International Court of Justice

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for an Advisory Opinion by the United Nations General Assembly)

Written Statement of the United Kingdom of Great Britain and Northern Ireland

JANUARY 2004

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I. INTRODUCTION

1.1 In its Order of 19 December 2003 the Court invited States to submit written statements regarding the request for an advisory opinion on the question of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.*

1.2 The United Kingdom has repeatedly made clear its position regarding the legality of Israel's actions in constructing the wall. [1] The United Kingdom voted in favour of General Assembly resolution ES-10/13, which was sponsored by the Members of the European Union and adopted on 21 October 2003 by 144 votes to 4, with 12 abstentions. In paragraph 1 of that resolution, the General Assembly -

> "*Demands* that Israel stop and reverse 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."

The United Kingdom has made statements to this effect in the United Nations and has participated in a number of similar statements by the European Union. United Kingdom Government Ministers have also made a number of statements to similar effect in Parliament.

1.3 The United Kingdom has, nevertheless, decided to submit this Written Statement, which deals only with the question whether the Court should exercise its discretion to decline to answer the question put and not with the substance of the matter. This is because of the great importance which the United Kingdom attaches to having the Court reaffirm and apply the principles already established in the case-law of the Court. Important questions of judicial propriety and the fundamental rights of the parties to a dispute are at issue.

1.4 The terms of the request made by the General Assembly of the United Nations in resolution ES-10/14, adopted at its resumed Tenth Emergency Special Session on 8 December 2003, are as follows:

> "*The General Assembly,*

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[1] In this Written Statement, the United Kingdom will use the term "wall", as used in the request for an advisory opinion, without implying that it is a more accurate or appropriate term than "security fence", "separation barrier" or such other term as may be employed.

...

Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of 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, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?"

1.5 The United Kingdom submits that the present case is one in which the Court should exercise its discretion, under Article 65, paragraph 1, of its Statute, to decline to answer the question posed in resolution ES-10/14. The United Kingdom believes that the most important priority in the Middle East is the achievement of a negotiated settlement based upon the road map (UN Doc S/2003/529) drawn up by the Quartet of the United Nations, European Union, Russian Federation and United States of America. The road map was endorsed by the Security Council in its resolution 1515 (2003), adopted unanimously on 19 November 2003, as the means of achieving "its vision of a region where two States, Israel and Palestine, live side by side within secure and recognized borders".

1.6 The United Kingdom and the other States involved in the Quartet have made it clear that they consider that for the Court to give an opinion on this matter would be likely to hinder, rather than assist, the peace process. In addition, the request for an advisory opinion is one which relates to what is essentially a dispute between two parties one of which has clearly not consented to the jurisdiction of the Court. For the Court properly to discharge its judicial function in giving an opinion would involve the determination of complex issues of fact in respect of which the necessary evidence would not be before the Court. Moreover, it cannot be said that an opinion is needed to assist the General Assembly in the performance of its functions.

1.7 This Statement deals only with these issues of judicial propriety. It is set out as follows. Part II will briefly review the background to the request for an advisory opinion. Part III will then set out the reasons why, in the view of the United

Kingdom, the Court should decline to answer the question put to it. The United Kingdom's conclusions are briefly summarised in Part IV.

II. THE BACKGROUND TO THE REQUEST

2.1 The present Part examines the background to the adoption by the General Assembly of resolution ES-10/14, which contains the request for an advisory opinion from the Court.

2.2 The search for peace in the Middle East has featured prominently on the agenda of the Security Council for many years, leading to the adoption of numerous resolutions, including the landmark resolution 242 (1967) which emphasised the inadmissibility of the acquisition of territory by war and affirmed the basic principles which should be included in a peaceful settlement, and resolution 338 (1973), in which the Council called upon the parties to implement resolution 242 (1967) in all of its parts.

2.3 Recent actions by the Security Council have included the adoption of resolutions 1397 (2002), 1402 (2002), 1403 (2002), 1405 (2002), 1435 (2002) and 1515 (2003). These cover a range of aspects of the situation in the Middle East but a common thread is support for the actions of the Quartet (the United Nations, European Union, Russian Federation and United States of America) in attempting to achieve a negotiated settlement based on the vision of two States living in peace alongside one another on the basis of secure and recognized boundaries. The road map, presented by the Quartet to Israel and the Palestinian Authority on 30 April 2003, is a practical, step-by-step plan for the realisation of that goal.

2.4 On 9 October 2003 the Syrian Permanent Representative to the United Nations in New York (in his capacity as Chairman of the Arab Group and on behalf of the States members of the League of Arab States) wrote to the President of the Security Council and asked him to convene an open meeting to discuss and take the necessary measures on alleged Israeli violations of international law including the construction of the wall. Their letter attached a draft Security Council resolution.

2.5 The main operative paragraph of the draft resolution provided that the Council:

> "*Decides* that the construction by Israel, the occupying Power, of a wall in the Occupied Territories and in departure of the armistice line of 1949 is illegal under relevant provisions of international law and must be ceased and reversed."

