INTERNATIONAL COURT OF JUSTICE

REQUEST FOR ADVISORY OPINION

LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY

WRITTEN STATEMENT OF THE FRENCH REPUBLIC

30 January 2004

[Translation by the Registry]

International Court of Justice

Request for Advisory Opinion

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

Written Statement of the French Republic

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INTRODUCTION AND SUMMARY

1. By means of resolution ES-10/14 of 8 December 2003, the United Nations General Assembly requested the Court to urgently render an advisory opinion on the following question:

> "What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General [Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13, A/ES/10/248], considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?"

2. In its Order of 19 December 2003, the Court decided that the United Nations and its Member States were "considered likely, in accordance with Article 66, paragraph 2, of the Statute, to be able to furnish information on all aspects raised by the question submitted to the Court for advisory opinion". It fixed 30 January 2004 as the time-limit within which they could submit to the Court written statements on the question. The present observations are submitted pursuant to that decision.

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3. Preliminarily, the French Republic wishes to recall that in the discussion preceding adoption of resolution ES-10/14 it joined in the common position adopted by the Member States of the European Union, as that position was set out by Italy's representative speaking on behalf of the 15 Member States, the ten countries to become members on 1 May 2004 and six other European States[1]. It is to be seen from this statement that the States on whose behalf it was made:

— condemn in the strongest terms terrorist attacks against Israel;

— are gravely concerned by the construction of the wall built by Israel in part on the Palestinian territory, which is not an appropriate response to these attacks, and they share the concerns expressed on this subject in the Secretary-General's Report;

— but consider that the request for advisory opinion made by the General Assembly is not conducive to relaunching the necessary political dialogue between the two parties.

4. Accordingly, France, like the other European Union members and the candidate countries, abstained in the vote on resolution ES-10/14, which was adopted by a majority of 90 votes in favour and 8 against, with 74 abstentions.

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[1] Statement by H.E. Mr. Marcello Spatafora, Ambassador, Permanent Representative of Italy to the United Nations, 8 December 2003, A/ES-10/PV.23, pp. 14-16.

5. The French Republic holds to the belief that the opinion which the Court has been asked to give is not conducive to facilitating the resumption of the dialogue, one which by nature is highly political, between Israel and Palestine. As the Security Council called upon them to do in resolution 1515 (2003), it is for the two parties "to fulfil their obligations under the Roadmap"[2] which they accepted on 4 June 2003 at the Aqaba meeting. It is through these efforts — supported by the "Quartet" and the international community as a whole — that the "vision of a region where two States, Israel and Palestine, live side by side within secure and recognized borders"[3] may finally be realized.

6. The French Republic further wishes to underscore that this request for advisory opinion could set a dangerous precedent, inciting States to seek a vote by the General Assembly to refer to the Court disputes over which the Court would not have contentious jurisdiction.

7. As the Court has noted time and again: "The power of the Court to give an advisory opinion is derived from Article 65 of the Statute. The power granted is of a discretionary character."[4]

8. France leaves it to the Court to determine in its wisdom whether it should exercise its power of discretion in the present case by deciding not to provide the requested opinion. The observations below are submitted for consideration in the event that the Court decides to respond on the merits to the question posed by the General Assembly.

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9. That question concerns solely the legal *consequences* of the construction of the disputed wall in the Occupied Palestinian Territory (the term "wall" used in this statement is that employed by the General Assembly in resolution ES-10/14). It is not about the conformity of the construction of the wall with international law. Determining its lawfulness is however prerequisite to responding to the question posed:

— first, the consequences of the construction of the wall along the chosen route are obviously very different depending on whether or not the construction is deemed in compliance with international law;

— secondly, in order to determine those consequences, it is necessary to ascertain not only *whether* the construction of the wall along the chosen route is lawful but also, if it is not, *which exact rules* of international law have been violated.

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[2] 19 November 2003, para. 2.

[3] Resolution 1397 (2002), 12 March 2002.

[4] Advisory Opinion of 20 July 1962, *Certain Expenses of the United Nations, I.C.J. Reports 1962*, p. 155; see also, for example, the Advisory Opinions of 30 March 1950, *Interpretation of Peace Treaties, First phase, I.C.J. Reports 1950*, p. 72; 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 27, para. 41; 16 October 1975, *Western Sahara, I.C.J. Reports 1975*, p. 21, para. 23, and 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996*, p. 235.

10. It should also be pointed out at the outset that the question submitted to the Court expressly concerns the legal consequences of the construction of the "wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem". It would appear that some segments of the wall have been built on Israeli territory, next to the "Green Line" defined by the Armistice Agreement of 3 April 1949. According to the Secretary-General's Report, these segments would appear to be very limited: "[t]he part of the barrier that roughly hews to the Green Line is along the northernmost part of the West Bank. A 1-2 km stretch west of Tulkarm appears to run on the Israeli side of the Green Line" (A/ES-10/248, p. 4, para. 7). It therefore appears pointless to address the question whether a State can construct a wall of this sort along its borders.

11. The construction of the wall along the chosen route appears, prima facie, incompatible with certain well-established rules of international law (I). However, in France's view this conclusion does not relieve the Court of the need to consider whether there are circumstances which could preclude the wrongfulness of the construction of the wall; in particular, while there can be no doubt that Israel is entitled to take the measures necessary to ensure its security, it should be ascertained whether the construction of the wall, in the light of the route chosen, is proportionate to the threats it is intended to meet (II). In so far as that is not the case, the construction of the wall along the chosen route could be held to be wrongful.

