

**UNITED NATIONS  
INTERNATIONAL MEETING  
ON THE QUESTION OF PALESTINE**

*Implementing the advisory opinion of the International Court of Justice  
on the legal consequences of the construction of a wall  
in the Occupied Palestinian Territory —  
the role of Governments, intergovernmental organizations and civil society*

**United Nations Office at Geneva, 8 and 9 March 2005**

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## I. Introduction

The United Nations International Meeting on the Question of Palestine was organized by the Committee on the Exercise of the Inalienable Rights of the Palestinian People on 8 and 9 March 2005 at the United Nations Office at Geneva. The holding of this event was mandated by [General Assembly resolutions 59/28](#) and [59/29](#) of 1 December 2004.

The theme of the Meeting was “Implementing the advisory [opinion](#) of the International Court of Justice on the legal consequences of the construction of a wall in the Occupied Palestinian Territory – the role of Governments, intergovernmental organizations and civil society.”

The meeting consisted of an opening session, three plenary sessions in which invited experts made presentations, and a closing session. Each plenary session included a discussion period open to all participants. The themes of the plenary sessions were: “Significance of the advisory opinion”; “Responsibility of Governments and intergovernmental organizations in upholding international law”; and “Role of parliaments and civil society in advocating adherence to international law.”

The meeting was attended by representatives of 78 Governments, Palestine, 5 intergovernmental organizations, 11 United Nations bodies and agencies, and 47 non-governmental organizations. The Committee on the Exercise of the Inalienable Rights of the Palestinian People was represented by a delegation headed by Paul Badji, Chairman of the Committee. A complete list of participants is contained in Section VIII of the present report.

During the meeting, in addition to the statements of the Secretary-General of the United Nations, the Chairman of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, and Palestine, statements were made by the following Governments: Senegal, on behalf of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, Malaysia, on behalf of the Movement of Non-Aligned Countries, Mexico, Iran (Islamic Republic of), Indonesia, China, Democratic Republic of the Congo, Syrian Arab Republic, Namibia, Pakistan and Jordan. Representatives of the Organization of the Islamic Conference and of the League of Arab States also took the floor. Presentations were made by 18 experts, including Palestinians and Israelis.

The main points of the discussion are summarized in the Final Document of the present report (see Section VII).

The present report contains the full text of the statements by the speakers in the opening and the closing sessions in accordance with the programme and the papers presented by the experts during the three plenary sessions, as well as summaries of the other statements made during the course of the meeting.

## II. Opening session

**Kofi A. Annan**

Secretary-General of the United Nations

(Message to the international meeting delivered by Sergei Ordzhonikidze,  
Director-General of the United Nations Office at Geneva)

This is a moment of promise in the search for peace in the Middle East. There is once again a real sense that after long years of suffering, bitterness and despair, better days may at last lie ahead.

The summit in Sharm el-Sheikh, Egypt, in January 2005 heralded a fresh start in efforts to end four years of bloodshed between Israelis and Palestinians. The agreement by Palestinian Authority President Mahmoud Abbas and Israeli Prime Minister Ariel Sharon to end the violence signalled a new attitude of cooperation and the rebuilding of trust between the two sides.

The meetings in London in late February 2005 built on that breakthrough. The session on Palestinian reform hosted by Prime Minister Blair pointed the way towards important changes in governance, security and economic development that are vital for the creation of an independent, democratic, viable and contiguous Palestinian State. The Quartet expressed full support for those efforts, and pledged to help Israelis and Palestinians implement the Sharm el-Sheikh understandings and their obligations under the [road map](#). I am determined that the United Nations will continue to work with the Palestinian Authority, the Government of Israel, the Quartet, donors and other partners to create an environment in which these new initiatives will take root and flourish.

You are meeting to discuss the [Advisory Opinion](#) of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (A/ES-10/273 and Corr.1). As you know, on 11 January 2005, I addressed a [letter to the President of the General Assembly](#) in which I outlined a framework for the register of damage the Assembly has asked me to establish (A/ES-10/294). Work is proceeding on this, and I expect to report shortly.

The long cherished dream of a vast majority of Israelis and Palestinians has been to live a normal life in peace and security. At long last, all of us can sense a new found movement towards that dream.

I urge everyone – the parties and the international community – to refrain from any actions that would be detrimental to the resumption of negotiations and implementation of the road map (S/2003/529, annex), or that could prejudice the resolution of final status issues. Let us all remain focused on our long-standing objective of two States – Israel and Palestine – living side by side in peace within secure and recognized borders, as called for by relevant Security Council resolutions. And let us do our utmost to turn the current moment of potential into a real end to the conflict.

**Paul Badji**  
Chairman

Committee on the Exercise of the Inalienable Rights  
of the Palestinian People

It is an honour for me to address you on behalf of the Committee on the Exercise of the Inalienable Rights of the Palestinian People and welcome you to the United Nations International Meeting on the Question of Palestine. The theme of this meeting is “Implementing the [advisory opinion](#) of the International Court of Justice on the legal consequences of the construction of the wall in the Occupied Palestinian Territory – the role of Governments, intergovernmental organizations and civil society.”

May I express my deep gratitude to Sergei Ordzhonikidze, Director-General of the United Nations Office at Geneva, who has kindly accepted to come and represent the Secretary-General at this opening meeting and will be reading a message from him.