The draft resolution made no reference to a request for an advisory opinion from the Court.

2.6 Following a period of informal consultations, the draft resolution was put to a vote on 14 October 2003. It received 10 votes in favour, 1 against (the United States of America) and 4 abstentions (including the United Kingdom) and so was not adopted because of the negative vote of a permanent member of the Council. At no time during the debate was any reference made by any delegation to any need to request an advisory opinion from the Court.

2.7 The focus of attention then moved to the General Assembly. On 16 October 2003 the President of the General Assembly announced a resumption of the Tenth Emergency Special Session. This Emergency Special Session had been convened under the Uniting for Peace resolution on 24 April 1997, following the vetoing of a draft Security Council resolution concerning the building of new Israeli settlements in the occupied territories. The Session resumed on 20 October 2003 at the request of Syria (on behalf the States members of the League of Arab States) and Malaysia (on behalf of the Non-Aligned Movement). Two draft resolutions were submitted to the Emergency Special Session: one repeating the terms of the resolution before the Security Council, the other requesting an advisory opinion from the Court.

2.8 At the meeting on 20 October 2003, there was little discussion of the request for an advisory opinion. It was mentioned by Palestine, Malaysia (on behalf of the Non-Aligned Movement) and, in passing, by Iran and Cuba. No speaker admitted any doubt as to the illegality of the wall (one speaker expressed the opinion that the statement that it was illegal was merely restating the obvious) or suggested any reason why the opinion of the Court was necessary for the work of the General Assembly. The proposed request for an advisory opinion was opposed by Israel and the United States and not referred to by the other speakers.

2.9 In the course of 21 October 2003, there were extensive consultations between delegations resulting in the tabling by the Members of the European Union of a

compromise replacement draft resolution which was then adopted as resolution ES-10/13. This resolution made no reference to the request for an advisory opinion.

2.10 Resolution ES-10/13 was adopted by 144 votes to 4, with 12 abstentions. It requested the Secretary-General to report on compliance within one month. The Secretary-General's report duly issued on 24 November 2003 and concluded that Israel was not in compliance with the Assembly's demand that it "stop and reverse the construction of the wall in the Occupied Palestinian Territory". The report did not, however, suggest seeking an advisory opinion from the Court, nor did it contain any observations concerning the wall which pointed to the utility of seeking such an opinion.

2.11 On 30 November 2003, a new draft resolution was tabled to be considered at the resumed Tenth Emergency Special Session of the General Assembly. The resolution contained the question which is now before the Court. The debate at the meeting on 8 December 2003 reflected once again the absence of any perceived difficulty in applying the law to the question of the wall; rather, it reflected the frustration of members of the General Assembly that a political solution to the problem of the wall had not yet been found. No State which spoke in favour of the resolution suggested that the Assembly needed the Court to clarify the legal position to enable the Assembly to discharge its functions.

2.12 It is clear from the debate, and from the voting record, that in requesting this advisory opinion from the Court, the General Assembly was deeply divided. The resolution was adopted by 90 votes to 8, with 74 abstentions. The Court is invited to take full note of the significant number of the States voting against or abstaining. The eight States voting against included Australia and Ethiopia, as well as Israel, and the United States of America. States abstaining on the resolution included all fifteen Members of the European Union and other European States, many Caribbean, Central and Latin American States, Central Asian and Pacific States, Burundi, Cameroon, Canada, Japan, New Zealand, Philippines, Republic of Korea, Russia, Singapore, Thailand and Uganda. Statements made by the European Union, Russia, Uganda and the United States during the debate and by the United Kingdom, Canada, Switzerland and Singapore in explanation of vote indicate that an important body of opinion opposed or was unwilling to support this request to the Court.

2.13 After the vote, in which the United Kingdom abstained, the United Kingdom representative stated that:

> "We consider it inappropriate, without the consent of both parties, to ask the Court to give an advisory opinion. Moreover, it is unlikely to solve the problem on the ground. This is not a case in which the General Assembly genuinely needs legal advice in order to carry out its functions. It has already declared the wall to be illegal. The United Kingdom voted in favour of that resolution...To pursue an advisory opinion will in no way help the parties to re-launch the much-needed political dialogue necessary to implement the road map – and implementing the road map should be the priority."

2.14 The representative of Italy speaking on behalf of the European Union, the ten States which will join the Union in May 2004 and nine other European States, said that the request for an advisory opinion was inappropriate and would not help the efforts of the two parties to re-launch a political dialogue.

2.15 The same view was expressed by the other States involved in the Quartet. The representative of the Russian Federation emphasised that political action was more appropriate than a legal opinion:

> "We understand the motives of the sponsors of the draft resolution aimed at studying the legal consequences of the construction of the wall. However, such an approach, politically, would mean that the international community condones the current situation. In our view, at this juncture all efforts must be focussed on halting and reversing the construction of the wall. This is called for in Security Council resolution 1515 (2003) and General Assembly resolution ES-10/13. This has been firmly advocated by all members of the international Quartet of mediators."