12. In the numerous instances in which the Court has been called upon to rule on the commission of an internationally wrongful act, it has explained the nature and scope of the legal consequences arising from such an act (III). First among those consequences are the obligations placed as a result of unlawful conduct upon the party having so acted. Thus, it is first incumbent upon that party to "[put] an end to an illegal situation"[5] if that situation is continuing, as in the present case. Just as "clearly"[6], the responsible State is required to make good in full the injury caused by the wrongful act. Thus, in the present case Israel must *inter alia* "stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem"[7], as the General Assembly has told it to do. Further, given the circumstances, in particular the route chosen, it is also important that Israel offer appropriate assurances and guarantees of non-repetition of the wrongful act.

13. Since it is internationally wrongful, the act of constructing the wall on the Occupied Palestinian Territory also entails legal consequences for third States and international organizations. *Inter alia*, they are under an obligation not to recognize as lawful the situation created by the route taken by this wall.

14. Finally, it is important to point out that restoration of the legal relationship that has been severely disturbed by the construction of the wall in the occupied territory cannot become effective and complete until good-faith performance of the violated obligations has resumed. While this duty falls first to the author of the wrongful act, it is not incumbent solely on that party. Under the circumstances having led to the present request for advisory opinion, it would appear especially necessary to remind all parties concerned of their international obligations.

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[5] Judgment of 13 June 1951, *Haya de La Torre, I.C.J. Reports 1951*, p. 82.

[6] *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, Judgment of 24 May 1980, p. 42, para. 90.

[7] Resolution ES-10/13, 21 October 2003, para. 1.

I. Question of the compatibility of the construction of the wall following the chosen route with various rules of international law

15. Speaking through its presidency, the European Union has several times disputed the lawfulness of the construction of the wall along the chosen route[8]. The General Assembly expressed the same view when it stated in resolution ES-10/13 of 21 October 2003 that the construction of the wall in the Occupied Palestinian Territory was "in contradiction to relevant provisions of international law". The French Republic has already expressed its full agreement with this conclusion[9]. It will therefore confine itself here to setting out the legal reasons justifying that conclusion. In so doing, France does not consider it its role to add to or dispute information appearing in the Secretary-General's Report and the summaries of the legal positions of Israel and Palestine[10] annexed thereto. It will thus limit itself to setting out the legal considerations which in France's estimation follow from the facts set out therein.

(a) *Question of the rules to be applied in assessing the lawfulness of the construction of the wall following the route chosen*

16. In resolution ES-10/14 the Court is asked to rule on the legal consequences of the construction of the wall "considering . . . the Fourth Geneva Convention . . . and relevant Security Council and General Assembly resolutions". This language implies, first, that those legal instruments are applicable in responding to the question posed and, second, that rules from other sources might apply. Thus, consideration should be given to all of the principles according to which the Court must respond to the question it has been asked.

(i) Applicability of the rules relating to belligerent occupation

17. The formulation itself of the question shows that the Court is to pay particular attention to the Fourth Geneva Convention of 1949. The use in the resolution of the terms "*occupying* Power" and "*Occupied* Palestinian Territory" confirms this point.

18. As the Court has recognized, the Geneva Conventions "are in some respects a development [of the fundamental general principles of humanitarian law] and in other respects no more than the expression [of them]"[11]. Thus, "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"[12]. It also follows that, in accordance with the fundamental principle laid down in the Martens Clause, first set out in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899, of which the Court has noted the continuing applicability in its modern version found in Article 1, paragraph 2, of Additional Protocol I of 1977[13], "civilians and combatants remain under the protection and

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[8]See the statements made in the Security Council by Italy's Permanent Representative on 14 October 2003 (S/PV.4841, p. 42) and to the General Assembly on 8 December 2003 (A/ES-10/PV.23, p. 15).

[9]See the statement made in the Security Council by France's Permanent Representative on 14 October 2003 (S/PV.4841, pp. 17-18).

[10]"Palestine" has been the term used since 1988 within the United Nations system.

[11]Judgment of 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua*, *I.C.J. Reports 1986*, p. 113, para. 218; see also the Advisory Opinion of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996*, p. 256, para. 75.

[12]*Ibid.*, p. 257, para. 79.

[13]See above-cited Opinion of 1996, *I.C.J. Reports 1996*, p. 257, para. 78, and p. 260, para. 87.

authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience".

19. Moreover, even if the Fourth Convention were not applicable *per se* because it has not been ratified by Palestine, the other party to the armed conflict, its provisions would nevertheless apply, not as such but as a result of the fact, and to the extent, that they express general principles of humanitarian law.

20. Further, more specifically in the present case,

— the armed conflict in 1967, the wellspring of the occupation of the West Bank and Gaza territories, pitted Israel against Egypt, Syria and Jordan, three States parties to the 1949 Conventions;

— Palestine, which has sought several times to become a party to the Geneva Conventions, has undertaken to apply these instruments unilaterally and the Swiss Government, the depositary, without "decid[ing] whether [the most recent of those communications, dated 21 June 1989, should] be considered as an instrument of accession in the sense of the relevant provisions of the Conventions and their Additional Protocols", has taken the position that "[t]he unilateral declaration of application of the four Geneva Conventions and of Additional Protocol I made on 7 June 1982 by the Palestine Liberation Organization remains valid"[14];

— Israel initially recognized the applicability of the Fourth Convention: according to Article 35 of Order No. 1, issued by the occupying authorities on 7 June 1967, "[t]he Military Court . . . must apply the provisions of the Geneva Convention dated 12 August 1949, Relative to the Protection of Civilians in Time of War, with respect to judicial procedures. In case of conflict between this Order and said Convention, the Convention shall prevail"[15]; further, it should be noted that in a decision dated 3 September 2002[16] the Supreme Court of Israel, hearing the case of Palestinian civilians expelled on orders of the Military Commander for Judea and Samaria from those territories to Gaza, explicitly applied certain provisions of the Fourth Convention, which it had previously avoided doing, even though it did apply them *de facto*[17];

— finally, the competent organs of the United Nations have repeatedly affirmed the applicability of the Fourth Convention[18].

