Separate opinion of Judge Elaraby

The nature and scope of United Nations responsibility — The international legal status of the Occupied Palestinian Territory — Historical survey — The law of belligerent occupation, including current situation of prolonged occupation, principle of military necessity, breaches of international humanitarian law and the erga omnes *right to self-determination of the Palestinian people.*

I would like to express, at the outset, my complete and unqualified support for the findings and conclusions of the Court. I consider it necessary, however, to exercise my entitlement under Article 57 of the Statute, to append this separate opinion to elaborate on some of the historical and legal aspects contained in the Advisory Opinion .

I feel obliged, with considerable reluctance, to start by referring to paragraph 8 of the Advisory Opinion. In my view, as Judge Lachs wrote in his separate opinion in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua*v. U*nited States of America), Judgment* , "A judge — as needs no emphasis — is bound to be impartial, objective, detached, disinterested and unbiased." (*I.C.J. Reports 1986* , p. 158.) Throughout the consideration of this Advisory Opinion, I exerted every effort to be guided by this wise maxim which has a wider scope than the solemn declaration every judge makes in conformity with Article 20 of the Statute of the International Court of Justice.

In this separate opinion, I will address three interrelated points:

(i) the nature and scope of the United Nations responsibility;
(ii) the international legal status of the Occupied Palestinian Territory;
(iii) the law of belligerent occupation.

I. The Nature and Scope of the United Nations Responsibility

1. The first point to be emphasized is the need to spell out the nature and the wide-ranging scope of the United Nations historical and legal responsibility towards Palestine. Indeed, the Court has referred to this special responsibility when it held that:

> "The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine . . . this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people." (Advisory Opinion, para. 49.)

What I consider relevant to emphasize is that this special responsibility was discharged for five decades without proper regard for the rule of law. The question of Palestine has dominated the work of the United Nations since its inception, yet no organ has ever requested the International Court of Justice to clarify the complex legal aspects of the matters under its purview. Decisions with far-reaching consequences were taken on the basis of political expediency, without due regard for the legal requirements. Even when decisions were adopted, the will to follow through to implementation soon evaporated. Competent United Nations organs, including the General Assembly and the Security Council, have adopted streams of resolutions that remain wholly or partially unfulfilled. The United Nations special responsibility has its origin in General Assembly resolution 118 (II) of 29 November 1947 (hereafter, the Partition Resolution).

Proposals to seek advisory opinions prior to the adoption of the Partition Resolution were considered on many occasions in the competent subsidiary bodies but no request was ever adopted. This fact by itself confers considerable importance on the request for an advisory opinion embodied in General Assembly resolution ES-10/14 (A/ES-10/L.16), adopted on 8 December 2003, at the 23rd meeting of the resumed Tenth Emergency Special Session. The request is indeed a landmark in the United Nations consideration of the question of Palestine. The historical record of some previous attempts to seek the views of the International Court of Justice deserves to be recalled, albeit briefly.

The report of the Sub-Committee 2 in 1947 to the*Ad Hoc* Committee on the Palestinian Question recognized the necessity to clarify the legal issues. In paragraph 38, it was stated:

> "The Sub-Committee examined in detail the legal issues raised by the delegations of Syria and Egypt, and its considered views are recorded in this report. There is, however, no doubt that it would be advantageous and more satisfactory from all points of view if an advisory opinion on these difficult and complex legal and constitutional issues were obtained from the highest international judicial tribunal." (Document A/AC.14/32 and Add. 1, 11 November 1947, para. 38.)

The "difficult and complex legal and constitutional issues" revolved around:

> "whether the General Assembly is competent to recommend either of the solutions proposed by the majority and by the minority respectively of the Special Committee, and whether it lies within the power of any Member or group of Members of the United Nations to implement any of the proposed solutions without the consent of the people of Palestine" (*ibid* ., para. 37).

Several such proposals were considered. None was adopted. The Sub-Committee in its report, some two weeks before the vote on the Partition Resolution, recognized that:

> "A refusal to submit this question for the opinion of the International Court of Justice would amount to a confession that the General Assembly is determined to make recommendations in a certain direction, not because those recommendations are in accord with the principles of international justice and fairness, but because the majority of the representatives desire to settle the problem in a certain manner, irrespective of what the merits of the question or the legal obligations of the parties might be. Such an attitude will not serve to enhance the prestige of the United Nations. . . ." (*Ibid* ., para. 40.)