We are most fortunate to have with us a gathering of very distinguished legal minds representing Governments, prominent legal institutions, academia and civil society organizations. Their legal expertise, as well as their understanding of the region and the Israeli-Palestinian conflict, will undoubtedly provide us with sound analyses of the advisory opinion of the International Court of Justice and of its impact on the livelihood of the Palestinian people, efforts at resuming the peace process and the future of the Palestine State.

We are meeting at a time when there is a sense of cautious optimism. The election of Mahmoud Abbas as President of the Palestinian Authority, followed by the Sharm el-Sheikh Summit, were very promising developments. At the Summit, President Abbas and Israeli Prime Minister Ariel Sharon reaffirmed their commitment to the [road map](#) and reached an understanding on the need to put an end to violence. A series of positive steps were taken by both sides and there is great hope that these would lead to the resumption of political negotiations, an end to occupation, and a negotiated solution to the conflict. However, violent clashes in the Occupied Palestinian Territory continue between Israelis and Palestinians. This reminds us of the volatility of the situation on the ground.

We are especially disheartened that activities such as the expansion and establishment of settlements and the building of the wall in the West Bank have not stopped in several areas. The construction of the wall continues to worsen the socio-economic situation in the Occupied Palestinian Territory, impedes the exercise by the Palestinian people of its inalienable rights, and may undermine efforts at realizing the vision of a two-State solution, with a viable and contiguous State of Palestine living side by side with Israel.

You may recall that back in June 2002, the Israeli Government began the project of building a separation wall in the West Bank. Israel said the wall was meant for defensive purposes. Indeed, Israel like every Member State, has the right and obligation to provide for the security of its citizens, and the Committee has always recognized it. However, the route of the wall, although continuously modified by the Israeli authorities, falls well within the Palestinian Territory, as defined by the 1949 Armistice line, the so-called Green Line. Curving around settlements, the wall incorporates many of them into Israel. Like the settlements, the wall creates new facts on the ground by changing the physical character of the land and the demographic composition of the territory. The construction of the wall provoked a loud protest of the majority of the international community and the General Assembly decided to turn to the International Court of Justice, [requesting its legal opinion on the matter](#).

On 9 July 2004, the Court issued its advisory opinion which was hailed by Member States as a landmark decision and a historic development. The Court's action is historic not only because of its strong message but also because it was the first time the highest judicial body of the United Nations addressed a substantive issue related to the question of Palestine. In its advisory opinion, the Court determined that the wall and its associated regime were contrary to international law, and that Israel was under an obligation to cease the construction and to dismantle portions built on Palestinian land, and to provide reparations to Palestinians whose lives had been harmed by the structure.

The Court also called on the United Nations, especially the General Assembly and the Security Council, to consider further action that would bring to an end the illegal situation resulting from the construction of the wall. It also concluded that the Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, have been established in breach of international law. It is important to recall that Israeli policies and practices of confiscating land in the Occupied Palestinian Territory, including East Jerusalem, for the construction of the wall or for any other purpose, is a violation of international law, in particular the Fourth Geneva Convention.<sup>1</sup>

Today, almost three years from the start of the construction, it is increasingly clear that the wall has the effect of extending Israeli territorial authority over large expanses of Palestinian land. What is also increasingly clear is the extent of the havoc the wall has already wrought on thousands of ordinary Palestinians.

The route of the wall protrudes well into the West Bank, separating Palestinian communities from their agricultural lands and neighbouring towns and villages. The wall not only confiscates land but also encloses and isolates Palestinian water wells and springs, exacerbating the water problem in many Palestinian villages and making the irrigation of crops nearly impossible. The wall has also made more difficult the transport of goods and products to market. It has greatly increased the susceptibility of many types of native vegetation to local eradication, or even extinction, because of the environmental destruction brought about by this massive construction. As a result, Palestinians, who depend on agriculture for their primary source of income, have to resort to other means of livelihood by leaving their communities. Since September 2000, the number of poor in the Occupied Palestinian Territory, including East Jerusalem, has tripled to over two million, and 60 per cent of households have lost more than half of their income. Over half a million Palestinians are now completely dependent on food aid.

The social impact of the wall is most worrisome. Palestinian built-up areas, particularly around East Jerusalem and Bethlehem, are surrounded by the wall and have become isolated ghettos. The thousands of Palestinians who happen to live in these ghettos are separated from friends and relations living in nearby villages. They are required to obtain permits from Israeli authorities simply to access their homes. The wall currently adversely affects access to health care for close to 600,000 Palestinians, including almost 20,000 elderly and more than 250,000 children under the age of five. These numbers promise to increase as construction continues. Some 30 per cent of medical staff are unable to reach the health centres and hospitals in which they work.

In June 2004, the Israeli High Court of Justice ordered changes in the route of the wall along a 30-kilometre segment north of Jerusalem, stating that the separation from their agricultural land injured local inhabitants in a severe and acute way. As recently as February 2005, the Israeli Cabinet approved changes to the route, which would be closer to the Green Line. However, seven per cent of Palestinian land would remain on the Israeli side of the wall, including four Palestinian villages south of Jerusalem with a population of 10,000, and the largest settlement blocks of “Ma’aleh Adumin” and “Gush Etzion,” with more than 100,000 settlers.

On 20 July 2004, the General Assembly adopted by an overwhelming majority [resolution ES-10/15](#), demanding that Israel heed the Court's opinion. That same resolution also requested the United Nations Secretary-General to establish a register of damage relating to Israel's construction of the wall in the West Bank.