21. As for the Hague Regulations of 1907, their provisions have taken on customary value, which makes them binding on all States, whether or not parties.

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[14] *IRRC*, 1990, pp. 64-65.

[15] Text in *Proclamation, Orders and Appointments of the Israeli Defence Forces in the West Bank Area*, 11 August 1967.

[16] See HCJ 7015/02 and 7019/02, Ajuri *v.* IDF Commander, [2002] IsrLR, para. 13.

[17] See HCJ 1361/91 Mesalem *v.* IDF Commander in Gaza Strip, IsrSC 36 (4) 444, p. 456; HSJ 554/81 Beransa *v.* Central Commander IsrSC 36 (4) 247, p. 250.

[18] See *inter alia* General Assembly resolutions 2851 (XXVI) of 20 December 1971, 3092 A (XXVIII) of 7 December 1973, 3240 B (XXIV) of 29 November 1974, 3525 B (XXX) of 15 December 1975 and 58/97 of 17 December 2003. On this point see also Security Council resolutions 271 (1969) of 15 September 1969, 446 (1979) of 22 March 1979, 465 (1980) of 1 March 1980, 672 (1990) of 12 October 1990 and, recently, 1322 (2000) of 7 October 2000 and 1435 (2002) of 24 September 2002.

(ii) Applicability of the rules of international human rights law

22. Unlike the Fourth Convention of 1949, the human rights treaties to which Israel is a party are not expressly cited as relevant instruments by resolution ES-10/14 seising the Court of the question under consideration. In this connection, it appears that the Court should be guided by the following two principles.

23. First, in accordance with Article 2 of the International Covenant on Civil and Political Rights, each State party "undertakes to respect and to ensure to all individuals within its territory *and subject to its jurisdiction*" the rights recognized therein. Even though there is no similar provision in the International Covenant on Economic, Social and Cultural Rights, owing to the nature of the rights set out therein, it must be construed in the same spirit. It follows that the Covenants are in principle applicable in the occupied territories to the extent that the individuals there "are subject to the jurisdiction" of the occupying Power.

24. Secondly, however, due account should be taken of Article 4 of the Covenant on Civil and Political Rights, which

— allows States parties to "take measures derogating from their obligations" thereunder "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 . . ." (paragraph 1);

— yet prohibits any derogation from certain provisions (paragraph 2); none of these prohibitions would appear relevant in the present instance.

(iii) Relevant Security Council and General Assembly resolutions

25. In its request for advisory opinion, the General Assembly underscored the need to take into consideration relevant Security Council and General Assembly resolutions. France thinks it well to make the following points on this subject.

26. The term "relevant resolutions" should probably not be interpreted too narrowly. It may be noted in this connection that the Security Council has not adopted any resolution dealing directly with the question of the lawfulness of the construction of the wall or with its consequences. As for the General Assembly, apart from resolution ES-10/14, it has, by resolution ES-10/13 of 21 October 2003, adopted on a vote of 144 in favour, 4 against, and 12 abstentions, demanded "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". In resolutions 58/98 and 58/99 of 9 December 2003, it again expressed concern about the construction of the wall and its route and in the former it again demanded that construction be stopped.

27. These few resolutions are not the only ones relevant for purposes of the request for advisory opinion: much information appearing in Security Council and General Assembly resolutions should also be taken into consideration by the Court, notably information concerning the applicable law[19], the inadmissibility of acquisition of territory by force and the condemnation of attempts at annexing certain territories occupied by Israel and of the settlement policy being carried

[19]See paragraph 21 above.

out there[20]. That is also true of other, more general, resolutions, such as resolutions 1368 (2001) and 1373 (2001) concerning the fight against terrorism[21].

(iv) Particular agreements binding the parties concerned

28. Even though resolution ES-10/14 does not specifically mention any particular legal instrument other than the Fourth Geneva Convention, its open-ended language is an inducement to consider whether there might be rules binding the parties concerned, between themselves or even in their relations with third parties, which would be relevant for purposes of the Court's response to the question posed to it by the General Assembly.

29. The Israeli-Palestinian Interim Agreement ("Taba") on the West Bank and the Gaza Strip of 28 September 1995, taking the place of the agreements signed in Washington on 13 September 1993 and in Cairo on 4 May 1994 and repeating and supplementing the relevant provisions of those agreements, could have a certain bearing in this respect[22]. Article XI of that Agreement provides: "The two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which will be preserved during the interim period." Further, Articles XXIX and XXX, and VIII and IX of Annex I, guarantee and make arrangements for free passage between the West Bank and the Gaza Strip and circulation within, from and towards those territories.

30. In addition, the question arises as to the legal status of the "roadmap", drawn up by the "Quartet" consisting of representatives of the United States of America, the Russian Federation, the European Union and the United Nations, and approved in Security Council resolution 1515 (2003) of 19 November 2003[23]. The document was presented to the Israeli Government and the Palestinian Authority on 30 April 2003 and, while Israel did make reservations concerning details in the text, the two parties approved it in principle at the Aqaba conference on 4 June 2003.

