no divine mandate to go to war only if there is no alternative. There is no moral imperative that a nation must, or is entitled to, fight only when its back is to the sea, or to the abyss. Such a war may avert tragedy, if not a Holocaust, for any nation; but it causes it terrible loss of life.

Quite the opposite. A free, sovereign nation, which hates war and loves peace, and which is concerned about its security, must create the conditions under which war, if there is a need for it, will not be for lack of alternative. The conditions much be such - and their creation depends upon man's reason and his actions - that the price of victory will be few casualties, not many.

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Annex (III)

Treaty of Peace

Between

The Hashemite Kingdom of Jordan

And

The State of Israel

Preamble

The Government of the Hashemite Kingdom of Jordan and the Government of the State of Israel:

Bearing in mind the Washington Declaration, signed by them on 25th July, 1994, and which they are both committed to honor,

Aiming at the achievement of a just, lasting and comprehensive peace in the Middle East based on Security Council resolutions 242 and 338 in all their aspects;

Bearing in mind the importance of maintaining and strengthening peace based on freedom, equality, justice and respect for fundamental human rights, thereby overcoming psychological barriers and promoting human dignity;

Reaffirming their faith in the purposes and principles of the Charter of the United Nations and recognizing their right and obligation to live in peace with each other as well as with all states, within secure and recognized boundaries;

Desiring to develop friendly relations and co-operation between them in accordance with the principles of international law governing international relations in time of peace;

Desiring as well to ensure lasting security for both their States and in particular to avoid threats and the use of force between them;

Bearing in mind that in their Washington Declaration of 25th July, 1994, they declared the termination of the state of belligerency between them;

Deciding to establish peace between them in accordance with this Treaty of Peace;

Have agreed as follows:

Article 1 - **Establishment of Peace**

Peace is hereby established between the Hashemite Kingdom of Jordan and the State of Israel (the "Parties") effective from the exchange of the instruments of ratification of this Treaty.

Article 2 - **General Principles**

The Parties will apply between them the provisions of the Charter of the United Nations and the principles of international law governing relations among states in time of peace. In particular:

1. They recognize and will respect each other's sovereignty, territorial integrity and political independence;

2. They recognize and will respect each other's right to live in peace within secure and recognized boundaries;

3. They will develop good neighborly relations of co-operation between them to ensure lasting security, will refrain from the threat or use of force against each other and will settle all disputes between them by peaceful means;

4. They respect and recognize the sovereignty, territorial integrity and political independence of every state in the region;

5. They respect and recognize the pivotal role of human development and dignity in regional and bilateral relationships;

6. They further believe that within their control, involuntary movements of persons in such a way as to adversely prejudice the security of either Party should not be permitted.

Article 3 - **International Boundary**

1. The international boundary between Jordan and Israel is delimited with reference to the boundary definition under the Mandate as is shown in Annex I (a), on the mapping materials attached thereto and coordinates specified therein.

2. The boundary, as set out in Annex I (a), is the permanent, secure and recognized international boundary between Jordan and Israel, without prejudice to the status of any territories that came under Israeli military government control in 1967.

3. The Parties recognize the international boundary, as well as each other's territory, territorial waters and airspace, as inviolable, and will respect and comply with them.

4. The demarcation of the boundary will take place as set forth in Appendix (I) to Annex I and will be concluded not later than 9 months after the signing of the Treaty.

5. It is agreed that where the boundary follows a river, in the event of natural changes in the course of the flow of the river as described in Annex I (a), the boundary shall follow the new course of the flow. In the event of any other changes the boundary shall not be affected unless otherwise agreed.

6. Immediately upon the exchange of the instruments of ratification of this Treaty, each Party will deploy on its side of the international boundary as defined in Annex I (a).

7. The parties shall, upon the signature of the Treaty, enter into negotiations to conclude, within 9 months, an agreement on the delimitation of their maritime boundary in the Gulf of Aqaba.

8. Taking into account the special circumstances of the Baqura/Naharayim area, which is under Jordanian sovereignty, with Israeli private ownership rights, the Parties agree to apply the provisions set out in Annex I (b).

9. With respect to the Al-Ghamr/Zofar area, the provisions set out in Annex I (c) will apply.

Article 4 - **Security**

1. a. Both Parties, acknowledging that mutual understanding and co-operation in security-related matters will form a significant part of their relations and will further enhance the security of the region, take upon themselves to base their security relations on mutual trust, advancement of joint interests and co-operation, and to aim towards a regional framework of partnership in peace,

b. Towards that goal, the Parties recognize the achievements of the

European Community and European Union in the development of the Conference on Security and Co-operation in Europe (CSCE) and commit themselves to the creation, in the Middle East, of a conference on Security and Co-operation in the Middle East (CSCME).

This commitment entails the adoption of regional models of security successfully implemented in the post World War area (along the lines of the Helsinki Process) culminating in a regional zone of security and stability.

2. The obligations referred to in this Article are without prejudice to the inherent right of self-defense in accordance with the United Nations Charter.

3. The Parties undertake, in accordance with the provisions of this Article, the following:

   a. To refrain from the threat of use of force or weapons, conventional, non-conventional or of any other kind, against each other, or of other actions or activities that adversely affect the security of the other Party;

   b. To refrain from organizing, instigating, inciting, assisting or participating in acts or threats of belligerency, hostility, subversion or violence against the other Party;

   c. To take necessary and effective measures to ensure that acts or threats of belligerency, hostility, subversion or violence against the other Party do not originate from, and are not committed within, through or over their territory (hereinafter the term "territory" includes the airspace and territorial waters).