On 11 January 2005, the Secretary-General sent a [letter to the President of the General Assembly](#) setting out a framework for the register. It will consist of an independent Board, legal and technical experts and a small secretariat making up a registry. The Board will have overall responsibility for the register and will establish rules and regulations governing its work. It aims to develop a structure that will focus on the technical task of gathering claims of damage relating to the construction of the wall. The details of the staffing, size and cost of the office remain to be worked out, and the Secretary-General will revert to the Assembly in due course. This measure will be a first

step in the huge task of recording damage inflicted on Palestinian families and towns.

It is indeed distressing that despite the positive movements on the ground in the areas of security coordination, Palestinian prisoner release and democratic elections, thousands of Palestinians trapped in ghettos within these walls have yet to receive some relief to ease the debilitating conditions under which they live. In fact, Israel continues to defy the recommendations contained in the advisory opinion of the International Court of Justice. In January 2005, construction resumed in a section of the wall by the settlement of Ariel, located 12 miles deep into the West Bank. Israeli bulldozers razed confiscated land in the area.

In February 2005, Israel started to construct huge cement sections of the wall in the villages of Hazma and Anata, northeast of Jerusalem. Military orders were handed to a number of Palestinian civilians from the Shu'fat refugee camp, confiscating at least 50 dunums of land. In the Beit Hanina village, north of Jerusalem, approximately 150 dunums were confiscated for the construction of the wall. Residents of the Tura al-Gharbiya village, west of Jenin, received military orders confiscating 301 dunums of agricultural land in the village. The High Court has ordered temporary injunctions to such orders due to petitions from Palestinian villagers. However, most of them were cancelled, allowing construction to resume. Such Israeli practices demonstrate no change in policy and are viewed as part and parcel of a broader Israeli Government plan to annex Palestinian land ahead of final status negotiations.

Almost eight months after the issuance of the advisory opinion, Israel responded to it by claiming that the Court's ruling was based on erroneous and outdated information, and that it totally ignored the terror attacks that made it imperative to set up the wall. Yet, the wall continues to be built, not along the Green Line, but on Palestinian land, such as the construction on the so-called fingernails. These free-standing segments of the wall are going up around the settlements of Kamei Shomron and Immanuel in the heart of the West Bank. The fingernails would link up with the existing wall, which parallels the Green Line, at a later date.

The so-called security barrier is becoming a barrier to peace. The Government of Israel has to stop building the wall, dismantle what has been built, and compensate Palestinians for all damage caused by construction.

The Committee continues to believe that the road map remains the most practicable way to reach a negotiated solution. This plan envisages such a goal – two States living side by side in peace in security, within secure and recognized borders. The Committee is of the view that the pursuit of a just, lasting and comprehensive peace in the Middle East could be achieved through the early implementation of the Quartet's road map, which is based on Security Council [resolutions 242 \(1968\)](#), [338 \(1973\)](#), [1397 \(2002\)](#) and [1515 \(2003\)](#), and accepted by both parties.

The Committee maintains, and this was confirmed in the advisory opinion of the Court, that the United Nations had permanent responsibility with respect to all aspects of the question of Palestine until it was resolved in a satisfactory manner, in conformity with relevant United Nations resolutions, international legitimacy and until the inalienable rights of the Palestinian people were fully realized.

The international community's role in reawakening the peace process is as vital as ever. Let us therefore redouble our efforts to help both sides succeed this time in breaking the four-year cycle of violence and embark on the road to peace. We look forward to the early resumption of political negotiations between the Israeli and Palestinian leaderships. It promises to be a difficult road ahead, but there is no other choice.

With hopes for a continued improvement in relations between Israelis and Palestinians, the Committee places great importance on this meeting. The adherence to the recommendations contained in the advisory opinion can only contribute positively to a just and fair resolution of the question of Palestine. I look forward to the discussions which will focus on the responsibility of Governments and intergovernmental organizations, as well as the role of parliaments and civil society in advocating adherence to the advisory opinion of the International Court of Justice and international law.

We look forward to interesting deliberations on this crucial issue. I am confident that this meeting will add to ongoing efforts to help the Palestinian people in their quest for the exercise of their inalienable rights.

**Abdullah Abdullah**

Deputy Minister for Foreign Affairs of the Palestinian Authority  
Representative of Palestine

It is an honour for me to be standing before you today to address the question of Palestine. The large attendance and the message of the Secretary-General are testimony to the better atmosphere nowadays. Palestine is a central issue at the United Nations and the organization is a central player in following the principles and applying the resolutions adopted during the 57 years of the life of the question of Palestine.

I am grateful to Ambassador Badji for his presentation on the situation as it stands in Palestine today. I will continue from the point where he finished. The situation is bleak; it is difficult; it is occupation. But I come before you today with a ray of hope, encouraging everyone that peace has a chance between Israelis and Palestinians. In the past few weeks, a series of positive events have taken place that revived the ray of hope that everyone is looking for: the calm and constitutional transition of the authority after the passing away of our great leader, the late Yasser Arafat, who symbolized Palestine as a cause and as a people; the presidential and local elections that testify to the fact that the Palestinian people, in conscience and in behaviour, are adhering to democracy; the summit meeting in February 2005 in Sharm el-Sheikh between the Palestinian President Mahmoud Abbas and Israeli Prime Minister Ariel Sharon and the understanding that resulted from that meeting; then the London meeting on 1 March 2005, in which prominent and eminent leaders of the world attended and committed themselves, once more, to the search for peace between Israelis and Palestinians and to do whatever they could to make that peace possible through the support of building State institutions in anticipation of the creation of the Palestinian State.