31. It is not out of the question to consider these reciprocal undertakings to be an agreement binding those having made them[24]; they can also be considered to be unilateral legal acts binding as such[25]. In any event, it should be noted that the "roadmap" is drafted in terms of obligations borne by the parties[26] and that the "Quartet" took note in its statement of 22 June 2003 of the

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[20]See, *inter alia*, in respect of the annexation of East Jerusalem: Security Council resolutions 298 (1971) of 25 September 1971, 476 (1980) of 30 June 1980, 478 (1980) of 20 August 1980; and General Assembly resolutions: 36/120 E of 10 December 1981, 56/31 of 3 December 2001 and 58/22 of 3 December 2003. In respect of the settlements, see Council resolutions 446 (1979) of 22 March 1979, 452 (1979) of 20 July 1979, 465 (1980) of 1 March 1980, and Assembly resolutions 2253 (ES-V) of 4 July 1967, 36/226 A of 17 December 1981, 38/58 C of 13 December 1983, 44/40 A of 4 December 1989, 57/126 of 11 December 2002, ES-10/6 of 9 February 1999, ES-10/13 of 21 October 2003 and 59/98 of 9 December 2003.

[21]See paragraph 49 below.

[22]Document A/51/889 and S/1997/357.

[23]Document S/2003/529.

[24]The Court has stated that international law does not require an agreement to take a particular form (see the Judgments of 19 December 1978, *Aegean Sea Continental Shelf, I.C.J. Reports 1978*, p. 39, para. 96, and of 1 July 1994, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, I.C.J. Reports 1994*, pp. 120-121, para. 23.

[25]See paragraph 20 above.

[26]See the introductory section, *in fine*: "In each phase, the parties are expected to perform their *obligations* in parallel, unless otherwise indicated" (S/2003/529, Annex, p. 2).

"commitments" made at the Aqaba Summit[27]. Moreover, in resolution 1515 (2003) of 19 November 2003, the Security Council called on "the parties to fulfil their obligations under the Road Map in co-operation with the Quartet and to achieve the vision of two States living side by side in peace and security".

32. As for the substance, the "road map" contains elements relating very directly to the question which the Court has been asked. In particular:

— in Phase I (in principle before May 2003), "the Palestinians immediately undertake an unconditional cessation of violence" and "Israel takes all necessary steps to help normalize Palestinian life" and "freezes all settlement activity";

— "GOI [the Government of Israel] takes no actions undermining trust, including deportations, attacks on civilians; confiscation and/or demolition of Palestinian homes and property, as a punitive measure or to facilitate Israeli construction; destruction of Palestinian institutions and infrastructure; and other measures specified in the Tenet work plan";

— further, "Israel takes measures to improve the humanitarian situation", including "easing restrictions on movement of persons and goods";

— in respect of Phase II (intended to last from June to December 2003), it is provided that, within the framework of the Israeli-Palestinian negotiating process aimed at creating an independent Palestinian state with provisional borders, there will be "implementation of prior agreements, to enhance maximum territorial contiguity".

(b) ***Question as to the conformity to these rules of the construction of the wall following the route chosen***

33. After examining the nature of the relevant rules, the French Republic will address the question as to the conformity to those rules of the construction of the wall following the route chosen. It would appear appropriate, for the sake of convenience, to distinguish, on the one hand, the problems raised by the prohibition on annexation (i) and, on the other, breaches of other rules of humanitarian law and breaches of the rules of human rights law (ii).

(i) Legal problems raised by the prohibition on annexation and related questions

34. There is no doubt that, if the construction of the wall were to be seen as the annexation of part of the Occupied Palestinian Territory, this would be inconsistent with the very essence of military occupation, which corresponds to a *de facto* power (see Article 42 of the Hague Regulations) intended to be exercised only temporarily. It follows that annexation, *de facto* or *de jure,* cannot deprive protected persons on the occupied territory of the benefit of the Fourth Convention of 1949 (Article 47).

35. This rule is buttressed by the principle forbidding the acquisition of territory by force. Deriving from Article 2, paragraph 4, of the United Nations Charter, this principle is clearly

[27]See the annex to the letter dated 25 June 2003 addressed to the President of the Security Council by the Secretary-General (S/2003/672).

expressed in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[28].

36. The Security Council applied this principle in the case of the occupied Arab territories as early as its resolution 242 (1967) of 22 November 1967, in which it made clear "the inadmissibility of the acquisition of territory by war" and asserted that "the establishment of a just and lasting peace" must include the principle of the "withdrawal of Israel armed forces from territories occupied in the recent conflict". The Council has reaffirmed this principle on many occasions since[29].

37. And, for its part, "Israel has repeatedly stated that the Barrier is a temporary measure"[30]. Thus, Israel's Permanent Representative asserted in a statement on 8 December 2003 made before the United Nations General Assembly that "the security fence is a temporary . . . measure . . . As soon as the terror ends, the fence will no longer be necessary"[31]. Decision 2077 of the Israeli Cabinet, approving the first phase of construction of the "security barrier", confirms moreover that it "does not represent a political or other border"[32].

38. In the view of the French Republic, these statements have legal impact. They lead the French Republic to believe that Israel cannot, solely on the basis of the construction of the wall, be held responsible for a violation of the fundamental principle of international law, applicable to the occupied territories, forbidding any acquisition of territory by force, since this construction is declared to be temporary and without effect on the course of the definitive borders between Israel and Palestine. The French Government does however note that the General Assembly stated in resolution ES-10/13 of 21 October 2003:

> "the route marked out for the wall under construction by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, could prejudge future negotiations and make the two-State solution physically impossible to implement and would cause further humanitarian hardship to the Palestinians".

(ii) Breaches of other rules of international humanitarian law and of principles of human rights law

39. The construction of the wall appears to infringe other rules of international humanitarian law or human rights rules binding on Israel. As France has stated above (Sections *(a)* (i) and (ii)), the two bodies of rules apply in the present case and are mutually complementary. Thus, violations of one or the other resulting from the construction of the wall should be examined together.