The clear and well-reasoned arguments calling for clarification and elucidation of the legal issues fell on deaf ears. The rush to vote proceeded without clarifying the legal aspects. In this context, it is relevant to recall that the Partition Resolution fully endorsed referral of "any dispute relating to the application or interpretation" [1] of its provisions to the International Court of Justice. The referral "shall be at the request of either party" [2] . Needless to say, this avenue was also never followed.

Thus, the request by the General Assembly for an advisory opinion, as contained in resolution 10/14, represents the first time ever that

the International Court of Justice has been consulted by a United Nations organ with respect to any aspect regarding Palestine. The Advisory Opinion has great historical significance as a landmark which will definitely add to its legal value.

II. The International Legal Status of the Occupied Palestinian Territory

2.1. The international legal status of the Palestinian Territory (paras. 70-71 of the Advisory Opinion), in my view, merits more comprehensive treatment. A historical survey is relevant to the question posed by the General Assembly, for it serves as the background to understanding the legal status of the Palestinian Territory on the one hand and underlines the special and continuing responsibility of the General Assembly on the other. This may appear as academic, without relevance to the present events. The present is however determined by the accumulation of past events and no reasonable and fair concern for the future can possibly disregard a firm grasp of past events. In particular, when on more than one occasion, the rule of law was consistently side-stepped.

The point of departure, or one can say in legal jargon, the critical date, is the League of Nations Mandate which was entrusted to Great Britain. As stated in the Preamble of the Mandate for Palestine, the United Kingdom undertook "to exercise it on behalf of the League of Nations" [3]. The Mandate must be considered in the light of the Covenant of the League of Nations. One of the primary responsibilities of the Mandatory Power was to assist the peoples of the territory to achieve full self-government and independence at the earliest possible date. Article 22, paragraph 1, of the Covenant stipulated that the "well-being and development of such peoples form a sacred trust of civilisation". The only limitation imposed by the League's Covenant upon the sovereignty and full independence of the people of Palestine was the temporary tutelage entrusted to the Mandatory Power. Palestine fell within the scope of Class A Mandates under Article 22, paragraph 4, of the Covenant, which provided that:

> "Certain communities, formerly belonging to the Turkish Empire, have reached a stage of development where their existence as independent nations can be provisionally recognized, subject to the rendering of administrative advice and assistance by a mandatory power until such time as they are able to stand alone."

The conventional wisdom and the general expectation were such that when the stage of rendering administrative advice and assistance had been concluded and the Mandate had come to an end, Palestine would be independent as of that date, since its provisional independence as a nation was already legally acknowledged by the Covenant. Moreover, the Covenant clearly differentiated between the communities which formerly belonged to the Turkish Empire, and other territories. Regarding the latter, the Mandatory Power was held responsible for the complete administration of the Palestinian territory and was not confined to administrative advice and assistance [4]. These distinct arrangements can be interpreted as further recognition by the Covenant of the special status of the former Turkish territories which included Palestine.

In point of fact, the report submitted by Sub-Committee 2 to the *Ad Hoc* Committee on the Palestinian question in 1947 shed more light on the status of Palestine. The report gave the conclusion that:

> "the people of Palestine are ripe for self-government and that it has been agreed on all hands that they should be made independent at the earliest possible date. It also follows, from what has been said above, that the General Assembly is not competent to recommend, still less to enforce, any solution other than the recognition of the independence of Palestine." (A/AC.14/32, and Add. 1, 11 November 1947, para. 18.)

The Sub-Committee further submitted the following views:

> "It will be recalled that the object of the establishment of Class A Mandates, such as that for Palestine, under Article 22 of the Covenant, was to provide for a temporary tutelage under the Mandatory Power, and one of the primary responsibilities of the Mandatory was to assist the peoples of the mandated territories to achieve full self-government and independence at the earliest opportunity. It is generally agreed that that stage has now been reached in Palestine, and not only the United Nations Special Committee on Palestine but the Mandatory Power itself agree that the Mandate should be terminated and the independence of Palestine recognized." (*Ibid*., para. 15.)

2.2. The Court has considered the legal nature of mandated territories in both 1950 *(International Status of South West Africa, Advisory Opinion)*, and in 1971 *(Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion)*, and laid down both the conceptual philosophy and the legal parameters for defining the legal status of former mandated territories. The dicta of the Court emphasized the special responsibility of the international community. It is to be noted that, in the setting up of the mandates system, the Court held that

> "two principles were considered to be of paramount importance: the principle of *non-annexation* and the principle that the well-being and development of such peoples form ' *a sacred trust of civilization* '" (*I.C.J. Reports 1950* , p. 131; emphasis added).