We are encouraged by these positive signs. But if these positive signs are not supported by a political process, they will wither away. If we were to look at the picture as it is painted today and as rightly presented by Ambassador Badji, then the international community has to take certain measures and shoulder certain responsibilities to make sure that the ray of hope does not slip out of our fingers.

I will not go back to the time of the Mitchell Report on the Israeli-Palestinian peace process or the former Director of the United States Central Intelligence Agency, George Tenet, and his understandings, detailing how to proceed with the peace process between Palestinians and Israelis. Nor will I go back to the commitments made by the Israeli Government to President Bush in April 2004 to get the letter of assurances in breach of the [road map](#). This has been rejected, not only by the Palestinians but also even by segments of Israeli society and by representatives of most world leaders.

The road map has obligations to be followed by both Palestinians and Israelis. There are certain measures that have to be taken in compliance with the road map and responses to the requirements of the revived peace process. I believe Israel is obligated in three areas to make very speedy movements. First, Israel has to undo all the punitive measures taken against the Palestinians in the past four and a half years. Roadblocks have to be removed, closures have to be lifted, and restrictions on the movements of people and goods have to be cancelled.

By the way, on my way out of Ramallah to Jericho, a journey of 30 km, there used to be two checkpoints, one out of Ramallah, and one next to Jericho. This time, I had to go

through nine Israeli checkpoints. This is not a sign of easing of restrictions on the movements of the Palestinians. Seven of them were flying checkpoints. At a certain time, Israeli soldiers are at that spot, and an hour later they will be at another spot on the same road. All those collectively punitive measures have to end if we are to actually start a political process conducive to achieving peace that is in line with the obligations of the road map, the only plan designed to achieve peace between Israelis and Palestinians.

Second, Israel has to stop all its policies that are counter and destructive to peace, which include the building and expansion of settlements and the resumption of the construction of the racist wall. This segregation wall has been deemed illegal, contrary to international law and in violation of international humanitarian law, an impediment to the right of the Palestinians to self-determination. It has to be stopped and dismantled, and the [advisory opinion](#) of the International Court of Justice must be heeded by the Israeli Government.

Third: Israel must reciprocate the Palestinian measures taken in order to show that there are genuine and serious efforts to achieving peace. Israel must take positive, genuine, serious steps conducive to peace.

All Palestinian prisoners must be released – gradually, we understand that, but all must be released. It is not enough that Israel released 500 Palestinian prisoners. Many of them were not political prisoners and most of them had less than two months to serve before the end of their sentences. Since their release, Israel has detained 300 others. All deportees, whether deported to Gaza or to Europe, must be allowed to return. This is in accordance with the understanding that was reached at the Sharm el-Sheikh Summit on 8 February 2005.

Unfortunately, on 1 March 2005, Israel ordered one Palestinian deported from Bethlehem to Gaza. Israel only allowed 16 out of 65 deportees to go home. This is not an honest and serious implementation of the commitments agreed to at the Sharm el-Sheikh Summit.

Israel must open direct negotiations with the Palestinian National Authority in order to proceed with implementing its obligations under the road map, so that we can move from the first phase to the second phase to prepare for the International Conference on Peace as envisaged in the road map.

Those three areas of action are vitally important if we are seriously considering the implementation of the vision outlined by President Bush that a viable, independent and territorially contiguous - not contiguous by bridges or tunnels - Palestinian State be established according to the 1967 borders, side by side with a secure and safe Israel. This only can be realized, and I am sure the American administration and the world leaders know, when the Israeli occupation of the Palestinian Territory, including East Jerusalem, is terminated once and for all.

So all the measures we ask for must be in the direction of putting an end to this occupation. As a sign of seriousness, we started implementing our obligations before asking Israel to take any action. We unified our security forces, and we are grateful once more to the international donor community which is ready and has plans to retrain, reorganize, strengthen and equip our security forces to be able to take on their responsibilities, first and foremost, to ensure law and order in our country for the safety of our citizens and to protect all agreements that we signed with our adversaries.

We deployed at the borders the forces that had already been trained, which has made a big difference in the security area. We are moving to stop any measures that may instigate, inflame, or provoke any negative attitude towards our peace partners. That is why we have a stronger voice now in calling on the Israelis to reciprocate and take measures that are conducive to peace.

The advisory opinion of the International Court of Justice of 9 July 2004 is excellent, not only because it deals with a wall that is contrary to international law and destructive of any possibility for peace, but also because it shows how Israel treats international law. No country should be allowed to challenge or defy international law. We witnessed that in certain instances wars have been launched to make sure that international law was obeyed. We are not asking for wars to be launched. We are asking for real political influence, for seriousness to have the law respected and abided by, and that the political process is strengthened in order to make sure that the hope we have will bear fruit.

Your efforts, your contributions to this present event, are a testimony that the values of universality and justice are still alive. Your endeavours are invaluable. We count on you.