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[28]Resolution 2625 (XXV) of 24 October 1970.

[29]See *inter alia* resolutions 252 (1968) of 21 May 1968, 267 (1969) of 3 July 1969, 298 (1971) of 25 September 1971, 476 (1980) of 30 June 1980, 478 (1980) of 20 August 1980 and 681 (1990) of 20 December 1990. See also, *inter alia,* General Assembly resolutions 2799 (XXVI) of 13 December 1971, 2949 (XXVII) of 8 December 1972, 31/61 of 9 December 1976, 32/20 of 25 November 1977, 37/123 A of 20 December 1982, 44/40 A of 4 December 1989, 52/52 of 9 December 1997, 55/55 of 10 December 2000, 56/36 of 3 December 2001 and 57/110 of 3 December 2002.

[30]Report of the Secretary-General, A/ES-10/248, para. 29.

[31]Text available on the site www.Israel-UN.org.

[32]See the Report of the Secretary-General, para. 5.

40. Apart from the aspects considered above (i), one of the most serious breaches of the rules of international humanitarian law resulting from the construction of the wall along the chosen route no doubt concerns, prima facie, the *property destruction* caused by it, which is referred to in the Secretary-General's Report[33].

41. On this subject international law calls for account to be taken of two considerations. First, it requires compensation which effectively makes good the entire injury suffered by the owners of the property in question. Second, it allows for account to be taken of "necessities of war".

42. It is forbidden by Article 23 *(g)* of the Hague Regulations of 1907 "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war". Article 53 of the Fourth Convention of 1949 provides:

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

In addition, under Article 147 of the Convention, "grave breaches" include the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".

43. By their wording, these prohibitions are not absolute and are subject to military necessity[34]. It is important to note however that in these three provisions necessity is described in particularly strict terms: it must be "imperative" or "absolutely necessary". It will be for the Court to make its own determination on this point.

44. There is a second domain in which the construction of the wall appears, prima facie, to flout at least the rules for the protection of human rights if not the rules of international humanitarian law. The construction in fact seriously infringes the *liberty of movement of persons* guaranteed by Article 12 of the International Covenant on Civil and Political Rights of 1966. Here again, the very wording of the provision shows that this liberty is not absolute because paragraph 3 of the Article recognizes the possibility of "restrictions . . . which are provided by law, are necessary to protect national security, public order *(ordre public)* . . .". In the view of the French Republic, this possibility in the context of military occupation should not be construed too restrictively. On the other hand, account should be taken of the extremely long duration of the occupation in question, which makes much less acceptable restrictions which would be justifiable if temporary and limited to the period immediately succeeding military operations.

II. Question of the proportionality to the threats to Israel of the construction of the wall following the route chosen

45. While, according to Article 1 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, in principle "[e]very internationally wrongful act of a State entails the international responsibility of that State", wrongfulness is precluded in a number of circumstances described in Articles 20 to 25 of the draft. Thus,

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[33] A/ES-10/248, para. 29. See also *ibid.*, paras. 17, 18 and 25.

[34] The legal impact of such necessity will be considered below (para. 53).

consideration should be given to the question whether the construction of the wall on the Occupied Palestinian Territory, even though it is, prima facie, in breach of various international obligations of Israel, can be justified by any of those circumstances. In particular, it should be considered whether this construction is proportionate *(b)* to the threats to which it is the response *(a)*.

(a) ***Israel's right to respond to the threats to its security***

46. As stated in the Secretary-General's Report, the construction of the wall is part of the measures considered by the Government of Israel "to halt infiltration into Israel from the central and northern West Bank" and was decided upon "[a]fter a sharp rise in Palestinian terror attacks in the spring of 2002"[35].

47. It cannot be denied that Israel is confronted with grave threats to its security and these must be brought to an end. That moreover is one of the concerns constantly reflected in the "roadmap", which states that "[a] two state solution to the Israeli-Palestinian conflict will only be achieved through an end to violence and terrorism" and calls insistently upon Palestinian leaders to "[act] decisively against terror"[36].

48. These concerns were expressed in no uncertain terms on 14 October 2003 by France's Permanent Representative during the debate within the Security Council: "France recognizes Israel's inalienable right to security, its right to self-defence and its right to combat terrorist attacks, which are totally condemnable, morally odious and which no cause can justify."[37] During the debates in the tenth emergency special session of the General Assembly on 20 October 2003[38] and then again on 8 December 2003 during the debate on draft resolution ES-10/14[39], Italy's Representative spoke to the same effect on behalf of all European Union Member States and reiterated their strong condemnation of the intensification of suicide attacks and other acts of violence, at the same time recognizing on behalf of the European Union "Israel's right to protect its citizens from terrorist attacks".

49. Similarly, the General Assembly has repeatedly condemned "all acts of violence, terrorism and destruction", in particular suicide bombings[40], and has called upon the Palestinian Authority "to arrest, disrupt and restrain individuals and groups conducting and planning violent attacks"[41]. For its part, the Security Council has "affirm[ed] a vision of a region where two States, Israel and Palestine, live side by side within secure and recognized borders", in full accordance with its resolutions 242 (1967) and 338 (1973), and has demanded "immediate cessation of all acts of violence, including all acts of terror"[42]. Further, in resolution 1269, which is general in scope, the Security Council "[u]nequivocally condemn[ed] all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations,

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[35] A/ES-10/248, para. 4.

[36] Document S/2003/529, Annex.

[37] See S/PV.4841, p. 18.

[38] See A/ES-10/PV.21, pp. 20-21.