The two fundamental principles enunciated by the Court in 1950 apply to all former mandated territories which have not gained independence. They remain valid today for the Occupied Palestinian Territory. The territory cannot be subject to annexation by force and the future of the Palestinian people, as "a sacred trust of civilization", is the direct responsibility and concern of the United Nations.

2.3. It should be borne in mind that General Assembly resolution 181 (II) of 29 November 1947, which partitioned the territory of mandated Palestine, called for, *inter alia* , the following steps to be undertaken:

(i) the termination of the Mandate not later than 1 August 1948;
(ii) the establishment of two independent States, one Arab and one Jewish;
(iii) the period between the adoption of the Partition Resolution and "the establishment of the independence of the Arab and Jewish States shall be a transitional period".

On 14 May 1948, the independence of the Jewish State was declared. The Israeli declaration was "by virtue of [Israel's] natural and historic right" and based "on the strength of the resolution of the United Nations General Assembly"[5]. The independence of the Palestinian Arab State has not yet materialized.

That there "shall be a transitional period" pending the establishment of the two States is a determination by the General Assembly within its sphere of competence and should be binding on all Member States as having legal force and legal consequences [6]. This conclusion finds support in the jurisprudence of the Court.

The Court has held in the *Namibia* case that when the General Assembly declared the Mandate to be terminated,

> "'South Africa has no other right to administer the Territory' . . . This is not a finding on facts, but the formulation of a legal situation. For it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion* , *I.C.J. Reports 1971* , p. 50, para. 105.)

The Court, moreover, has previously held, in the *Certain Expenses* case, that the decisions of the General Assembly on "important questions" under Article 18, "have dispositive force and effect" (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion* , *I.C.J. Reports 1962* , p. 163).

The legal force and effect of a General Assembly resolution adopted by the General Assembly "within the framework of its

competence" is therefore well established in the Court's jurisprudence. On that basis, it is submitted that two conclusions appear imperative:

(a) the United Nations is under an obligation to pursue the establishment of an independent Palestine, a fact which necessitates that the General Assembly's special legal responsibility not lapse until the achievement of this objective;

(b) the transitional period referred to in the Partition Resolution serves as a legal nexus with the Mandate. The notion of a transitional period carrying the responsibilities emanating from the Mandate to the present is a political reality, not a legal fiction, and finds support in the dicta of the Court, in particular, that former mandated territories are the "sacred trust of civilization" and "cannot be annexed". The stream of General Assembly and Security Council resolutions on various aspects of the question of Palestine provides cogent proof that this notion of a transitional period is generally, albeit implicitly, accepted.

2.4. The legal status of the Occupied Palestinian Territories cannot be fully appreciated without an examination of *Israel's contractual undertakings* to respect the territorial integrity of the territory, and to withdraw from the occupied territories. The withdrawal and the territorial integrity injunctions are based on Security Council resolution 242 (1967) which is universally considered as the basis for a just, viable and comprehensive settlement. Resolution 242 is a multidimensional resolution which addresses various aspects of the Arab-Israeli dispute. I will focus only on the territorial dimension of resolution 242: the resolution contained two basic principles which defined the scope and the status of the territories occupied in 1967 and confirmed that occupied territories have to be "de-occupied": resolution 242 emphasized the inadmissibility of acquisition of territory by war, thus prohibiting the annexation of the territories occupied in the 1967 conquest. It called for the withdrawal of Israeli armed forces from the territories occupied in the conflict. On 22 October 1973, the Security Council adopted resolution 338 (1973) which reiterated the necessity to implement resolution 242 "in all of its parts" (S/Res/338 of 22 October 1973, para. 2).

Following resolution 242, several undertakings to end the Israeli military occupation, while reserving the territorial integrity of the West Bank and Gaza, were made by Israel:

(a) The Camp David Accords of 17 September 1978, in which Israel agreed that the basis for a peaceful settlement of the conflict with its neighbours is United Nations Security Council resolution 242 in all its parts.

(b) The Oslo Accord, signed in Washington, D.C. on 13 September 1993, which was a bilateral agreement between Israel and Palestine. Article IV of the Oslo Accord provides that "the two sides view the West Bank and the Gaza Strip as a single territorial unit whose integrity will be preserved during the interim period".