4. Consistent with the area of peace and with the efforts to build regional security and to avoid and prevent aggression and violence, the Parties further agree to refrain from the following:

   a. Joining or in any way assisting, promoting or co-operating with any coalition, organization or alliance with a military or security character with a third party, the objectives or activities of which include launching aggression or other acts of military hostility against the other Party, in contravention of the provisions of the present Treaty;

   b. Allowing the entry, stationing and operating on their territory, or through it, of military forces, personnel or material of a third party, in circumstances which may adversely prejudice the security of the other Party.

5. Both Parties will take necessary and effective measures, and will co-operate in combating terrorism of all kinds. The Parties undertake:

    a. To take necessary and effective measures to prevent acts of terrorism, subversion or violence from being carried out from their territory or through it and to take necessary and effective measures to combat such activities and all their perpetrators;

    b. Without prejudice to the basic rights of freedom of expression and association, to take necessary and effective measures to prevent the entry, presence and operation in their territory of any group or organization, and their infrastructure which threatens the security of the other Party by the use of, or incitement to the use of, violent means;

    c. To co-operate in preventing and combating cross-boundary infiltrations.

6. Any question as to the implementation of this Article will be dealt with through a mechanism of consultations which will include a liaison system, verification, supervision, and where necessary, other mechanisms, and higher level consultations. The details of the mechanism of consultations will be contained in an agreement to be concluded by the Parties within 3 months of the exchange of the instruments of ratification of this Treaty.

7. The Parties undertake to work as a matter of priority, and as soon as possible, in the context of the Multilateral Working Group on Arms Control and Regional Security, and jointly, towards the following:

    a. The creation in the Middle East of a region free from hostile alliances and coalitions;

    b. The creation of a Middle East free from weapons of mass destruction, both conventional and non-conventional, in the context of a comprehensive, lasting and stable peace, characterized by the renunciation of the use of force, and by reconciliation and good will.

Article 5- **Diplomatic and Other Bilateral Relations**

1. The Parties agree to establish full diplomatic and consular relations and to exchange resident ambassadors within one month of the exchange of the instruments of ratification of this Treaty.

2. The Parties agree that the normal relationship between them will further include economic and cultural relations.

Article 6 - **Water**

With the view to achieving a comprehensive and lasting settlement of all the water problems between them:

1. The Parties agree mutually to recognize the rightful allocations of both of them in Jordan River and Yarmouk River waters and Araba/Arava ground water in accordance with the agreed acceptable principles principles, quantities and quality as set out in Annex II, which shall be fully respected and complied with.

2. The parties, recognizing the necessity to find a practical, just and agreed solution to their water problems and with the view that the subject of water can form the basis for the advancement of co-operation between them, jointly undertake to ensure that ensure that the management and development of their water resources do not, in any way, harm the water resources of the other party.

3. The parties recognize that their water resources are not sufficient to meet their needs. More water should be supplied for their use through various methods, including projects of regional and international co-operation.

4. In light of paragraph 3 of this Article, with the understanding that co-operation in water-related subjects would be to the benefit of both Parties, and will help alleviate their water shortages, and that water issues along their entire boundary must to be dealt with in their totality, including the possibility of trans-boundary water transfers, the Parties agree to search for ways to alleviate water shortages and to co-operate in the following fields:

    a. Development of existing and new water resources, increasing the water availability, including cooperation on a regional basis, as appropriate, and minimizing wastage of water resources through the chain of their uses;

    b. Prevention of contamination of water resources;

    c. Mutual assistance in the alleviation of water shortages;

    d. Transfer of information and joint research and development in

water-related subjects, and review of the potentials for enhancement of water resources development and use.

5. The implementation of both parties undertakings under this article is detailed in Annex II.

Article 7 - **Economic Relations**

1. Viewing economic development and prosperity as pillars of peace, security and harmonious relations between states, peoples and individual human beings, the parties, taking mote of understandings reached between them, affirm their mutual desire to promote economic co-operation between them, as well as within the framework if wider regional economic co-operation.

2. In order to accomplish this goal, the parties agree to the following:

    a. To remove all discriminatory barriers to normal economic relations, to terminate economic boycotts directed at the other Party, and to co-operate in terminating boycotts against either Party by third parties;

    b. Recognizing that the principle of free and unimpeded flow of goods and services should guide their relations, the parties will enter into negotiations with a view to concluding agreements on economic co-operation, including trade and the establishment of a free trade area or areas, investment, banking, industrial co-operation and labor, for the purpose of promoting beneficial economic relations, based on principles to be agreed upon, as well as on human development considerations on a regional basis. These negotiations will be concluded no later than 6 months from the exchange of the instruments of ratification of this Treaty;

    c. To co-operate bilaterally, as well as in multilateral forums, toward the promotion of their respective economies and of their neighborly economicrelations with other regional parties.

Article 8 - **Refugees and Displaced Persons**

Recognizing the massive human problems caused to both Parties by the conflict in the Middle East, as well as the contribution made by them towards the alleviation

of human suffering, the parties will seek to further alleviate those problems arising on a bilateral level.