[39] See A/ES-10/PV.23, p. 15.

[40] Resolution ES-10/13 of 21 October 2003; see also resolutions ES-10/2 of 25 April 1997, ES-10/8 of 20 December 2001, 57/110 of 3 December 2002, 57/127 of 11 December 2002, ES-10/12 of 19 September 2003 and 58/98 and 58/99 of 9 December 2003.

[41] Resolution ES-10/13.

[42] Resolution 1397 (2002) of 12 March 2002; see also resolutions 1402 (2002) of 30 March 2002, 1435 (2002) of 24 September 2002 and 1515 (2003) of 19 November 2003.

wherever and by whomever committed, in particular those which could threaten international peace and security"[43]. In resolution 1435, it "call[ed] on the Palestinian Authority to meet its expressed commitment to ensure that those responsible for terrorist acts are brought to justice by it"[44].

50. These acts have no doubt created a situation entitling Israel to take measures to ensure its security, whether this situation is to be characterized as one of self-defence, distress or necessity.

(b) ***Assessment of the proportionality issue***

(i) Proportionality requirement

51. Apart from the specific conditions to which each of the circumstances precluding wrongfulness may be subject, all of them require that the acts in question be proportionate to the danger to which they respond. Thus, in respect of self-defence, which Israel expressly invokes[45], the exercise is subject, pursuant to Article 51 of the Charter and customary international law, to strict conditions one of which being precisely the principle of proportionality; "the requirements of proportionality and of necessity [are] inherent in the notion of self-defence"[46].

52. The proportionality requirement also applies if the construction of the wall is considered to be a countermeasure adopted and implemented in response to the threats, indisputably wrongful[47], against Israel. In addition to the fact that countermeasures "are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State" and "shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question"[48] and shall not affect "[o]bligations for the protection of fundamental human rights" or "[o]bligations of a humanitarian character prohibiting reprisals"[49], "[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question"[50].

53. The fact that the wall is being built in the context of military occupation has no impact on the fundamental proportionality requirement. The entire law of international armed conflict is dominated by the attempt to balance the necessities of war and the humanization of war, which in itself is an illustration of the principle of proportionality. This is set out more specifically in the particular provisions to be applied in the present case, whether Article 23 *(g)* of the Hague Regulations of 1907 or Articles 53 or 147 of the Fourth Geneva Convention of 1949, which are

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[43]Resolution 1269 (1999) of 19 October 1999, para. 1. See also resolutions 1368 (2001) and 1373 (2001).

[44]Resolution 1435 (2002) of 24 September 2002, para. 4.

[45]Annex I to the Report of the Secretary-General, A/ES-10/248, para. 6.

[46]Report of the International Law Commission, 53rd Session, 2001, General Assembly, Official Records, 56th Session, Supplement No. 10 (A/56/10), p. 180, commentary to Article 21, para. 6. See, *inter alia*, Judgment of 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua*, *I.C.J. Reports 1986*, p. 94, para. 176, or p. 103, para. 194, Advisory Opinion, 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996 (I)*, p. 245, para. 41, and Judgment of 6 November 2003, *Oil Platforms*, paras. 43, 51, 74 and 76.

[47]See *(a)* above.

[48]Article 49, paras. 2 and 3, of the above-cited ILC draft.

[49]*Ibid.*, Article 50, paras. 1 *(b)* and *(c)*.

[50]*Ibid.*, Article 51. See Judgment of 25 September 1997, *Gabčíkovo-Nagymaros Project*, *I.C.J. Reports 1997*, p. 56, para. 85.

especially restrictive in limiting the possibility of invoking "military necessity" (see paras. 42-43 above).

54. This is also true in respect of the fight against terrorism. Thus, while recognizing "Israel's inalienable right to security, its right to self-defence and its right to combat terrorist attacks" (see para. 48, above), France's Permanent Representative said in his statement on 14 October 2003 before the Security Council: "However, the struggle against terrorism cannot justify everything and must be carried out with respect for the law."[51]

(ii) Assessment of proportionality

55. If the Court chooses to comply with the request for advisory opinion, it will need to ascertain whether the conditions required for the existence of a circumstance precluding wrongfulness resulting from the construction of the wall are met and, in particular, whether the fundamental requirement of proportionality has been respected.

56. In so doing, the Court will be required to take into consideration not only the immediate circumstances surrounding the building of the wall but also the more general context in which this is occurring.

57. In the case concerning *Oil Platforms*, the Court stated that it "cannot assess in isolation the proportionality of [the action against the oil platforms] to the attack to which it was said to be a response"[52]. Here as well, it will have to take full account at one and the same time of: the gravity of the threats to Israel's security; the set of steps taken by the Government of Israel to deal with them, the construction of the wall being only one of those steps; and the violations of Palestinian rights caused by the construction of the wall.

58. In this connection the Court may wish to consider the fact that the wall, if completed, will be a continuous barrier, punctuated by a small number of crossing points, stretching 720 km[53], creating a number of enclaves affecting more than half a million Palestinians[54] and *de facto* dismembering the Occupied Palestinian Territory, a portion of which will be completely cut off from any direct contact with a third State.

III. Question of the legal consequences of the construction of the wall following the route chosen

(a) *Obligation to put an end to the unlawful situation and to make reparation for the injury caused by it*

59. As the International Law Commission states in the commentary to the Articles it adopted in 2001 on the responsibility of States for internationally wrongful acts, "[t]he question of cessation

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[51]See S/PV.4841, p. 18. See also the above-cited statements (notes 73, 74 and 75) by Italy's Representative on behalf of the European Union on 14 and 20 October 2003 and on 8 October 2003.