(c) The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, signed in Washington, D.C. on 28 September 1995, reiterated the commitment to respect the integrity and status of the Territory during the interim period. In addition, Article XXXI (7) provided that "[n]either side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations".

Thus Israel undertook to carry out the following obligations:

(i) to withdraw in conformity with resolution 242;

(ii) to respect the territorial integrity of the West Bank and the Gaza Strip; and

(iii) to refrain from taking any step that would change the status of the West Bank and Gaza.

These undertakings were contractual and are legally binding on Israel.

2.5. Yet, notwithstanding the general prohibition against annexing occupied territories, the dicta of the Court on the legal nature of former mandatory territories, and in clear contravention of binding bilateral undertakings, on 14 April 2004, the Prime Minister of Israel addressed a letter to the President of the United States. Attached to the letter is a Disengagement Plan which one has to interpret as authoritatively reflecting Israel's intention to annex Palestinian territories. The Disengagement Plan provides that

> "it is clear that in the West Bank, there are areas which will be part of the State of Israel, including cities, towns and villages, security areas and installations, and other places of special interest to Israel".

The clear undertakings to withdraw and to respect the integrity and status of the West Bank and Gaza legally debar Israel from infringing upon or altering the international legal status of the Palestinian territory. The construction of the wall, with its chosen route and associated régime, has to be read in the light of the Disengagement Plan. It is safe to assume that the construction was conceived with a view to annexing Palestinian territories, "cities, towns and villages" in the West Bank which "will be part of the State of Israel". The letter of the Prime Minister of Israel was dated 14 April 2004, over two months before the delivery of the Advisory Opinion.

The Court reached the correct conclusion regarding the characterization of the wall when it held that:

> "the construction of the wall and its associated régime create a 'fait accompli' on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation" (Advisory Opinion, para. 121).

It is submitted that this finding should have been reflected in the *dispositif* with an affirmation that the Occupied Palestinian Territory cannot be annexed. It would also have been appropriate, in my view, to refer to the implications of the letter of the Prime Minister of Israel and its attachments and to underline that what it purports to declare is a breach of Israel's obligations and contrary to international law.

III. The Law of Belligerent Occupation

The Court was requested by the General Assembly to urgently render an advisory opinion on "the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory" (A/RES/ES-10/14(A/ES-10/L.16). The focus of the request evolves around the law of belligerent occupation. As already stated, I do concur with the reasoning and conclusions in the Advisory Opinion. I feel constrained, however, to emphasize and elaborate on some points:

(a) the prolonged occupation;

(b) the scope and limitations of the principle of military necessity;

(c) the grave breaches of international humanitarian law; and

(d) the right to self-determination.

3.1. The prohibition of the use of force, as enshrined in Article 2, paragraph 4, of the Charter, is no doubt the most important principle that emerged in the twentieth century. It is universally recognized as a *jus cogens* principle, a peremptory norm from which no derogation is permitted. The Court recalls in paragraph 87, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (resolution 2625 (XXV)), which provides an agreed interpretation of Article 2 (4). The Declaration "emphasized that 'No territorial acquisition resulting from the threat or use of force shall be recognized as legal.'" (Advisory Opinion, para. 87). The general principle that an illegal act cannot produce legal rights — *ex injuria jus non oritur* — is well recognized in international law.

The Israeli occupation has lasted for almost four decades. Occupation, regardless of its duration, gives rise to a myriad of human, legal and political problems. In dealing with prolonged belligerent occupation, international law seeks to "perform a holding operation pending the termination of the conflict" [7] . No one underestimates the inherent difficulties that arise during situations of prolonged occupation. A prolonged occupation strains and stretches the applicable rules, however, the law of belligerent occupation must be fully respected regardless of the duration of the occupation.

Professor Christopher Greenwood provided a correct legal analysis which I share. He wrote:

> "Nevertheless, there is no indication that international law permits an occupying power to disregard provisions of the Regulations or the Convention merely because it has been in occupation for a long period, not least because there is no body of law which might plausibly take their place and no indication that the international community is willing to trust the occupant with *carte blanche* ." [8]

Both Israelis and Palestinians are subjected to untold sufferings. Both Israelis and Palestinians have a right to live in peace and security. Security Council resolution 242 affirmed the right "of every State in the area . . . to live in peace within secure and recognized boundaries free from threats or acts of force" (S/Res/242 (1967), para. 1 (ii)). These are solemn reciprocal rights which give rise to solemn legal obligations. The right to ensure and enjoy security applies to the Palestinians as well as to the Israelis. Security cannot be attained by one party at the expense of the other. By the same token of corresponding rights and obligations, the two sides have a reciprocal obligation to scrupulously respect and comply with the rules of international humanitarian law by respecting the rights, dignity and property of the civilians. Both sides are under a legal obligation to measure their actions by the identical yardstick of international humanitarian law which provides protection for the civilian population.