1. Recognizing that the above human problems caused by the conflict in the Middle East cannot be fully resolved on the bilateral level, the Parties will seek to resolve them in appropriate forums, in accordance with international law, including the following:

   a. In the case of displaced persons, in a quadripartite committee together with Egypt and the Palestinians;

   b. In the case of refugees,

      (i) In the framework of the Multilateral Working Group on Refugees;

      (ii) In negotiations, in a framework to be agreed, bilateral or other wise in conjunction with and at the same time as the permanent status negotiations pertaining to the Territories referred to in Article 3 of this Treaty;

   c. Through the implementation of agreed United Nations programs and other agreed international economic programs concerning refugees and displaced persons, including assistance to their settlement.

Article 9 - **Places of Historical and Religious Significance and Interfaith Relations**

1. Each Party will provide freedom of access to places of religious and historical significance.

2. In this regard, in accordance with the Washington Declaration, Israel respects the present special role of the Hashemite Kingdom of Jordan in Muslim Holy shrines in Jerusalem. When negotiations on the permanent status will take place, Israel will give high priority to the Jordanian historic role in these shrines.

3. The Parties will act together to promote interfaith relations among the three monotheistic religions, with the aim of working towards religious understanding , moral commitment, freedom of religious worship, and tolerance and peace.

Article 10 - **Cultural and Scientific Exchanges**

The parties, wishing to remove biases developed through periods of conflict, recognize the desirability of cultural and scientific exchanges in all fields, and agree to establish normal cultural relations between them. Thus, they shall, as soon as possible and not later than 9 months from the exchange of the instruments of ratification of this Treaty, conclude the negotiations on cultural and scientific agreements.

Article 11 - **Mutual Understanding and Good Neighborly Relations**

1. The Parties will seek to foster mutual understanding and tolerance based on shared historic values, and accordingly undertake:

    a. To abstain from hostile or discriminatory propaganda against each other, and to take all possible legal and administrative measures to prevent the dissemination of such propaganda by any organization or individual present in the territory of either Party;

    b. As soon as possible, and not later than 3 months from the exchange of the instruments of ratification of this Treaty, to repeal all adverse or discriminatory references and expressions of hostility in their respective legislation;

    c. To refrain in all government publications from any such references or expressions;

    d. to ensure mutual enjoyment by each other's citizens of due process of law within their respective legal systems and before their courts.

2. Paragraph 1 (a) of this Article is without prejudice to the right to freedom of expression as contained in the International Covenant on Civil and Political Rights.

3. A joint committee shall be formed to examine incidents where one Party claims there has been a violation of these Article.

Article 12 - **Combating Crime and Drugs**

The Parties will co-operate in combating crime, with an emphasis on smuggling, and will take all necessary measures to combat and prevent such activities as the production of, as well as the trafficking in illicit drugs, and will bring to trial perpetrators of such acts. In this regard, they take note of the understandings reached between them in the above spheres, in accordance with Annex III and undertake to conclude all relevant agreements not later than 9 months from the date of the exchange of the instruments of ratification of this Treaty.

Article 13 - **Transportation and Roads**

Taking note of the progress already made in the area of transportation, the Parties recognize the mutuality of interest in good neighborly relations in the area of transportation and agree to the following means to promote relations between them in this sphere:

1. Each party will permit the free movement of nationals and vehicles of the other into and within its territory according to the general rules applicable to nationals and vehicles of other states. Neither Party will impose discriminatory taxes or restrictions on the free movement of persons and vehicles from its territory to the territory of the other.

2. The Parties will open and maintain roads and border-crossings between their countries and will consider further roads and rail links between them.

3. The Parties will continue their negotiations concerning mutual transportation agreements in the above and other areas, such as joint projects, traffic safety, transport standards and norms, licensing of vehicles, land passages, shipment of goods and cargo, and meteorology, to be concluded not later than 6 months from the exchange of the instruments of ratification of this Treaty.

4. The Parties agree to continue their negotiations for a highway to be constructed and maintained between Egypt, Jordan and Israel near Eilat.

Article 14 - **Freedom of Navigation and Access to Ports**

1. Without prejudice to the provisions of paragraph 3, each party recognizes the right of the vessels of the other Party to innocent passage through its territorial waters in accordance with the rules of international law.

2. Each party will grant normal access to its ports for vessels and cargoes of the other, as well as vessels and cargoes destined for or coming from the other party. Such access will be granted on the same conditions as generally applicable to vessels and cargoes of other nations.

3. international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and over flight. The parties will respect each other's right to navigation and overflight for access to either Party through the Straits of Tiran and the Gulf of Aqaba.

Article 15 - **Civil Aviation**

1. The parties recognize as applicable to each other the rights, privileges and obligations provided for by the multilateral aviation agreements to which they are both party, particularly by the 1944 Convention on International Civil Aviation (the Chicago Convention) and the 1944 International Air Services Transit Agreement.

2. Any declaration of national emergency by a Party under Article 89 of the Chicago Convention will not be applied to the other Party on a discriminatory basis.

3. The parties take note of the negotiations on the international air corridor to be opened between them in accordance with the Washington Declaration. In addition, the Parties shall, upon the exchange of the instruments of ratification of this Treaty enter into negotiations for the purpose of concluding a Civil Aviation Agreement. All the above negotiations are to be concluded not later than 6 months from the exchange of the instruments of ratification of this Treaty.

Article 16 - **Post and Telecommunications**

The Parties take note of the opening between them, in accordance with the Washington Declaration, of direct telephone and facsimile lines. Postal links, the negotiations on which having been concluded, will be activated upon the signature of this Treaty. The Parties further agree that normal wireless and cable communications and television relay services by

cable, radio and satellite, will be established between them, in accordance with all relevant international conventions and regulations. The negotiations on these subjects will be concluded not later than 9 months from the exchange of the instruments of ratification of this Treaty.