2.16 The representative of the United States of America said:

> "The international community has long recognised that resolution of the conflict must be through negotiated settlement, as called for in Security Council resolutions 242 (1967) and 338 (1973). That was spelled out clearly to the parties in the terms of reference of the Madrid Peace Conference in 1991. Involving the International Court of Justice in this conflict is inconsistent with that approach and could actually delay a two-State solution and negatively impact road map implementation. Furthermore, referral of this issue to the International Court of Justice risks politicising the Court. It will not advance the Court's ability to contribute to global security, nor will it advance the prospects of peace."

2.17 The United Kingdom also notes the statements by Uganda and Singapore, both members of the Non-Aligned Movement who were prepared to forego voting with that Movement because of their regard for the work of the Court. The representative of Uganda said:

> "The solution lies in a negotiated settlement by both sides. That is why, in our opinion, referring the matter to the International Court of Justice would not serve the cause of peace. We should avoid politicising the Court, as this would undermine its impartiality and credibility. Furthermore, going to the International Court of Justice would amount to forum shopping when there is already a mechanism through the Quartet-led road map to address the issue."

The representative of Singapore, explaining Singapore's abstention, said:

> "We do not support the actions of Israel in building the wall. However, we have reservations about seeking an International Court of Justice (ICJ) advisory opinion on the Israeli wall, as there are wider implications that cause us concern. As a small State, we rely on the integrity of international law, of which the ICJ is one of the most important pillars. We do not consider it appropriate to involve the ICJ in this dispute in this way. The underlying dispute is one concerning territorial boundaries. This should be settled by negotiation among the parties concerned or by the binding decision of an appropriate international tribunal such as the ICJ...The purpose of seeking the advisory opinion of the ICJ must be to assist or facilitate the work of the General Assembly."

2.18 Finally, the representative of Switzerland, explaining Switzerland's abstention, said:

> "Despite our commitment to international law, Switzerland abstained in the vote on the draft resolution seeking to submit the question of the consequences of the wall to the International [Court of Justice]. We do not judge it to be appropriate in the current circumstances to bring before a legal body a subject in which highly political implications predominate."

III. THE COURT SHOULD DECLINE TO ANSWER THE QUESTION POSED

(A) The discretionary nature of the Court's functions under Article 65(1) of the Statute

3.1 The authority of the Court to give an advisory opinion is defined by Article 65, paragraph 1, of the Statute of the Court. The language of that provision is discretionary, not mandatory. As the Court has repeatedly made clear, when confronted with a request for an advisory opinion, the Court has a discretion in deciding whether it should respond. Thus, in the *Interpretation of Peace Treaties* case, the Court said that:

> "Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request ... the Court possesses a large amount of discretion in the matter."[2]

3.2 Similarly, in the *Western Sahara* case, the Court said of the discretion under Article 65:

> "In exercising this discretion, the International Court of Justice, like the Permanent Court of International Justice, has always been guided by the principle that, as a judicial body, it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions. If the question is a legal one which the Court is undoubtedly competent to answer, it may none the less decline to do so. As this Court has said in previous Opinions, the permissive character of Article 65, paragraph 1, gives it the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the request." [3]

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[2] Advisory Opinion of 30 March 1950, ICJ Reports 1950, p. 72. See also the advisory opinions on *Reservations to the Genocide Convention*, ICJ Reports 1951, at p. 19, and *Certain Expenses of the United Nations*, ICJ Reports 1962, at p. 155.

[3] ICJ Reports 1975, at p. 21.

The Court has taken a similar view in its advisory opinions in other cases (e.g. *Judgments of the Administrative Tribunal of the ILO upon Complaints made against UNESCO,* [4] *Fasla,* [5] *Mortished,* [6] *Mazilu* [7] and *Cumaraswamy* [8]).

3.3 It is within that margin of discretion that the question of propriety falls to be considered. The Court has repeatedly emphasised that there are inherent limitations on the judicial function [9] and that these limitations apply particularly to issues raised with the Court which might call into question the judicial nature of its role. Thus, judgments which are "devoid of object or purpose," [10] or "remote from reality" [11] or incapable of effective application [12] have been held to fall into this category. As the Court stated in the *Northern Cameroons* case:

> "If the Court were to proceed and were to hold that the Applicant's contentions were all sound on the merits, it would still be impossible for the Court to render a judgment capable of effective application." [13]

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4 "The Court is a judicial body and, in the exercise of its advisory functions, it is bound to remain faithful to the requirements of its judicial character. Is that possible in the present case?" ICJ Reports 1956, p. 84.

5 "Article 65 of the Statute is, however, permissive, and, under it, the Court's power to give an opinion is of a discretionary character. In exercising this discretion, the Court has always been guided by the principle that, as a judicial body, it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions." ICJ Reports 1973, p. 175, para. 24.