[52]Judgment of 6 November 2003, para. 77, see also para. 68.

[53]Report of the Secretary-General, A/ES-10/248, para. 6.

[54]*Ibid*., para. 8.

often arises in close connection with that of reparation, and particularly restitution"[55]. In effect, a State cannot fully perform its duty, under the head of reparation, to eliminate the consequences of its wrongful conduct until it has fulfilled the obligation to cease that conduct[56].

(i) Obligation to put an end to the unlawful situation

60. Two conditions must be met before a State responsible for an internationally wrongful act is placed under an obligation to cease that act. In the words of the Arbitral Tribunal in the *Rainbow Warrior* case, the existence of the obligation of cessation presupposes both "that the wrongful act has a continuing character and that the violated rule is still in force"[57] at the time when the legal consequences of that act are to be determined. There can be no doubt in the light of these two requirements that, as a result of the construction of the wall in the occupied territory, the first obligation borne by Israel is to cease its wrongful conduct.

61. The construction of the wall, following the route chosen by Israel, must first of all be understood as the act giving rise to an "illegal situation"[58]. That is the situation, seen in the light of the violations it entails, which is continuing today in contravention of some of the most firmly established rules of international law and which must cease. To that end, the first measure which Israel must take to remedy the wrongfulness of its conduct is to stop the construction work it has been carrying out in the Palestinian territories for more than 18 months, as the General Assembly has demanded that it do[59].

62. Although it has made no pronouncement on the problem of the wall built by Israel or on its consequences, the Security Council has on many occasions adopted similar language in respect of other actions taken by Israel in the occupied Palestinian territories. Thus, in resolution 452 (1979), it "[c]alls upon the Government and people of Israel to cease, on an urgent basis, the establishment, construction and planning of settlements in the Arab territories occupied since 1967, including Jerusalem"[60]. Similarly, at a time when Israel's decision to build a "system of fences, walls, ditches and barriers in the West Bank"[61] was already known, the Council demanded that the Government of that country "cease measures . . . [of] destruction of . . . civilian . . . infrastructure" in certain parts of the occupied territories[62].

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[55]Report of the International Law Commission, Fifty-third session — General Assembly, Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10) [hereinafter "ILC Report 2001"], p. 218, commentary to Article 30, para. 7.

[56]In the case concerning *United States Diplomatic and Consular Staff in Tehran* for example, the Court held that the first action Iran had to take to redress the situation was to "immediately terminate the unlawful detention" of the American hostages (Judgment of 24 May 1980, p. 44, para. 95, point 3 *(a)*).

[57]Award of 30 April 1990, United Nations, Reports of International Arbitral Awards, Vol. XX (1990), p. 270, para. 114; see also ILC Report 2001, p. 217, commentary to Article 30, para. 3.

[58]See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, p. 54, para. 118.

[59]See resolutions ES-10/13 of 21 October 2003 and 58/98 of 9 December 2003.

[60]Resolution of 20 July 1979.

[61]Report of the Secretary-General, A/ES-10/248, para. 2.

[62]Resolution 1435 (2002), 24 September 2002, para. 2.

(ii) Obligation to make reparation for the damage caused by the unlawful situation

63. As the Permanent Court of International Justice stated in a famous passage: "The essential principle contained in the actual notion of an illegal act . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[63]

64. Restitution is the prime means of reparation[64]. Under Article 35 of the ICL Draft Articles on Responsibility of States for Internationally Wrongful Acts, in this instance codifying a rule grounded in straightforward logic and supported by well-settled jurisprudence[65], the responsible State is required to make restitution "provided and to the extent that [it] is not materially impossible". Now, even though it would appear from the Secretary-General's Report that the wall is a massive structure intended tangibly to mark the Occupied Palestinian Territory[66], the destruction of that part of it situated on the territory and the restoration of the *status quo ante* do not appear impossible.

65. First, while restitution often proves impossible where the prejudice arises from the destruction of property, it would always seem possible if, as in the present case, the converse is true and it is a question of demolishing an existing structure. The process can sometimes present significant practical difficulties; they alone however are not sufficient to make restitution materially impossible[67]. Second, and most importantly, Israel has on a number of occasions underscored the temporary nature of the structure it is building[68], insisting moreover that it be called a "security fence", not a "separation wall" intended to be permanent[69].

66. At the same time Israel has clearly expressed its desire to condition any dismantling of the wall, or a change in its route, on progress in the negotiations on the final status of the occupied

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[63]*Factory at Chorzów, Judgment No. 13,* 13 September 1928, *Series A, No. 17*, p. 47; see also ICJ, *Arrest Warrant of 11 April 2000*, Judgment of 14 February 2002, *I.C.J. Reports 2002*, pp. 31-32, para. 76.

[64]In the Judgment concerning the *Factory at Chorzów*, the PCIJ underscored, immediately after the passage quoted above, the primacy of restitution over the other forms of reparation (*Series A, No. 17*, pp. 47-48; see also the Award rendered by Mr. Dupuy, the sole arbitrator, in the *Texaco-Calasiatic* case (19 January 1977, text in *J.D.I.*, 1977, p. 350).

[65]See *inter alia* the Judgment rendered by the PCIJ in the case concerning the *Factory at Chorzów* (13 September 1928, *P.C.I.J., Series A, No. 17*, p. 48) and the cases cited by the ILC in the commentary to Article 35 (ILC Report 2001, p. 239, footnote No. 526).

[66]A/ES-10/248, in particular paras. 9-14.

[67]In a similar vein, it should be recalled that, after having found that "Israel's . . . practices of settling parts of its population and new immigrants" in the occupied Palestinian territories constituted a "flagrant violation" of the Fourth Geneva Convention, the Security Council called upon the Government of Israel to "dismantle the existing settlements" (resolution 465 (1980), 1 March 1980, paras. 5 and 6).