Article 17 - **Tourism**

The Parties affirm their mutual desire to promote co-operation between them in the field of tourism. In order to accomplish this goal, the Parties-taking note of the understandings reached between them concerning tourism-agree to negotiate, as soon as possible, and to conclude not later than 3 months from the exchange of the instruments of ratification of this Treaty, an agreement to facilitate and encourage mutual tourism and tourism from third countries.

Article 18 - **Environment**

The Parties will co-operate in matters relating to the environment, a sphere to which they attach great importance, including conservation of nature and prevention of pollution, as set forth in Annex IV. They will negotiate an agreement on the above, to be concluded not later than 6 months from the exchange of the instruments of ratification of this Treaty.

Article 19 - **Energy**

1. The Parties will co-operate in the development of energy resources, including the development of energy related projects such as the utilization of solar energy.

   The Parties, having concluded their negotiations the interconnecting of their electric grids in the Eilat-Aqaba area, will implement the interconnecting upon the signature of this Treaty. The Parties view this step as a part of a wider binational and regional concept. They agree to continue their negotiations as soon as possible to widen the scope of their interconnected grids.

2. The Parties will conclude the relevant agreements in the field of energy within 6 months from the date of exchange of the instruments of ratification of this Treaty.

Article 20 - **Rift Valley Development**

The Parties attach great importance to the integrated development of the Jordan Rift Valley area, including joint projects in the economic, environmental, energy-related and tourism fields. Taking note of the Terms of Reference developed in the framework of the Trilateral Jordan-Israel-US Economic Committee towards the Jordan Rift Valley Development Master Plan, they will

vigorously continue their efforts towards the completion of planning and towards implementation.

Article 21 - **Health**

The Parties will co-operate in the area of health and shall negotiate with a view to the conclusion of an agreement within 9 months of the exchange of the instruments of ratification of this Treaty.

Article 22 - **Agriculture**

The Parties will co-operate in the areas of agriculture, including veterinary services, plant protection, biotechnology and marketing, and shall negotiate with a view to the conclusion of an agreement within 6 months from the date of the exchange of instruments of ratification of this Treaty.

Article 23 - **Aqaba and Eilat**

The Parties agree to enter into negotiations, as soon as possible, and not later than one month from the exchange of the instruments of ratification of this Treaty, on arrangements that would enable the joint development of the towns of Aqaba and Eilat with regard to such matters, inter alia, as joint tourism development joint customs posts, free trade zone, co-operation in aviation,

prevention of pollution, maritime matters, police, customs and health co-operation. The Parties will conclude all relevant agreements within 9 months from the exchange of instruments of ratification of the Treaty.

Article 24 - **Claims**

The parties agree to establish a claims commission for the mutual settlement of all financial claims.

Article 25 - **Rights and Obligations**

1. This Treaty dose not affect and shall not be interpreted as affecting, in any, way the rights and obligations of the Parties under the Charter if the United Nations.

2. The Parties undertake to fulfill in good faith their obligations under this Treaty, without regard to action or inaction of any other party and independently of any instrument inconsistent with this Treaty. For the purposes of this paragraph, each party represents to the other that in its opinion and interpretation there is no inconsistency between their existing treaty obligations and this Treaty.

3. They further undertake to take all the necessary measures for the application in their relations of the provisions of the multilateral conventions which they are parties, including the submission of appropriate notification to the Secretary General of the United Nations and other depositories of such conventions.

4. Both Parties will also take all the necessary steps to abolish all pejorative references to the other Party, in multilateral conventions to which they are parties, to the extent that such references exist.

5. The Parties undertake not to enter into any obligation in conflict with this Treaty.

6. Subject to Article 103 of the United Nations Charter, in the event of a conflict between the obligations of the Parties under the present Treaty and any of their other obligations, the obligations under this Treaty will be binding and implemented.

Article 26 - **Legislation**

Within 3 months of the exchange of the instruments of ratification of this Treaty, the Parties undertake to enact any legislation necessary in order to implement the Treaty, and to terminate any international commitments and to repeal any legislation that is inconsistent with the Treaty.

Article 27 - **Ratification and Annexes**

1. This Treaty shall be ratified by both Parties in conformity with their respective national procedures. It shall enter into force on the exchange of the instruments of ratification.

2. The Annexes, Appendices, and other attachments to this Treaty shall be considered integral parts thereof.

Article 28 - **Interim Measures**

The Parties will apply, in certain spheres to be agreed upon, interim measures pending the conclusion of the relevant agreements in accordance with this Treaty, as stipulated in Annex V.

Article 29 - **Settlement of Disputes**

Disputes arising out of the application or interpretation of this Treaty shall be resolved by negotiations.

Any such disputes which cannot be settled by negotiations shall be resolved by conciliation or submitted to arbitration.

Article 30 - **Registration**

This Treaty shall be transmitted to the Secretary General of the United Nations for registration in accordance with the previsions of Article 102 of the Charter of the United Nations.

Done at the Araba/Arava Crossing point this day Jumada Al-Ula, 21st 1415, Heshvan 21st, 5755 to which corresponds 26th October, 1994 in the Arabic, Hebrew and English languages, all texts being equally authentic. In case of divergence of interpretation, the English text shall prevail.