6 ICJ Reports 1982, p. 344 et seq.

7 ICJ Reports 1989, p. 190 et seq.

8 ICJ Reports 1999, p. 78.

9 See, amongst many instances, the *Free Zones* case, PCIJ, Series A/B, No. 46, 1932, p. 161; the *Status of Eastern Carelia* case, PCIJ, Series B, No. 5, 1923, p. 29; the *Nuclear Tests* cases, ICJ Reports 1974, p. 271 and pp. 476-477 and the *Northern Cameroons* case, ICJ Reports 1963, p. 30.

10 *Western Sahara* case, ICJ Reports 1975, at p. 37.

11 *Northern Cameroons* case, ICJ Reports 1963, at p. 33.

12 *Northern Cameroons* case, ICJ Reports 1963, at p. 33.

13 *Northern Cameroons* case, ICJ Reports 1963, at p. 33.

Although that was a contentious case, the Court emphasised that all these considerations of judicial propriety apply equally to the exercise of the advisory jurisdiction.[14]

3.4 The Court has, of course, made clear that, as the principal judicial organ of the United Nations, it should normally give its opinion on a legal question when requested to do so by a competent organ (or specialized agency) of the United Nations. Thus, in the *Interpretation of Peace Treaties* case the Court said:

> "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." [15]

More recently, in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, the Court, citing statements in several previous cases, stated that only "compelling reasons" should lead it to refuse to give an opinion when requested to do so by a competent organ or agency.[16] On no occasion amongst the 23 requests for an advisory opinion considered by the Court prior to this date has the Court found such compelling reasons to exist, although the Permanent Court of International Justice declined to answer the question posed to it in the *Eastern Carelia* case.

3.5 The question, therefore, is what might constitute such "compelling reasons". The United Kingdom suggests that the answer is to be found in three closely related strands of the Court's jurisprudence.

3.6 First, the Court has always insisted that the advisory jurisdiction exists to ensure that other organs of the United Nations (and specialized agencies) can obtain clarification of the law from the Court in order to assist them in their activities. For example, in the *Reservations* case, the Court stressed that "the object of this request for an Opinion is to guide the United Nations in respect of its own action". [17] Similarly, in the *Namibia* case, the Court stated that:

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[14] *Northern Cameroons* case, ICJ Reports 1963, at p. 30.

[15] ICJ Reports 1950, at p. 71.

[16] ICJ Reports 1996, at p. 235, para. 14.

[17] ICJ Reports 1951, p. 19.

> "The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions. This objective is stressed by the preamble to the resolution requesting the opinion, in which the Security Council has stated 'that an advisory opinion from the International Court of Justice would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking.' " [18]

And in the *Western Sahara* case, the Court noted that "an opinion given by the Court in the present proceedings will furnish the General Assembly with elements of a legal character relevant to its further treatment of the decolonisation of Western Sahara". [19]

3.7 It is thus a common characteristic of these, and the other advisory opinions rendered to date, that the Court considered that its opinion was likely to make a positive contribution to the work of the requesting organ and of the United Nations as a whole. The converse, however, is also true: if the Court considers that an opinion would be unlikely to assist the requesting organ and, *a fortiori*, if it considers that rendering an opinion would have an adverse effect on the work of the United Nations as a whole, the Court should exercise its discretion to decline to give an opinion.

3.8 It is true that in the particular circumstances of the *Legality of the Threat or Use of Nuclear Weapons* case, the Court declined to inquire into the purpose for which an opinion was requested, on the ground that it was for the requesting organ to decide whether or not it needed an advisory opinion. [20] However, the question whether there exist compelling reasons for the Court to decline to give an opinion when requested to do so must be a question which only the Court itself can answer. If, therefore, in a particular case there are good reasons for the Court to consider that its opinion would not be of positive assistance and that it might even be detrimental to the work of the United Nations if the Court were to render an opinion, then these are considerations which the Court must be able to take into account in determining how it should exercise its discretion under Article 65, paragraph 1, of the Statute, albeit that it would only be in a rare case that the Court would conclude that there existed sufficient reason for it to decide not to answer a request put to it.

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[18] ICJ Reports 1971, p. 24, para. 32.

[19] ICJ Reports 1975, p. 37, para. 72.

[20] ICJ Reports 1996, p. 237, para. 16.

3.9 Secondly, the Court has made clear that the advisory jurisdiction is not to be used as a means of circumventing the requirement of the consent of the parties to a dispute which is a central feature of the contentious jurisdiction of the Court; in other words, the advisory jurisdiction is not to be used as a form of "back-door" compulsory jurisdiction in relation to matters which are in substance disputes between two parties. This principle was first mentioned by the Permanent Court of International Justice in the *Eastern Carelia* case. [21] While the decision not to give an opinion in that case took into account the fact that one of the parties to the dispute, Russia, was not then a member of the League of Nations, the Court has subsequently emphasised the importance of the broader principle.