## General discussion

The representative of **Senegal**, speaking on behalf of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, stated that even though the Government of Israel had the right and the duty to protect its citizens, its actions should be undertaken within the framework of international law. The Committee had never been authorized to visit the Occupied Palestinian Territory, including East Jerusalem. However, based on sworn testimony by numerous witnesses, it had been able to document numerous violations related to the construction of the wall, including the confiscation of land and the destruction of irrigation facilities, houses and factories. Palestinian communities, particularly those in the “seam zone” had been turned into virtual prisons with severely restricted and arbitrary access. The Committee was of the view that given the recent positive developments, the time had come for Israel to implement the advisory opinion and for the Palestinian Authority to do everything possible to prevent the threats against the security of Israel emanating from its territory.

The representative of the **Organization of the Islamic Conference**, delivering a message from the Secretary-General of the organization, said that the International Court of Justice ruling was historic in characterizing the construction of settlements and the Wall as a serious violation of the Palestinian right to self-determination. He stressed that the legal consequences of the advisory opinion had to be a condemnation of the State responsible for the illegal construction of the wall in the West Bank and that other States were under an obligation to condemn violations of the law committed by Israel and not to contribute directly or indirectly to them. He drew attention to the need for international financial institutions to refrain from extending any facilities to the occupying State that help establish the wall.

The representative of **Malaysia**, speaking on behalf of the Non-Aligned Movement, stated that in spite of some positive developments in recent weeks, the Non-Aligned Movement continued to be seriously concerned by the ongoing illegal policies and practices by Israel, including the construction of the expansionist wall. The repeated attempts by Israel to evade the road map and to substitute it with different steps were also a matter of grave concern to the movement. The theme the Committee on the Exercise of the Inalienable Rights of the Palestinian People had chosen for the meeting was therefore extremely pertinent. The movement’s Ministerial Conference held in Durban, South Africa, in August 2004 had called for the Security Council to fulfil its responsibilities by adopting a clear resolution and undertaking the necessary measures in regard to the advisory opinion, for the Secretary-General to expedite the work to establish a register of damages resulting from the construction of the wall, and for Member States to prevent any products from the Israeli settlements from entering their markets, decline entry to settlers and impose sanctions against companies involved in the construction of the wall and other illegal activities in the Occupied Palestinian Territory, including East Jerusalem. The High Contracting Parties to the [Fourth Geneva Convention](#) should undertake measures to ensure compliance by Israel with the Convention. Switzerland, the depositary of the Convention, should expedite its consultations, including with regard to reconvening the Conference of High Contracting Parties. The Non-Aligned Movement reaffirmed the May 2004 decision of the Ministerial Meeting of its Committee on Palestine for the early convening of a special meeting of regional and international groupings aimed at building a broad partnership for achieving a peaceful solution to the Israeli-Palestinian conflict.

The representative of **Mexico** said that his Government recognized the fundamental role of the International Court of Justice in upholding international law and had invoked Court procedures on several occasions. The Mexican Government called on Israel, in a friendly yet firm way, to abide by the terms of the advisory opinion. The representative called on the leaders of Israel and the Palestinian Authority to live up to their obligations under the road map. Mexico saluted the decision by the Israeli Government to implement the Gaza Strip disengagement plan, and intended to support the Palestinians in implementing the road map by opening an official mission in Ramallah.



The representative of the **Islamic Republic of Iran** stated that the construction of the separation wall, even in the wake of the issuance of the advisory opinion by the International Court of Justice, was not only in clear defiance of international law, but was also an act of disrespect and intransigence towards the will of the international community. He congratulated the Palestinian groups for their unity and cooperation that facilitated the recent free and fair elections. The Government of the Islamic Republic of Iran was of the view that without a just and comprehensive solution to the question of Palestine, the Middle East would remain plagued by instability and tension. An end to the Israeli occupation and the formation of a Palestinian State, with Al-Quds as its capital, and the return of all Palestine refugees to their homeland was the only solution to this enduring crisis.

The representative of **Indonesia** stated that his Government had participated in the advisory proceedings before the International Court of Justice on the construction of the wall. Indonesia welcomed the breakthrough of the Sharm el-Sheikh summit between the leaders of the Palestinian Authority and Israel as the first crucial step towards reviving the peace process on the basis of the road map. However, the Israeli Government continued to build the wall in defiance of the advisory opinion and reinforced its land-grab policy to permit the seizure of the property of Palestinians in East Jerusalem. Indonesia believed that the overwhelming vote of the International Court of Justice against the construction of the wall on Palestinian land would contribute to a peaceful settlement and co-existence in the Middle East. The legal principles pronounced by the Court in the advisory opinion had become part of the corpus of international law. Indonesia has continuously called upon Israel to respect the decision of the International Court of Justice to stop the construction and dismantle the existing wall. The Indonesian Government firmly believes that a faithful adherence to the Court's ruling is a small price to pay for a peace that would be stronger and more reassuring than any wall.

The representative of **China** reiterated his Government's longstanding position that the construction of a wall on the Occupied Palestinian Territory, including East Jerusalem, could not resolve Israel's security problem and could only intensify the conflicts between the Palestinians and Israel. China opposed the construction of the wall and was of the view that conflicts having to do with such important issues as the boundary demarcation and security should be resolved through dialogue and political negotiation. The representative noted that both the Palestinians and Israel had recently shown willingness to resume the peace talks and that the relationship between the two sides had clearly ameliorated. China welcomed these developments and hoped that the two sides would grasp the opportunity to accelerate the pace of negotiations for the eventual realization of the co-existence of the two States in peace and harmony.