For the Hashemite Kingdom of Jordan
Abdul Salam Majali
Prime Minister

For the State of Israel
Yitzhak Rabin
Prime Minister

Witnessed by:

William J. Clinton
President of the United states of America

List of Annexes, Appendices and Other Attachments

Annex I : (a) International Boundary
(b) Baqura/Naharayim Area
(c) Al-Ghamr/Zofar Area

Appendices (27 sheets):

- Wadi Araba (10 sheets), 1:20,000 orthophoto maps
- Dead sea (2 sheets), 1:50,000 orthoimages
  Jordan and Yarmouk Rivers (12 sheets), 1:10:000 orthophoto maps
- Baqura Area (1 sheet), 1:20,000 orthophoto maps
- Al-Ghamr Area (1 sheet), 1:20,000 orthophoto maps
- Gulf of Aqaba (1 sheets), 1:50,000 orthoimages

Annex II: Water
Annex III: Crime and drug
Annex IV: Environment
Annex V: Interim Measures

Attachments: Agreed Minutes A to D

ANNEX I (a)

JORDAN-ISRAEL INTERNATIONAL BOUNDARY DELIMITATION AND DEMARCATION

ANNEX I (a)

JORDAN-ISRAEL INTERNATIONAL BOUNDARY DELIMITATION AND DEMARCATION

1. It is agreed that, in accordance with Article 3 of the Treaty, the international boundary between the two States consists of the following sectors:

- The Jordan and Yarmouk Rivers.
- The Dead Sea.
- The Wadi Araba/Emek Ha'arava.
- The Gulf of Aqaba.

2. The boundary is delimited as follows:

I. Jordan and Yarmouk Rivers

a) The boundary Line shall follow the middle of the main course of the flow of the Jordan and Yarmouk Rivers.

b) The boundary line shall follow natural changes (accretion or erosion) in the course of the rivers unless otherwise agreed. Artificial changes in or of the course of the rivers shall not affect the location of the boundary unless otherwise agreed. No artificial changes may be made except by agreement between both Parties.

c) In the event of a future sudden natural change in or of the course of the rivers (avulsion or cutting of new bed) the Joint Boundary Commission (Article 3 below) shall meet as soon as possible, to decide on necessary measures, which may include physical restoration of the prior location of the river course.

d) The boundary line in the two rivers is shown on the 1/10,000 orthophoto maps dated 1994 (Appendix III attached to this Annex).

e) Adjustment to the boundary line in any of the rivers due to natural changes (accretion or erosion) shall be carried out whenever it is deemed necessary by the Boundary Commission or once every five years.

f) The lines defining the special Baqura/Naharayim area are shown on the 1:10,000 orthophoto map (Appendix IV attached to this Annex).

g) The orthophoto maps and image maps showing the line separating Jordan from the territory that came under Israeli Military government control in 1967 shall have that line indicated in a different presentation and the legend shall carry on it the following disclaimer:

"This line is the administrative boundary between Jordan and the territory which came under Israeli military government control in 1967. Any treatment of this line shall be without prejudice to the status of that territory."

II. **Dead Sea and Salt Pans**

The boundary line is shown on the 1:50,000 image maps (2 sheets Appendix II attached to the Annex). The list of geographic and Universal Transverse Mercator (UTM) coordinates of this boundary line shall be based on Israel Jordan Boundary Datum (IJBD 1994) and, when completed and agreed upon by both parties, this list of coordinates shall be binding and take precedence over the maps as to the location of the boundary line in the Dead Sea and the salt pans.

III. **Wadi Araba/Emek Ha'arava**

a) The boundary line is shown on the 1:20,000 orthophoto maps (10 sheets, Appendix I attached to this Annex).

b) The land boundary shall be demarcated, under a joint boundary demarcation procedure, by boundary pillars which will be jointly located, erected, measured and documented on the basis of the boundary shown in the 1/20,000 orthophoto maps referred to in Article 2-C-(1) above. Between each two adjacent boundary pillars the boundary line shall follow a straight line.

c) The boundary pillars shall be defined in a list of geographic and UTM coordinates based on a joint boundary datum (IJBD 94) to be agreed upon by the Joint Team of Experts appointed by the two parties (hereinafter the JTE) using joint Global Positioning System (GPS) Measurements. The list of coordinates shall be prepared, signed and approved by both Parties as soon as possible and no later than 9 months after this Treaty enters into force and shall become part of this Annex. This list of geographic and UTM coordinates when completed and agreed upon by both Parties shall be binding and shall take precedence over the maps as to the location of the boundary line of this sector.

d) The boundary pillars shall be maintained by both Parties in accordance with a procedure to be agreed upon. The coordinates in Article 2-C-(3) above shall be used to reconstruct boundary pillars in case they are damaged, destroyed or displaced.

e) The line defining the Al-Ghamr/Zofar area is shown on the 1/20,000 Wadi Araba/Emek Ha'arava orthophoto map (Appendix V attached to this Annex).

IV. **The Gulf of Aqaba**

The Parties shall act in accordance with Article 3.7 of the Treaty.

3. Joint Boundary Commission

a) For the purpose of the implementation of this Annex, the Parties will establish a Joint Boundary Commission comprised of three members from each country.

b) The Commission will, with the approval of the respective governments, specify its work procedures, the frequency of its meetings, and the details of its scope of work. The Commission may invite experts and/or advisors as may be required.

c) The Commission may form, as it deems necessary, specialized teams or committees and assign to them technical tasks.

