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INTERNATIONAL COURT OF JUSTICE

LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY (REQUEST FOR ADVISORY OPINION)

MEMORIAL OF THE REPUBLIC OF PALAU

28 January 2004

January 29, 2004

Mr. Philippe Couvreur
Registrar of the Court
International Court of Justice
2517 KJ The Hague
The Netherlands

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

Sir:

To His Excellency, the President, to the Judges of the International Court of Justice, the undersigned being duly authorized by the Republic of Palau, I have the honour of transmitting to you this Memorial in accordance with Article 66, paragraph 2 of the Statute of the Court, Article 105 of the Rules of the Court, and the Court's Order, dated 19 December 2003. For the Court's convenience, I have enclosed with this package 30 English copies of my Government's Memorial. I have also enclosed with this package a CD-Rom which contains an electronic copy of this submission.

As the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands share similar concerns with respect to the advisory opinion request, they have decided to submit separate but substantially identical written submissions to the Court.

Thank you for your consideration.

Sincerely yours,

H.E. Mr. Hersey Kyota
Ambassador Extraordinary and Plenipotentiary
Permanent Representative of the
Republic of Palau to the United Nations

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The Government of the Republic of Palau presents its compliments to the Registrar of the International Court of Justice and, with reference to the letter of 19 December 2003 by which member States of the United Nations were invited to present their views regarding the question referred to the Court in General Assembly resolution A/RES/ES-10/14 of 8 December 2003, has the honor to present the following written submission.

The Republic of Palau is not in a position to make submissions with respect to the merits of the substantive issues raised by the said request. The present submission is made without prejudice to its views on the specific substantive question that has been put before the Court.

The Republic of Palau is a small Pacific island-state and a member of the United Nations that is committed to the principles and protection afforded by international law, the International Court of Justice and the United Nations. It is concerned by several aspects of the advisory opinion request submitted in the aforementioned General Assembly resolution. The Republic of Palau's decision not to vote in favor of this resolution reflects its view that the request for an advisory opinion is inappropriate in this case and that there are compelling reasons for the Court to exercise its discretion to decline to respond to this request, even if the Court finds that it does in fact have jurisdiction to do so.

The request contained in resolution ES-10/14, asks the Court to address an issue that is fundamentally in dispute. The Republic of Palau is concerned that reliance on the advisory opinion procedure in such a case risks circumventing and eroding the principle, enshrined in Article 36 of the Court's statute, that contentious issues can only be brought before the Court with the consent of the parties concerned and thus threatens to undermine the stature and judicial integrity of the Court and establish a dangerous precedent.

The request seeks to embroil the Court in a charged and inflammatory political issue by way of the advisory opinion request. The political and contentious nature of this subject is amply borne out not only by its divisive effect on the political organs of the United Nations, but by the use of terminology and of legal assertions and assumptions throughout the text of resolution ES-10/14 that are themselves the subject of considerable dispute, and for which the Court's imprimatur is indirectly sought. The adoption of General Assembly resolution A/RES/ES-10/13 of 21 October 2003, which determined issues strikingly similar to those put before the Court also raises doubts as to the extent to which this request for an advisory opinion can be considered a genuine request for legal guidance in accordance with Article 96 of the UN Charter.

Given the formulation of the question and the context in which it is adopted, the Republic of Palau is concerned that any non-binding advisory opinion on the substantive issue may have significant detrimental effects. It would risk introducing further acrimony between the parties, undermine the prospects for a peaceful and negotiated settlement, and, in the process, possibly taint the reputation of the Court to the detriment of those States, especially small States, that look to the International Court of Justice for the authoritative resolution of disputes in accordance with international law.

In this regard, the Republic of Palau notes that the parties concerned have committed themselves to comprehensively resolving all outstanding issues between them by a process of negotiation, in accordance with relevant Security Council Resolutions and in the framework of the "Performance-Based Road Map", sponsored by the Quartet, where the UN plays a central role, and endorsed by the Security Council in resolution 1515 of 19 November 2003. This resolution was adopted less than three weeks before the General Assembly passed the resolution at issue in the present proceedings. The involvement of the Court in one isolated aspect of this dispute, without the consent of both parties, seems to run counter to the dispute settlement mechanism agreed between the parties. It also undercuts the endorsement of this mechanism by the Security Council - the organ charged with primary responsibility for the maintenance of international peace and security under the United Nations Charter, and which is still seized of and engaged in the matter.

It is also noteworthy in this context that the request for an advisory opinion was never presented to the Security Council for its consideration before its submission to the General Assembly in emergency special session under the Uniting for Peace procedure, and that the Assembly was in regular session at the time. The Republic of Palau is committed to adherence to the General Assembly Rules of Procedure and the requirements laid down in the Charter and other relevant UN documents as the basis for predictable and orderly proceedings applicable to all States and providing all States, particularly small states and those who might find themselves in the minority, with a sense of security and fair play. Without addressing this issue in detail, the Republic of Palau is concerned about the apparent violations of procedural and substantive conditions in the present case.

As a member of the United Nations, that shares the hopes of the international community for the peaceful resolution of the Israeli-Palestinian conflict in all its' aspects, the Republic of Palau supports the view expressed by several delegations in

the debate on resolution ES-10/14 that the efforts of the international community should be directed towards steps which are conducive to dialogue and negotiations. The international community has recognized that the resolution of this conflict, in all its aspects, must be through negotiated settlement, as called for in Security Council resolutions 242 (1967) and 338 (1973). This principle was restated by the Secretary-General in concluding his report pursuant to General Assembly resolution ES-10/13. After analyzing all aspects of the barrier, he concluded:

> After so many years of bloodshed, dislocation and suffering, it should be clear to all of us, as well as to the parties, that only through a just, comprehensive and lasting peace settlement based on Security Council resolutions 242(1968) and 338(1973) can the security of both Palestinians and Israelis be assured.

Without prejudice to its concerns about the route of the security barrier, and about the terrorism and violence in the region, the Government of the Republic of Palau does not believe that referral of isolated issues to the Court, without the consent of the parties, can advance the peaceful resolution of the conflict, and is concerned at the detrimental impact such a move may have on the Court's ability to exercise its judicial function.

Accordingly, the Court is respectfully requested to exercise its discretion, on grounds of propriety, to decline to hear this case.

Signed:

Tommy L. Shmull
Minister of State
Republic of Palau

Date: 01-28-04