The representative of the **Democratic Republic of the Congo** supported the statement made by Malaysia on behalf of the Non-Aligned Movement. He expressed the hope that progress could be made in reactivating the road map. His delegation found it regrettable that the Government of Israel was absent from the international meeting; it could have been useful to listen to Israel's viewpoint and engage in dialogue.

The representative of the **Syrian Arab Republic** said that the advisory opinion was remarkable because it reaffirmed certain fundamental principles of international law, such as the need for Israel to withdraw from all the Arab territories occupied in 1967 and abide by the Fourth Geneva Convention. Equally remarkable was the near unanimous manner in which it had been adopted by the Court. The sole dissenting Judge Thomas Buergenthal, (United States of America) did so not because of his legal convictions, but because of political instructions received from his capital. However, Israel, as usual, turned a deaf ear to the verdict of international legality and continued the construction of the wall in flagrant disregard of the advisory opinion. The States Members of the United Nations were faced with the challenge of ensuring respect for international law and the 600 United Nations resolutions that Israel had blatantly ignored. The Court's decision also had to be respected by the United States, which, while proclaiming itself a champion of democracy, had sided with Israel when the latter defied international legality. The representative congratulated the International Court of Justice on its courageous decision.

The representative of **Namibia** associated his delegation with the statement made by Malaysia on behalf of the Non-Aligned Movement. He congratulated the Palestinians on the successful presidential elections and expressed confidence that the forthcoming elections for the Palestinian legislative body would be equally successful, despite the difficult conditions of the occupation. Namibia welcomed the Sharm el-Sheikh summit and hoped that the understandings reached there would be fully respected and implemented. The release of some Palestinian prisoners was a positive step but the release of all prisoners, especially political prisoners, was needed. While Namibia recognized Israel's right to defend its citizens, it strongly believed that that right ought to be exercised in accordance with international law. The question before the meeting's participants was: how should the international community compel Israel to abide by her legal obligations? Governments, intergovernmental organizations, and civil society also needed to be reminded of their own obligations as defined in the advisory opinion of the International Court of Justice.

The representative of **Pakistan** associated her delegation with the statement made by Malaysia on behalf of the Non-Aligned Movement. The wall did not address the security concerns of Israel. On the contrary, it only added to the suffering of the Palestinian people and their further alienation. The international community, and particularly the United Nations, had a responsibility to ensure that the construction of the wall was discontinued and the wall dismantled in compliance with the advisory opinion of the International Court of Justice, human rights norms, and humanitarian law. In the past, the Security Council had declared Israel's annexation of Palestinian land, including East Jerusalem, null and void. The international community was duty bound to oppose the construction of this wall and the United Nations had to shoulder its responsibility in that regard. Pakistan hoped that the spirit of the Sharm el-Sheikh Summit would be translated into addressing the problem of the wall.

The representative of **Jordan** associated his delegation with the statement made previously by Malaysia on behalf of the Non-Aligned Movement. He stated that it was superfluous to attempt to emphasize the advisory character of opinion rendered by the International Court of Justice, because it had reaffirmed the fundamental norms of customary international law which were being consistently breached by Israel, including the right of the Palestinians to self-determination, the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land of 1907 and of the Fourth Geneva Convention, which the Court unequivocally stated applied de jure to the Occupied Palestinian Territory, including East Jerusalem. Jordan saluted the measures taken by Palestinian Authority President Abbas to achieve calm and quiet and hoped that Israel would fulfil its commitments undertaken at the Sharm el-Sheikh Summit. Jordan believed that strict Israeli adherence to the ruling of the Court would send a message that the Gaza Strip disengagement plan was part and parcel of the full implementation of the road map and ultimately would lead to the establishment of a viable, territorially contiguous, stable and peaceful Palestinian State within pre-1967 borders. At the same time, Jordan was particularly alarmed by Israel's extraterritorial application of its absentee property law to areas in and around East Jerusalem, leading to the confiscation of Palestinian and Jordanian-owned property.

The representative of the **League of Arab States** said that the advisory opinion of the International Court of Justice could not be ignored by a Member State or a set of Member States of the United Nations without undermining the entire collective security system of the Organization. The International Court of Justice and the General Assembly had played the role entrusted to them by the United Nations [United Nations Charter](#) in insisting that Member States and international organizations were obliged not to recognize the situation resulting from the construction of the wall and not to undertake anything that could perpetuate this situation. Non-governmental organizations and the media must continue to highlight the disastrous effects of the wall on the living conditions of Palestinians. Yet Israel had not changed its policy and was pursuing a plan aimed at annexing even more Palestinian land. The League of Arab States expected the meeting to seek out proposals that could help the Security Council and the United Nations Secretary-General to implement as rapidly as possible the advisory opinion and the relevant resolution of the General Assembly.

### III. Plenary I

#### Significance of the advisory opinion

- Legal analysis of the advisory opinion

- **Response by the parties to the advisory opinion**
- **Reaction of the international community**

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Significance of the advisory opinion of the International Court of Justice  
on the legal consequences of the construction of a wall  
in the Occupied Palestinian Territory: a legal analysis

1. The advisory opinion of the International Court of Justice in the case concerning the legal consequences of the construction of a wall in the Occupied Palestinian Territory (the 'Wall' case) gives rise to important questions:

- Has the situation of Palestine been treated as a political matter demanding compromise, rather than a legal matter demanding the vindication of rights, and if so, why?
- Who should decide whether it is appropriate for the International Court of Justice to make legal declarations in the midst of a complex and volatile political conflict?
- What criteria should be applied in order to reach the decision?