ANNEX I (b)

THE BAQURA / NAHARAYIM AREA

ANNEX I (b)

THE BAQURA / NAHARAYIM AREA

1. The two parties agree that a special regime will apply to the Baqura/Naharayim area ("the area") on a temporary basis, as set out in this Annex. For the purpose of this Annex the area is detailed in Appendix IV.

2. Recognizing that in the area which is under Jordan's sovereignty with Israeli private land ownership rights and property interests ("Land Owners") in the land comprising the area ("the land") Jordan undertakes:

- to grant without charge unimpeded freedom of entry to, exit from land
- usage and movement within the area to the land-owners and to their invitees or employees and to allow the land owners freely to dispose of their land in accordance with applicable Jordanian law;

a) Not to apply its customs or immigration legislation to land-owners, their invitees or employees crossing from Israel directly to the area for the purpose of gaining access to the land for agricultural, touristic or any agreed purpose;

b) Not to impose discriminatory taxes or charges with regard to the land or activities within the area;

c) To take all necessary measures to protect and prevent harassment of or harm to any person entering the area under this Annex;

d) To permit with the minimum of formality, uniformed officers of the Israeli police force, access to the area for the purpose of investigating crime or dealing with other incidents solely involving the landowners, their invitees or employees.

3. Recognizing Jordanian sovereignty over the area, Israel Undertakes:

a) Not to carry out or allow to be carried out in the area activities prejudicial to the peace or security of Jordan;

b) Not to allow any person entering the area under this Annex (other than the uniformed officers referred to in paragraph 2 (e) of this Annex to carry weapons of any kind in the area; unless authorized by the licensing authorities in Jordan after being processed by the liaison committee referred to in Article 8 of this Annex.

c) Not to allow the duping wastes from outside the area into the sea.

4. Subject to this Annex, Jordanian law will apply to this area:

a) Israeli law applying to the extra territorial activities of Israelis may be applied to Israelis and their activities in the area, and Israel.

b) May take measures in the area to enforce such laws.

c) Having regard to this Annex, Jordan will not apply its criminal law to activities in the area which involve only Israeli nationals.

5. In the event of any joint projects to be agreed and developed by the parties in the area the terms of this Annex may be altered for the purpose of the joint project by agreement between the parties at any time. One of the options to be discussed in the context of the joint projects would be the establishment of a Free - Trade Zone.

6. Without prejudice to private rights of ownership of land within the area, this Annex will remain in force for 25 years, and shall be renewed automatically for the same periods, unless one year prior notice of termination is given by either party, in which case, at the request of either party, consultations shall be entered into.

7. In addition to the requirement referred to in Article 4 (a) of this Annex, the acquisition of the land in the area by persons who are not Israeli citizens shall take place only with the prior approval of Jordan.

8. A Jordanian-Israeli Liaison Committee is hereby established in order to deal with all matters arising under this Annex.

ANNEX I (c)

THE AL-GHAMR / ZOFAR AREA

ANNEX I (c)

THE AL-GHAMR / ZOFAR AREA

1. The two Parties agree that a special regime will apply to the Al-Ghamr/Zofar area ("the area") on a temporary basis, as set out in this Annex. For the purpose of this Annex the area is detailed in Appendix V.

2. Recognizing that in the area which is under Jordan's sovereignty with Israeli private land use rights ("land users") in the land comprising the area ("the land") Jordan undertakes:

   a) To grant without charge unimpeded freedom of entry to, exit from land usage and movement within the area to the land-users and to their invitees or employees and to allow the land-users freely to dispose of their rights in the usage of the land in accordance with applicable Jordanian law;

   b) Not to apply its customs or immigration legislation to land-users, their invitees or employees crossing from Israel directly to the area for the purpose of gaining access to the land for agricultural or any agreed purpose;

   c) Not to impose discriminatory taxes or charges with regard to the land or activities within the area;

   d) To take all necessary measures to protect and prevent harassment of or harm to any person entering the area under this Annex;

   e) To permit with the minimum of formality, uniformed officers of the Israeli police force, access to the area for the purpose of investigating crime or dealing with other incidents solely involving the land-users, their invitees or employees.

3. Recognizing Jordanian sovereignty over the area, Israel undertakes:

   a) Not to carry out or allow to be carried out in the area activities prejudicial to the peace or security of Jordan;

   b) Not to allow any person entering the area under this Annex (other than the uniformed officers referred to in paragraph 2(e) of this Annex) to carry weapons of any kind in the area; unless authorized

c) By the licensing authorities in Jordan after being processed by the liaison committee refereed to in Article 8 of this Annex.

d) Not to allow the dumping of wastes from outside the area into the area.

4. a) Subject to this Annex, Jordanian law will apply to this area.

b) Israeli law applying to the extra territorial activities of Israelis may be applied to Israelis and their activities in the area, and Israel may take measures in the area to enforce such laws.

c) Having regard to this Annex, Jordan will not apply its criminal laws to activities in the area which involve only Israeli nationals.

5. In the event of any joint projects to be agreed and developed by the parties in the area the terms of this Annex may be altered for the purpose of the joint project by agreement between the Parties at any time.

6. Without prejudice to private rights of use of land within the area, this Annex will remain in force for 25 years, and shall be renewed automatically for the same periods, unless one year prior notice of termination is given by either Party, in which case, at the request of either Party, consultations shall be entered into.

7. In addition to the requirement referred to in Article 4(a) of this Annex, the acquisition of the land in the area by persons who are not Israeli citizens shall take place only with the prior approval of Jordan.