3.10 Thus, in the *Interpretation of Peace Treaties* case, the Court stated, with regard to the *Eastern Carelia* case:

> "[The Permanent Court] declined to give an opinion because it found that the question put to it was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties, and that at the same time it raised a question of fact which could not be elucidated without hearing from both parties." [22]

The principle was reaffirmed by the Court in the *Western Sahara* case, where, after referring to the *Peace Treaties* case, the Court stated:

> "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.
>
> 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. If such a situation should arise, the powers of the Court, under the discretion given to it by Article 65, paragraph 1,

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21 PCIJ, Series B, No. 5.

22 ICJ Reports 1950, p. 72

of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction." [23]

Similarly, in the *Mazilu* case, the Court insisted that:

"While, however, the absence of the consent of Romania to the present proceedings can have no effect on the jurisdiction of the Court, it is a matter to be considered when examining the propriety of the Court giving an opinion." [24]

3.11 The Court has repeatedly stressed "that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction". [25] The use of the advisory jurisdiction as a means of by-passing this principle would, therefore, be wholly contrary to considerations of judicial propriety, as the Court recognized in the *Western Sahara* case. The scrutiny of any request for an advisory opinion to ascertain whether it is in fact being used in this way is even more important than it was in the days of the Permanent Court of International Justice, for in the League of Nations the practice of unanimity in the Council offered an important safeguard which is absent in the case of the United Nations, where a majority in the General Assembly suffices for a request to be made.[26]

3.12 In the *Western Sahara* case, the Court nevertheless went on to hold that it should not refuse to answer the question put to it by the General Assembly, notwithstanding the existence of a dispute between Morocco and Spain. The Court made clear, however, that it did not intend to depart from or weaken the general principle that the advisory jurisdiction is not to be used as a means of embroiling the Court in what is in substance a dispute between two or more parties where the consent of all parties to the Court's jurisdiction has not been given. On the contrary, the Court

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[23] ICJ Reports 1975, p. 25, paras. 32-33. See also the Court's Opinion in the *Namibia* case, ICJ Reports 1971, p. 24, paras. 33-34.

[24] ICJ Reports 1989, pp. 190-191, para. 37. The brief reference to the *Eastern Carelia* precedent in the Court's Opinion on *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 235, para. 14, refers only to the fact of Russian non-membership of the League, but the broader principle identified in *Peace Treaties, Western Sahara* and *Mazilu* did not arise in that case and was not considered.

[25] *East Timor* case, ICJ Reports 1995, p. 101. para. 26.

[26] See S. Rosenne, *The Law and Practice of the International Court, 1920-1996* (1997), vol. I, pp 293-5.

restated the general principle (in the passage quoted in paragraph 3.10, above) and explained why that principle did not apply to the particular case before it in the following terms:

> "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." [27]

The *Western Sahara* exception to the general principle is a narrow one, readily explained in that case by the way in which the issue of decolonisation and self-determination for Western Sahara had unfolded in the General Assembly between 1958 and 1974. It does not mean that a dispute between two parties may, in effect, be made the subject of an advisory opinion just because it involves issues which have been the subject of discussion (however extensive) in the General Assembly.

3.13 Thirdly, the Court has recognized the difficulty which might arise in an advisory jurisdiction case in dealing with complex issues of fact. In the *Eastern Carelia* case, the Permanent Court of International Justice stated:

> "The Court does not say that there is an absolute rule that the request for an advisory opinion may not involve some enquiry as to facts, but, under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are.
>
> The Court is aware of the fact that it is not requested to decide a dispute, but to give an advisory opinion. This circumstance, however, does not essentially modify the above considerations. The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Finland and Russia, and can only be decided by an investigation into the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court."[28]

3.14 It would be contrary to considerations of judicial propriety for the Court to seek to give an advisory opinion regarding the application of legal principles to factual situations if the facts in question are not agreed and cannot be ascertained in a properly judicial fashion. As the Court said in the *Western Sahara* case:

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[27] ICJ Reports 1975, p. 25, para. 34.

"the issue is whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character." [29]

(B) The present case is one in which the Court should decline to give an Opinion

3.15 It follows from the analysis in the preceding section that compelling reasons for the Court to decline to give an opinion exist in the following cases:-

(i) where the opinion sought would not be a clarification of the law which could be expected to assist the requesting organ and, even more so, where the opinion sought might well be detrimental to the work of the United Nations; or

(ii) where the question on which an opinion is sought is one which forms the substance of a dispute between two parties and one of them does not consent to the exercise of the Court's jurisdiction; or

(iii) where the question posed cannot be answered without certain factual determinations and the material before the Court does not permit of a properly judicial conclusion regarding those facts.