The Court has very clearly held, in the *Legality of the Threat or Use of Nuclear Weapons* case, that

> "The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use." (*Advisory Opinion, I.C.J. Reports 1996 (I)* , p. 257, para. 78.)

The fact that occupation is met by armed resistance cannot be used as a pretext to disregard fundamental human rights in the occupied territory. Throughout the annals of history, occupation has always been met with armed resistance. Violence breeds violence. This vicious circle weighs heavily on every action and every reaction by the occupier and the occupied alike.

The dilemma was pertinently captured by Professors Richard Falk and Burns Weston when they wrote

> "the occupier is confronted by threats to its security that arise . . . primarily, and especially in the most recent period, from a pronounced and sustained failure to restrict the character and terminate its occupation so as to restore the sovereign rights of the inhabitants. Israeli occupation, by its substantial violation of Palestinian rights, has itself operated as an inflaming agent that threatens the security of its administration of the territory, inducing reliance on more and more brutal practices to restore stability which in turn provokes the Palestinians even more. In effect, the illegality of the Israeli occupation regime itself set off an escalatory spiral of resistance and repression, and under these conditions all considerations of morality and reason establish a right of resistance inherent in the population. This right of resistance is an implicit legal corollary of the fundamental legal rights associated with the primacy of sovereign identity and assuring the humane protection of the inhabitants." [9]

I wholeheartedly subscribe to the view expressed by Professors Falk and Weston, that the breaches by both sides of the fundamental rules of humanitarian law reside in "the illegality of the Israeli occupation regime itself". Occupation, as an illegal and temporary situation, is at the heart of the whole problem. The only viable prescription to end the grave violations of international humanitarian law is to end occupation.

The Security Council has more than once called for ending the occupation. On 30 June 1980, the Security Council reaffirmed "the overriding necessity for ending the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem" (S/Res/476 (1980). Notwithstanding this clarion call, the Palestinians are still languishing under a heavy-handed, prolonged occupation.

3.2. The Court, in paragraph 135, rejected the contention that the principle of military necessity can be invoked to justify the construction of the wall. The Court held that:

> "However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations." (Advisory Opinion, para. 135.)

I fully share this finding. Military necessities and military exigencies could arguably be advanced as justification for building the wall had Israel proven that it could perceive no other alternative for safeguarding its security. This, as the Court notes, Israel failed to demonstrate. A distinction must be drawn between building the wall as a security measure, as Israel contends, and accepting that the principle of military necessity could be invoked to justify the unwarranted destruction and demolition that accompanied the construction process. Military necessity, if applicable, extends to the former and not the latter. The magnitude of the damage and injury inflicted upon the civilian inhabitants in the course of building the wall and its associated régime is clearly prohibited under international humanitarian law. The destruction of homes, the demolition of the infrastructure, and the despoilment of land, orchards and olive groves that has accompanied the construction of the wall cannot be justified under any pretext whatsoever. Over 100,000 civilian non-combatants have been rendered homeless and hapless.

It is a fact that the law of belligerent occupation contains clauses which confer on the occupying Power a limited leeway for military necessities and security. As in every exception to a general rule, it has to be interpreted in a strict manner with a view to preserving the basic humanitarian considerations. The Secretary-General reported to the General Assembly on 24 November 2003 that he recognizes "Israel's right and duty to protect its people against terrorist attacks. However, that duty should not be carried out in a way that is in contradiction to international law." (A/ES-10/248, para. 30.)

The jurisprudence of the Court has been consistent. In the 1948 *Corfu Channel* case, the Court referred to the core and fabric of the rules of humanitarian law as "elementary considerations of humanity, even more exacting in peace than in war" (*Corfu Channel, Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*, p. 22). In the case concerning *Legality of the Threat or Use of Nuclear Weapons* case, the Court held that

> "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" (*Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996 (I),* p. 257, para. 79).