8. A Jordanian-Israeli Liaison Committee is hereby established in order to deal with all matters arising under this Annex.

Annex (IV)

EU raises pressure on Israel
Declaration, *EU,* 18 November 2003

After the fourth meeting of the Association Council, the European Union issued a statement, saying its wants Israel to halt the construction of its wall through the West Bank. Below is the text of the statement issued by the European Union on the fourth meeting of the Association Council EU-Israel, held in Brussels, 17-18 November 2003.

Declaration

1. The EU welcomes this fourth meeting of the Association Council with Israel. The Association Agreement offers the framework for strengthening bilateral ties and the EU is committed to continuously deploying efforts to this effect. This session follows the last meeting of the Association Committee on 9 July 2003 in Brussels, which enabled us to make good progress in several areas of co-operation.

2. The Association Agreement provides us also with an institutionalised framework to conduct a regular political dialogue at various levels on all issues of common interest, the aim of which is to develop better mutual understanding, increasing convergence of positions on international issues, opening the way to new forms of co-operation with a view to achieving common goals, in particular peace, security and democracy. The EU attaches great importance to conducting and maintaining a regular political dialogue with Israel at all levels. Consequently, the Association Committee at its last meeting devoted time to discussing a number of political issues, among which were the Middle East Peace Process, Iran, Iraq, terrorism, nonproliferation, the Wider Europe initiative and the Euro-Mediterranean Partnership.

The EU is ready to consider proposals submitted by Israel in the margins of the last Association Committee to deepen and strengthen the dialogue; in this context the ban imposed by Israel on official contacts with EU representatives who meet with the President of the Palestinian Authority is not in line with the spirit of these proposals. The EU stresses the importance of open and unhindered channels of communication for all EU interlocutors, including EU Special Representative, Ambassador Marc Otte. The EU urges the Israeli side to reconsider its position in view of the negative impact it

might have for the future dialogue.

/...

4. The EU is firmly committed to the clear objective of two States, Israel and a viable and democratic Palestinian State, living side by side in peace and security, in the framework of a comprehensive peace in the Middle East, as laid out in the Road Map.

The EU is deeply concerned by the situation in the region and has noted that, despite support given by the international community to the quest for a just and lasting solution, insufficient effort has been made by the concerned parties to seize the opportunity for peace set out in the Road Map, underscored by the recent Quartet Ministerial Statement issued September 26 last. On the contrary, rising violence is bringing added suffering and death to both the Israeli and the Palestinian peoples and putting at risk security in the region and beyond.

The EU therefore calls on both parties – Israel and the Palestinian Authority – to live up to the commitments they undertook at the Aqaba summit on 4 June 2003. A settlement can be achieved through negotiation, and only through negotiation. The objective is an end to the occupation and the early establishment of a democratic, viable, peaceful and sovereign State of Palestine, on the basis of the 1967 borders, if necessary with minor adjustments agreed by the parties. The end result should be two states living side by side within secure and recognised borders enjoying normal relations with their neighbours.

The EU urges all sides in the region to immediately implement policies conducive to dialogue and negotiations. The EU relationship with those who will take steps to the contrary will be inevitably affected by such behaviour.

The EU strongly condemns the intensification of suicide attacks and other acts of violence that have occurred over the last few weeks and calls upon all sides to refrain from any provocative action which can further escalate the tension.

Terrorist attacks against Israel have no justification whatsoever. The EU reiterates that the fight against terrorism in all its forms remains one of the priorities of the European Union as well as of the entire international

Community and that it is the duty of all countries, in particular of those in the region, to actively co-operate in the fight against terrorism and to abstain from all support, direct or indirect, to terrorist organisations.

The EU emphasises once again that the Palestinian Authority must concretely demonstrate its determination in the fight against extremist violence and urges the PA and its President to take immediate, decisive steps to consolidate all Palestinian security services under the clear control of a duly empowered Prime Minister and Interior Minister, and confront individuals and groups conducting and planning terrorist attacks.

The EU recognises Israel's right to protect its citizens from terrorist attacks. It urges the Government of Israel, in exercising this right, to exert maximum effort to avoid civilian casualties and take no action that aggravates the humanitarian and economic plight of the Palestinian people. It also calls on Israel to abstain from any punitive measures which are not in accordance with international law, including extra-judicial killings and destruction of houses.

The EU reiterates that actions to remove the elected President of the Palestinian Authority would be contrary to international law and counterproductive to the efforts at reaching a peaceful solution to the conflict.

Decisive steps must be taken to reverse the sharply deteriorating humanitarian situation in the West Bank and Gaza which is making life increasingly intolerable for ordinary Palestinians and fuelling extremism and support to fundamentalist groups to the detriment of popular support to the Palestinian Government. The EU, which is one of the largest donors to the Palestinian Authority, is providing assistance to alleviate the suffering of the Palestinian people, as well as to support structural reforms in view of a future Palestinian State. This assistance is becoming increasingly difficult and costly for the EU to provide. The EU calls on the Government of Israel to facilitate the reform of the Palestinian Authority and increase efforts to ease the plight of the Palestinian people by taking on more responsibility from the international community to provide humanitarian assistance to the Palestinian population. In the meantime, it is necessary that humanitarian access and security of humanitarian personnel and their installations be guaranteed. Full safe and unfettered access of humanitarian personnel to the Palestinian territories is crucial. We attach importance to the work carried