3.16 The United Kingdom submits that the present case falls into all three categories.

(1) An Opinion is not necessary to assist the General Assembly in the exercise of its functions and would be likely to prove detrimental to the work of the UN as a whole

3.17 The Court's statement in the *Legality of the Threat or Use of Nuclear Weapons* case that it would not normally question the view of the requesting organ on whether or not an opinion was necessary for the work of that organ has already been mentioned.[30] The present case, however, is an unusual one in that it directly concerns other principal organs of the United Nations. While the request in the present case

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[28] PCIJ, Series B, No. 5, pp. 28-29.

[29] ICJ Reports 1975, pp. 28-9, para. 46.

was made by an Emergency Special Session of the General Assembly convened under the Uniting for Peace resolution, [31] the situation in the Middle East, including the Palestinian Question, is one which falls within the primary responsibility of the Security Council for the maintenance of international peace and security.

3.18 The responsibility of the Court, as a principal organ of the United Nations, when exercising its powers under the advisory jurisdiction is not limited to the requesting organ but extends to the United Nations as a whole. It follows that, in considering whether the rendering of an opinion would have positive benefits and whether it might have detrimental effects, the Court should, in the present case, look beyond the possible impact which its opinion would have on the General Assembly and consider the effect which the opinion might have upon the work of the United Nations as a whole and, in particular, on the work of the organ with primary responsibility for the maintenance of international peace and security, namely the Security Council.

3.19 The Council has by no means been inactive on the issue of the Middle East in recent months. As outlined in paragraphs 2.2 to 2.6 of this Statement, although a draft resolution on the Israeli wall was vetoed on 14 October 2003, the Council has adopted a number of other resolutions, most recently resolution 1515 (2003) on 19 November 2003. Resolution 1515 (2003), which was adopted unanimously, follows on from the support which the Security Council has given on numerous occasions (most noticeably in resolution 1435 (2002)) to the attempts of the Quartet to secure the agreement of both Israel and the Palestinian Authority to a practical peace plan and then to ensure its implementation. In resolution 1515 (2003), the Council gave its endorsement to the road map (the peace plan produced by the Quartet earlier in 2003) and called on both Israel and the Palestine Authority to fulfil their obligations thereunder.

3.20 The road map calls for practical steps to be taken in a series of stages by both Israel and the Palestinian Authority. These include immediate steps regarding security in which the Palestinian Authority would declare an unequivocal end to violence and terrorist attacks against Israel and undertake visible efforts to restrain those conducting

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30 See para. 3.8, above.

31 See paras. 2.7 to 2.12, above.

and planning attacks on Israel and Israelis. Israel would take no actions undermining trust and would engage in a progressive withdrawal from areas previously controlled by the Palestinian Authority. Later phases would culminate in a permanent status agreement under which such issues as Jerusalem and the Israeli settlements would be resolved.[32]

3.21 It is plainly the view of the Council that the balanced, negotiated approach to peace represented by the road map offers the best chance for a peaceful resolution of the situation in the Middle East. That has not been disputed by the Assembly. Indeed, whatever functions the Assembly, meeting in the resumed Tenth Emergency Special Session, may have with regard to the Middle East, it is clearly not entitled to undermine the actions of the Security Council in this matter. The yardstick for determining whether or not the Court should respond to the request from the General Assembly is, therefore, whether the rendering of an opinion would be beneficial or detrimental to the goal of achieving peace through the adoption and implementation of the road map.

3.22 In its Opinion on *Legality of the Threat or Use of Nuclear Weapons*, the Court was wary of coming to conclusions regarding the effects which an opinion might have on the prospects for negotiations, commenting that it had "heard contrary positions advanced and there are no evident criteria by which it can prefer one assessment to another".[33]

3.23 In the present case, however, there is a striking degree of consensus amongst those most closely involved in promoting the peace process in the Middle East that an advisory opinion on the question sought would be of no assistance and would be likely to be unhelpful. It has already been observed that all of the States involved in the Quartet have taken that position.[34] All of them abstained or voted against the decision to request the Court's opinion, as did Norway, which had been closely involved in

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32 UN Doc S/2003/529.

33 ICJ Reports 1996, p. 237, para. 17.

34 See paragraphs 1.6 and 2.13 to 2.16 of this Statement.

earlier peace talks, and Switzerland, which has provided the location for many of the meetings in the peace process.

3.24 By contrast, not one of the States which spoke in favour of the draft resolution on the request suggested that an opinion would further the road map peace process or responded to the concerns expressed by the members of the Quartet in this regard.

3.25 The United Kingdom submits that those concerns are perfectly understandable. The road map involves a delicate process of mutual concessions in which the actions of one party are never addressed in isolation but always in the context of the actions of the other party, in which agreement is to be obtained and trust developed by dealing with issues in a sequence according to which certain matters are to be addressed at once, while others are deferred to a later stage of the process, and in which the emphasis is upon future action rather than responsibility for what has happened in the past.