[68]See para. 37 above.

[69]See the Report of the Secretary-General, A/ES-10/248, para. 2 (asterisk).

Palestinian territories[70]. This is incompatible with the very spirit of the reparation process, as defined by the Permanent Court of International Justice in a famous dictum[71].

67. Finally, in order for the *status quo ante* to be restored as completely as possible, it is important that the dismantling of the wall in the Occupied Palestinian Territory be accompanied by the annulment of the legal instruments having permitted its construction[72] and, if necessary, the payment of appropriate compensation.

(iii) Need to offer appropriate assurances and guarantees of non-repetition

68. The need to offer assurances or guarantees of non-repetition of the wrongful act does not automatically follow from the commission of the act but must be assessed on the basis of the specific circumstances of the situation in question[73]. To a great extent, it therefore results above all from a discretionary determination as to their appropriateness, based essentially on the magnitude of the breaches of law found and the probability that they may reoccur. On these two bases, the offering of such assurances and guarantees would appear appropriate under the circumstances underlying the request for advisory opinion.

(b) ***Obligation not to recognize the lawfulness of the situation***

69. The obligation not to recognize an unlawful situation is often associated with the violation of obligations of fundamental importance to the international community as a whole[74].

70. In the present case, during the debates on the construction of the wall held within the Security Council and the General Assembly on 14 and 20 October and 8 December 2003, the Permanent Representatives of France and Italy to the United Nations — the latter speaking on behalf of the members of the European Union — expressed concerns as to the consequences which further construction work may have[75]. As stated above, trust should however be placed in the commitments made by Israel as to this point and, specifically, as to the fact that the wall does not form a political border[76].

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[70]See in particular the statement to the General Assembly by Israel's Permanent Representative to the United Nations during the debate on the adoption of resolution ES-10/14 (text available on the website www.Israel-UN.org; see also press release AG/1463 of 8 December 2003).

[71]"It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself." (*Factory at Chorzów (Jurisdiction)*, 26 July 1927, *P.C.I.J., Series A, No. 9*, p. 21).

[72]The Security Council has time and again made similar demands in respect of measures to modify the status of Jerusalem or to promote the establishment of settlements (see *inter alia* resolutions 446 (1979), 465 (1980) and 476 (1980) of 22 March 1979, 1 March and 30 June 1980, respectively).

[73]In Article 30 *(b)* of its Draft Articles on Responsibility of States for Internationally Wrongful Acts, the ILC makes provision for the obligation to offer such assurances and guarantees "if circumstances so require".

[74]In its Draft Articles on Responsibility of States for Internationally Wrongful Acts, the ILC refers to the obligation of non-recognition and non-assistance in case of "serious breach by a State of an obligation arising under a peremptory norm of general international law" (Article 40 (2) and Article 41 (2)).

[75]See S/PV.4841, p. 17, for the French statement to the Security Council on 14 October 2003; see A/ES-10/PV.21, p. 21, for the statement to the General Assembly by the Italian Representative on behalf of the members of the European Union on 20 October 2003.

[76]Paras. 37 and 38 above.

71. In any event, in explaining the reach of the obligation of non-recognition in the present situation, it is not necessary to determine whether these violations of law constitute serious breaches of intransgressible obligations under international law. Such a determination is required when the responsible State seeks to induce the injured party to recognize the wrongful act and to waive any challenge of its consequences[77]. On the other hand, it would seem of no real relevance as far as the conduct of third parties is concerned: either those third parties are unjustified in pronouncing upon a legal relationship *inter partes* which is wholly foreign to them; or, conversely, there exists a situation which is illegal as to the world at large and is likely to have effects *erga omnes*, and to this they cannot by definition remain indifferent[78]. It is this second scenario, in many respects analogous to the problem dealt with by the Court in 1971, which obtains here.

(c) ***Obligation to resume performance of the violated obligations***

72. There are no legal grounds for thinking that the obligations which have been referred to in this statement have become inapplicable as a result of Israel's construction of the wall in the Occupied Palestinian Territory. Whether arising under general international law, humanitarian law, the principles of international human rights law or individual agreements binding Israel and Palestine, those obligations remain in force and the parties must perform them in good faith. Thus, strictly in terms of the question submitted to the Court, the duty to resume performance of the violated obligations no doubt does not figure among the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

73. The French Republic does however believe that it could be useful for the Court to consider stating, by way of juridical supererogation, the legal consequences which the construction of the wall does not have, reminding in particular the parties concerned, but also the international community as a whole, to fulfil their international obligations, notably the duty to negotiate with a view to the pacific settlement of disputes[79].

CONCLUSION

74. The French Republic requests the Court, in the event that it deems it appropriate to respond to the request for advisory opinion contained in General Assembly resolution ES-10/14, to do so in the light of the foregoing observations.

Paris, 30 January 2004

(Signed) Ronny ABRAHAM.
Agent of the French Republic

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[77] See the ILC Report 2001, commentary to Article 41, pp. 289-290, para. 9.

[78] On this "illegal situation", see para. 61.

[79] The Court has done so a number of times; see *inter alia United States Diplomatic and Consular Staff in Tehran*, Judgment of 24 May 1980, *I.C.J. Reports 1980*, pp. 42-43, para. 92; *Gabčíkovo-Nagymaros Project*, Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 81, para. 154; *Aerial Incident of 10 August 1999, Jurisdiction*, Judgment of 21 June 2000, *I.C.J. Reports 2000*, p. 34, para. 55 (concerning the obligation to settle international disputes peacefully).