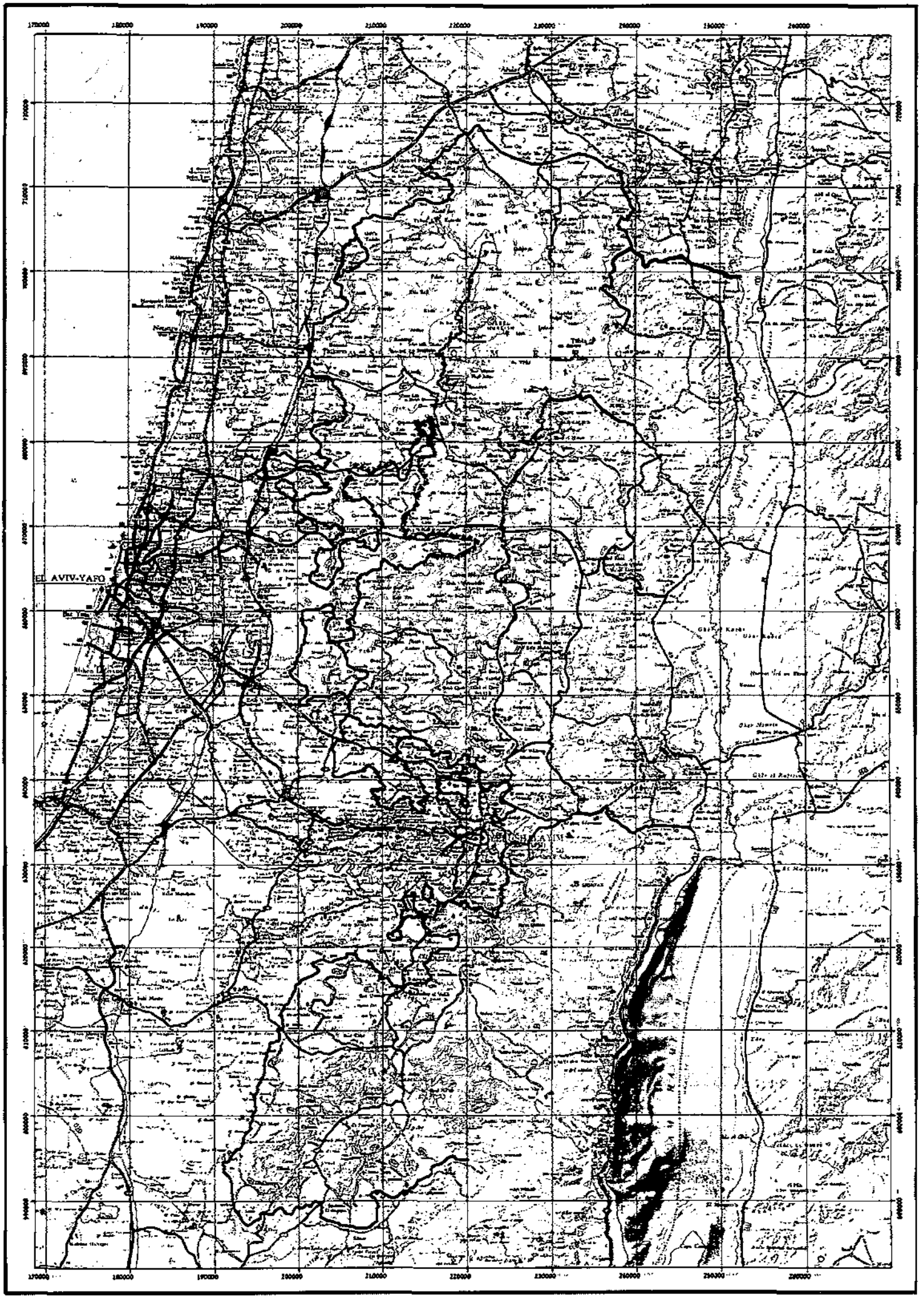
out by UNRWA, other agencies and NGOs in order to improve living conditions and alleviate human suffering.

The EU is particularly concerned by the route marked out for the so-called security fence in the Occupied West Bank and East Jerusalem. The envisaged departure of the route from the "green line" could prejudge future negotiations and make the two-State solution physically impossible to implement. It would cause further humanitarian and economic hardship to the Palestinians. Thousands of Palestinians west of the fence are being cut off from essential services in the West Bank, Palestinians east of the fence will lose access to land and water resources. In this context the EU is alarmed by the designation of land between the fence and the "green line" as a closed military zone. This is a de-facto change in the legal status of Palestinians living in this area which makes life for them even harder. Hence, the EU calls on Israel to stop and reverse the construction of the so-called security fence inside the occupied Palestinian territories, including in and around East Jerusalem, which is in departure of the armistice line of 1949 and is in contradiction to the relevant provisions of international law.

Also, the continued expansion of settlements and related construction, such as the tenders for several hundred new units issued in October, inflames an already volatile situation and is inconsistent with the Road Map. It is an obstacle to peace. The EU urges the Government of Israel to reverse its settlement policy and activity and end land confiscations. As a first step the EU calls on the Government of Israel to apply immediately a full and effective freeze on all settlement activities and to dismantle all settlement outposts established since March 2001.

The EU reaffirms once again that there is no alternative to a swift and full implementation, in good faith by the two sides, of the Road Map. The EU reiterates the determination of the European Union to contribute to all aspects of the implementation of the Road Map, including to a credible and effective third-party monitoring mechanism as laid out in the Road Map, which should be urgently set up.

Annex (V)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