3.26 By contrast, the request asks the Court for an opinion on the actions of only one party, Israel, and in respect of one isolated issue, that is the wall. A focus on the legal consequences of the Israeli construction of the wall to the exclusion of those other issues is directly contrary to the approach followed in the road map. It is difficult to see how a legal opinion on that one issue can have a beneficial effect on the United Nations' attempts to further peace through the road map (and no State has suggested that it would have such an effect), whereas there is every reason to fear that the rendering of such an opinion, however careful, by the Court would have a detrimental effect on the peace process.

3.27 While the Court is rightly concerned to play its part as the principal judicial organ of the United Nations in responding to requests from other organs, the United Kingdom submits that it is precisely because the Court is a principal organ of the United Nations that it has a responsibility to be alert to the danger that its opinion on one aspect of a situation as delicate as that of the Middle East peace process might harm the actions of the Organization as a whole in relation to that process. Where, as here, there is good reason to think that that would be the case, there exists a compelling reason why the Court should not give an opinion in response to the request made of it.

3.28 The United Kingdom also notes that, even if the Court were concerned only with the effect which its opinion might have on the work of the General Assembly, the conclusion would be the same. The point has already been made that no State which spoke in favour of what became resolution ES-10/14 suggested that there was any need for an advisory opinion in order to assist the Assembly in its future work. Nor did any of them suggest that there were legal issues which needed to be clarified. On the contrary, most States seem to have regarded the legal position as clear. The Assembly had already declared that the building of the wall in Occupied Palestinian Territory involved violations of international law. There is no hint in the record of the debate on 8 December 2003 that any of the supporters of the resolution had any doubts on that score or that there was any doubt or controversy regarding the legal consequences of the building of the wall.

3.29 The stated reason for seeking an advisory opinion was rather that this step was necessary because Israel had not complied with the Assembly's earlier demands regarding the wall. Thus, the representative of Palestine said:

> "Israel has not complied with the resolution [ES-10/13] and therefore further actions must be taken. As you are all aware, we believe that further possible action at this stage is to request an advisory opinion from the International Court of Justice about the legal consequences arising from the construction of the wall by Israel, the occupying Power, in disregard of the relevant provisions of international law, as well as relevant Security Council and General Assembly resolutions.
>
> In the absence of any other specific practical measures to compel Israel to stop building the wall and to dismantle the existing parts we must, at a minimum, seek to affirm the legal aspects of this matter, such as the illegality of the wall and the necessity of non-recognition of the wall and its implications by States and by the United Nations system. We also hope that that will put additional pressure on Israel, the occupying Power, so that it will comply with and adhere to the provisions of international law and the will of the international community."[35]

3.30 It is imperative to recall, however, that the advisory jurisdiction is a means by which advice about the law can be obtained by an organ which needs to have the law clarified for its future actions. It is not a means by which the law is to be enforced against a State, however recalcitrant it might be. The statement quoted in the

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[35] A/ES-10/PV.23, p. 3.

preceding paragraph strongly suggests that the opinion sought is not needed for the purpose for which the advisory jurisdiction exists. Moreover, to seek to employ the advisory jurisdiction as a form of enforcement mechanism runs counter to the principle that States cannot be compelled to submit their disputes or subject their conduct to the scrutiny of an international tribunal unless they have given their consent, a point developed in the next sub-section.

(2) The present case concerns a bilateral dispute

3.31 The United Kingdom also submits that the present case is one which falls within the principle, well stated in the *Western Sahara* case and which it invites the Court to reaffirm, that the Court will decline to answer a question put to it if by answering that question it would be deciding an issue in a bilateral dispute and thereby circumventing the requirement of consent in the contentious jurisdiction. The Court's own jurisprudence shows that the importance of that principle is beyond doubt. It is particularly significant here.

3.32 In the present case, the construction of the wall has undoubtedly given rise to a bilateral dispute between Israel and Palestine. (It is submitted that for the purpose of the application of this principle in these proceedings, the status of Palestine may be assimilated to that of a State.) Speaker after speaker in the various debates in the General Assembly and the Security Council made clear that it was not the construction of the wall *per se* which involved a violation of international law but the construction of part of it on the occupied territory. Possible implications for title to territory have been identified as a principal concern. The issues are thus clearly part of a bilateral dispute between Israel and Palestine and the principle restated in *Western Sahara* is accordingly applicable. It is also manifest that Israel does not consent to the jurisdiction of the Court over this dispute. The only question is whether the exception identified in that case applies here.

3.33 In the United Kingdom's submission, it does not. There are two significant respects in which this case is different from the facts of *Western Sahara*. First, this is not a case in which, to adopt the language of the *Western Sahara* Opinion, any dispute "arose during the proceedings of the General Assembly" and "did not arise

independently in bilateral relations." [36] The questions put by the General Assembly in the *Western Sahara* case concerned matters which arose only because of the way in which the decolonisation process which had begun in the General Assembly was being handled there. By contrast, the dispute over the wall has arisen out of the bilateral relationship between Israel and Palestine and the mutual recriminations between them over security issues.