In the final analysis, I have reached the same conclusion as Professor Michael Schmitt, that

> "Military necessity operates within this paradigm to prohibit acts that are not militarily necessary; it is a principle of limitation, not authorization. In its legal sense, military necessity justifies nothing." [10]

The Court reached the same conclusion. The Court held that

> "In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction." (Advisory Opinion, para. 140.)

3.3 It is relevant to recall, moreover, that the reading of the reports by the two Special Rapporteurs, John Dugard and Jean Ziegler,

leaves no doubt that as an occupying Power, Israel has committed grave breaches. The pattern and the magnitude of the violations committed against the non-combatant civilian population in the ancillary measures associated with constructing the wall, are, in my view, "[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" (Fourth Geneva Convention, Art. 147). In the area of extending protection to civilians, the rules of international humanitarian law have progressively developed since the conclusion of the Geneva Conventions and Additional Protocols. It is submitted that the Court should have contributed to the development of the rules of *jus in bello* by characterizing the destruction committed in the course of building the wall as grave breaches.

3.4. The Court underlined the paramount importance of the right to self-determination in our contemporary world and held in paragraph 88: "The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes* (see *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29)." Moreover, the Court notes that the route chosen for the wall and the measures taken "severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right" (Advisory Opinion, para. 122). This legally authoritative dictum, which has my full support, was confined to the reasoning. The legal consequences that flow for all States from measures which severely impede the exercise by the Palestinians of an *erga omnes* right, should, in my view, have been included in the *dispositif* .

Conclusion

I now approach my final comment. It is a reflection on the future. The Court, in paragraph 162, observes that in its view

> "this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973)" (Advisory Opinion, para. 162).

This finding by the Court reflects a lofty objective that has eluded the international community for a very long time. Since 22 November 1967, all efforts have been aimed at ensuring the implementation of Security Council resolution 242 (1967) which was adopted unanimously. In the course of its 37-year lifespan, Security Council resolution 242 has been both praised and vilified. Yet detractors and supporters alike agree that the balance in its provisions represent the only acceptable basis for establishing a viable and just peace. The Security Council, in the aftermath of the 1973 armed conflict, adopted resolution 338 (1973), which called upon the parties to start immediately after the ceasefire *"the immediate implementation of 242 (1967) in all of its parts"* (emphasis added). The obligations emanating from these resolutions are obligations of result of paramount importance. They are synallagmatic obligations in which the obligation of each party constitutes the raison d'être of the obligation of the other. It is legally wrong and politically unsound to transform this obligation of result into a mere obligation of means, confining it to a negotiating process. Any attempt to tamper with such solemn obligation would not contribute to an outcome based on a solid foundation of law and justice.

The establishment of "a just and lasting peace", as called for in Security Council resolution 242, necessitates the full implementation of the corresponding obligations by the two parties. The Advisory Opinion should herald a new era as the first concrete manifestation of a meaningful administration of justice related to Palestine. It is hoped that it will provide the impetus to steer and direct the long-dormant quest for a just peace.

(Signed) Nabil **Elaraby.**

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[1] No. 181 (II), resolution adopted on the report of the *Ad Hoc* Committee on the Palestinian Question (29 November 1947), Chap. 4, para. 2.

[2] *Ibid.*

[3] Preamble, CMD. No. 1785 (1923), reprinted in report of the United Nations Special Committee on Palestine (UNSCOP report).

[4] Covenant of the League of Nations, Article 22.

[5] *Laws of the State of Israel* , Vol. I, p. 3.

[6] Moreover, Judge Weeramantry, in his dissenting opinion in the *East Timor* case, considered that "a resolution containing a decision within its proper sphere of competence may well be *productive of legal consequences* " (*East Timor (Portugal* v. *Australia)* , *I.C.J. Reports 1995* , p. 186; emphasis added).

[7] C. Greenwood, "The Administration of Occupied Territory in International Law", *International Law and the Administration of Occupied Territories* , (Ed. by E. Playfair, Clarendon Press, Oxford, 1992), pp. 262-263.

[8] *Ibid.*

[9] Falk & Weston, "The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza" , *International Law and the Administration of Occupied Territories* (ed. by E. Playfair, Clarendon Press, Oxford, 1992), Chap. 3, pp. 146-147.

[10] M. N. Schmitt, "Bellum Americanum: The U.S. View of Twenty-First Century War and its Possible Implications for the Law of Armed Conflict" (1998), 19 *Michigan Journal of International Law* , p. 1080.