2. The answers given by the Court affirm its role within the United Nations structure, and the relevance of international law in international relations. The implications for the use by States of the United Nations are serious. (Paragraph numbers refer to the text of the advisory opinion.)

- The Court affirmed that its advisory opinion role lay within the structure of the United Nations system, and that in principle it is for United Nations organs to decide whether they need the Court's advice (paras. 44, 62).
- The opinion was sought by the General Assembly, acting under its resolution 377 (V) A of 3 November 1950, (paras. 19, 29-32). The Court might not have accepted the case had the United States of America not vetoed Security Council resolutions on Palestine.
- A range of United Nations reports on Palestine provided an adequate, and probably indispensable, factual basis upon which the Court could base its opinion (paras. 57, 58).
- The Court can and will discern and rule upon legal questions that arise in political disputes (para. 41). Arguments that an advisory opinion would interfere with political processes, including the road map, did not persuade the Court (para. 53).
- The Israel-Palestine question is not a purely bilateral matter. It is of direct concern to the United Nations (paras. 49-50).

3. The Court affirmed legal principles of fundamental importance to Palestine.

- There are legal rights and duties involved in the Palestinian question, and not only interests and aspirations to be bargained for.
- Palestine is a territory under foreign military occupation (para. 101).
- "Palestine" includes Occupied East Jerusalem and all of the territories east of the Green Line (paras. 101, 120).
- The Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law (para. 120).
- The wall and its associated regime create a *fait accompli* that could become permanent, which would be tantamount to *de facto* annexation (para. 121).
- The route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Israel and the settlements and severely impedes Palestinian self-determination (para. 122).
- Humanitarian law, the laws of war, and human rights law apply cumulatively in the Occupied Palestinian Territory (paras. 105-114).
- Both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on both sides (para. 162).
- Israel has violated obligations under humanitarian law, including the prohibition on deportations and transfers of civilian populations (para. 120) and on the destruction of civilian property (para. 132), and has unlawfully impeded liberty of movement and rights to work, to health, to education and to an adequate standard of living (para. 134).
- Israel may take account of military exigencies, even after the close of military operations but the Court is not convinced that Israel's destruction of Palestinian territory is rendered absolutely necessary by military operations (paras. 135, 137).
- Israel may not invoke self-defence under Article 51 of the United Nations Charter in respect of attacks emanating from territory under its control (paras. 139, 142). It has the right, and the duty, to respond to acts of violence in order to protect its civilians, but the measures taken must remain within international law (para. 141).

- The construction of the wall, and its associated regime, are contrary to international law (para. 142).
- Israel is under a legal obligation:
  - To respect Palestine's right to self-determination (para. 149);
  - To cease forthwith construction of the wall, including in and around East Jerusalem (para. 151);
  - To dismantle the wall forthwith (para. 151);
  - To repeal forthwith all legislative and regulatory acts adopted with a view to the construction of the wall and to the establishment of its associated regime (para. 151); and
  - To make reparation for the damage arising from its unlawful conduct (paras. 152, 153).
- All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in The Occupied Palestinian Territory, including in and around East Jerusalem. They must not render aid or assistance in maintaining that situation, and must see to it that any impediment to the exercise of the Palestinian people's right of self-determination is brought to an end (para. 159).
- All States Parties to the Fourth Geneva Convention are under an obligation to ensure compliance by Israel with international humanitarian law as embodied in that Convention (para. 159).
- The situation can be resolved only through implementation in good faith of all relevant Security Council resolutions, in particular 242 (1967) and 338 (1973).

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Legal consequences of the construction of a wall in the Occupied Palestinian Territory:  
legal analysis of the advisory opinion of the International Court of Justice

## 1. Introduction

The battle about Palestine has not only been a political or military one, it has also been a legal battle since the League of Nations took over by placing Palestine under the mandates system. Legal instruments have been relevant for the fate of Palestine and its population, and parties to that conflict have buttressed their political interests by legal arguments. Legal designs have also been developed for the purpose of solving the conflict. On the other hand, the role of law has been challenged in the proceedings before the Court. Thus, it is important to recall the role of international law at the outset of a legal analysis of some of the points which the International Court of Justice addressed in its opinion.

There we find two fundamental political issues underlying the request from the General Assembly for an advisory opinion:

- (a) The living conditions of the Palestinian population;
- (b) The status of the territory, in particular the danger that the wall might create a *fait accompli* in this respect.

Those political issues raised two fundamental legal issues:

- (a) Legal restraints on Israel's measures that cause the deterioration of the living conditions of the Palestinian population;
- (b) Legal restraints on Israel's measures that could prejudice the status of the territory.

The question asked by the General Assembly related to the consequences of the construction of the wall. That formulation is understandable in the light of the fact that there have already been a number of utterances by the political organs of the United Nations as to the illegality of the construction. Yet, the Court could not possibly address the consequences of that illegality without reviewing its reasons. That is indeed the way in which the Court approached its task. In doing so, the Court has addressed, clarified and developed a number of important issues of international law in general and as they relate to Palestine in particular – thus fulfilling with great distinction its noble task as the principal judicial organ of the United Nations.

In addressing these legal issues, the Court gave an answer to questions raised at three levels, in a logical order:

- What is the applicable yardstick for Israel's behaviour?
- Are the relevant norms violated?
- Are there any reasons which could, as an exception, justify the violations, if any?