3.34 Secondly, the nature of the questions in *Western Sahara* meant that the Court's response was not definitive of the legal position at the time the opinion was sought but related to historical rights in Western Sahara at the time of colonisation by Spain. As the Court there pointed out, the answers to the questions put before it would not affect Spain's title to the territory:

> "The settlement of this issue will not affect the rights of Spain today as the administering Power, but will assist the General Assembly in deciding on the policy to be followed in order to accelerate the decolonization process in the territory. It follows that the legal position of the State which has refused its consent to the present proceedings is not 'in any way compromised by the answers that the Court may give to the questions put to it' (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950,* p. 72)."[37]

3.35 The present case also differs from the *Namibia* case, even though the question posed in the present case has apparently been inspired by that in *Namibia*. The *Namibia* case concerned the legal consequences for States flowing from a resolution of the Security Council and South Africa's continued presence in Namibia notwithstanding that resolution. The question posed in the present case also asks about legal consequences of Israel's action but the relevant law is the armistice agreement of 1949, the provisions of the law of armed conflict and belligerent occupation and other principles of general international law. Although the question posed in resolution ES-10/14 also refers to "relevant Security Council and General Assembly resolutions", none of those resolutions constitutes a decision which occupies the central position which the decision of the Security Council occupied in the *Namibia* case. In particular, in sharp contrast to the position in the *Namibia* case,

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[36] ICJ Reports 1975, p. 25, para. 34.

[37] ICJ Reports 1975, p. 27, para. 42.

the legality or illegality of the actions in question, and the legal consequences which may flow from that legality or illegality, are not in any way dependent upon a decision of the organ which has sought the opinion of the Court, in this case the General Assembly.

(3) An Opinion in the present case would require determinations of fact which the Court cannot properly make on the basis of the material before it

3.36 Finally, the United Kingdom submits that if the Court were to answer the question put to it, it would have to make a number of determinations of fact in order to answer the legal question posed. The Court has made clear that its judicial character means that any findings of fact in advisory proceedings must be made with the same care and the same need for evidence as those in a contentious case. The Court cannot, in short, adopt the same approach to issues of fact as a political organ, or States participating in a political process, may do. In the present case, the United Kingdom respectfully doubts that it will be possible for the Court to make the necessary factual determinations in the manner that its jurisprudence requires.

3.37 It is not possible here to speculate on all of the factual issues which might require determination but it is difficult to see how the Court can determine the legal consequences of the construction of the wall without considering the nature and severity of the threat which the wall is intended to meet and the factual aspects of the question whether the wall (and the particular route which it follows) is an appropriate response to that threat. The former would require an analysis of the attacks upon Israeli targets which have occurred in recent years and of the likely pattern of future attacks. The latter would require consideration of the likely impact of the wall on such attacks, balanced against the effect on the Palestinian population. Different stretches of the wall would require separate analysis since it is the route of the wall, and the location of parts of the wall on occupied territory, which lie at the heart of the argument that Israel is acting unlawfully.

3.38 The difficulty can be seen most clearly if one considers the legal position under two of the treaties specifically invoked in resolution ES-10/14, the Fourth Geneva Convention, 1949, and the Regulations annexed to the Fourth Hague Convention

Respecting the Laws and Customs of War on Land, 1907 ("the Hague Regulations"). These address the circumstances in which an Occupying Power may requisition or destroy property. Thus, Article 23(g) of the Hague Regulations states that:

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

Article 52 deals with requisition of private property "for the needs of the army of occupation". Similarly, Article 53 of the Fourth Geneva Convention prohibits the destruction of property "except where such destruction is rendered absolutely necessary by military operations" and Article 147 of the same Convention makes "extensive destruction and appropriation of property" a grave breach punishable with criminal sanctions if it is "not justified by military necessity and carried out unlawfully and wantonly".

3.39 It is difficult to see how the Court, consistent with its judicial character, could apply these provisions without first making complex factual determinations regarding the scale, nature and location of the threats posed to Israel, since such findings would be essential to the application of the military necessity provisions.

3.40 Factual determinations of this kind would be difficult in any proceedings but they are rendered more difficult in the present case by the fact that much of the information is available only to Israel. In addition, the nature of advisory proceedings makes it difficult to test evidence by the interaction between the parties which is a feature of contentious proceedings or, where necessary, by means of the examination and cross-examination of witnesses.

3.41 All these considerations lead to the conclusion that this is precisely the type of case to which the Permanent Court's decision in *Eastern Carelia* regarding the need to decline to exercise the advisory jurisdiction in cases where there were intractable issues of fact was intended to apply.

IV. CONCLUSIONS

4.1 For the reasons given above, the United Kingdom respectfully requests the Court to reaffirm the principles upon which it should exercise its discretion under Article 65, paragraph 1, of the Statute, and decline to give an answer the question posed by the General Assembly in this case.

M. C. Wood

28 January 2004

M.C. Wood
(Representative of the United
Kingdom of Great Britain
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