## 2. The living conditions of the Palestinian population

### 2.1 The double yardstick: international humanitarian law and human rights



First, the living conditions of the population:

In this respect, there is the question of a double yardstick. Relevant questions are the object of rules pertaining to two different bodies of international law, namely to the field of human rights and to that of the law of armed conflict, or international humanitarian law. There is an old debate as to whether those two bodies of international law are mutually exclusive, which could mean that in a concrete case, a legal decisionmaker must make up his or her mind as to whether the situation is subject to one or the other body of law, opening also the odd possibility that it is subject to neither.

The Court has reconfirmed with all necessary clarity earlier holdings in the *Nuclear Weapons* case that it is the function of both human rights law and humanitarian law to protect victims of armed conflicts (paras. 102 et seq. of the Opinion). Those two bodies of international law can be applied concurrently; they are not mutually exclusive, they are mutually supportive and they reinforce each other. The Court did not have to address the question of possible contradictions or inconsistencies between the two areas of law. At least in the case before the Court, there are no such contradictions or inconsistencies.

## 2.2 International humanitarian law – the law of belligerent occupation

As to the rules of international humanitarian law, it is the law of belligerent occupation which is relevant. This is found, first, in the Hague Regulations. It is not disputed that those rules apply as they constitute customary international law (para. 89). The law of belligerent occupation is further embodied in the Fourth Geneva Convention. The applicability of this treaty is disputed by Israel, but this claim has long been rejected by the United Nations and by other parties to the Convention. The Court reconfirms the application of the Convention (paras. 90 et seq.).

Which are the relevant rules contained or formulated in these treaties – and are they violated? According to the Hague Regulations, it is in particular the duty of the occupying power to “insure public order and life” in the territory and to respect private property (para. 124). The Fourth Geneva Convention also contains a number of provisions imposing on the occupying power the duty to ensure adequate living conditions. Of particular importance are article 49 prohibiting inter alia the transfer of parts of the occupying power’s own population into the occupied territory and article 53 prohibiting the destruction of property.

The Court holds (para. 132) that in the course of building the wall, property was destroyed in violation of articles 46 and 52 of the Hague Regulations and of article 53 of the Fourth Geneva Convention. In addition, by contributing to the demographic changes already brought about and continued to be pursued through the Israeli settlements policy, it was part of an illegal design as this settlement policy constitutes a violation of article 49 of the Fourth Geneva Convention (paras. 120, 134).

The Court then turns to possible justifications of these violations. It recognizes Israeli security considerations, but it does not accept them as a sweeping catch-all justification. It deals with those considerations concretely in connection with the various norms that are possibly violated. None of the relevant prohibitions is absolute, but each has its own precise qualifications. A correct legal analysis must, as the Court clearly shows, concentrate on those concrete limitations or qualifications.

In this respect, the Court notes that articles 46 and 52 of the Hague Regulations do not contain any qualifying provision enabling account to be taken of military exigencies (para. 135). In contradistinction, article 53 of the Fourth Geneva Convention admits such an exception, but only “where such destruction is rendered absolutely necessary by military operations,” a necessity which the Court does not see in the present case. As to Article 49, the provision also contains an exception clause for “imperative military reasons”, but this does not relate to the paragraph prohibiting the transfer of the occupying power’s own population. Thus, the relevant clauses that would allow acceptance of security considerations as grounds to justify action which, without such justification, would constitute a violation do not apply in the case of the wall.

## 2.3 Human rights

The wall bars the movement of persons and goods. Mobility or freedom of movement is protected in various ways by human rights provisions. The fact that the wall prevents many persons from moving, to render themselves to other places where, for various reasons, they want to be or have to be is thus relevant for the application of a number of human rights guarantees.

In a general way, article 12 of the International Covenant on Civil and Political Rights (CCPR) (General Assembly resolution 2200 (XXI), annex) protects the freedom of movement (para. 134). It is noteworthy that the scope of protection includes – as the Court states – the right of access to Christian, Jewish and Islamic holy places (para. 129).

In addition, restraining the movement of persons violates a number of social rights protected by the International Covenant on Economic, Social and Cultural Rights (CESCR) (General Assembly resolution 2200 (XXI), annex) which depend on mobility for their effective implementation: the right to work because the worker can no longer reach the place of work; the right to health because the patient cannot reach the place where he/she could receive medical care; the right to education because the students cannot reach their schools; and so forth. In the light of the fact that the wall indeed cuts the lifelines of the Palestinian inhabitants, these rights are infringed upon (para. 133).

The Court then turns to possible exceptions to or limitations of these rights based on consideration of security. As in the case of international humanitarian law, it analyses limitations or exceptions relating to each particular norm in question: the general derogation clause of article 4 of CCPR, the specific limitation clause of para. 3 of article 12 of CCPR, and the general limitation clause of article 4 of CESCR. As to article 4 of CCPR, article 12 is not covered by the Israeli notification made under the derogation clause. Thus, although there might be an emergency, article 12 is not derogated.

As to the limitations possibly justified under para. 3 of article 12, the Israeli measures fail to meet the test of proportionality which the Court applies as a limitation of the limitation clause. By applying this principle of proportionality, the Court follows a general line of interpretation of limitation clauses adopted by many international human rights bodies and courts, by the European Court of Justice and also by national courts.

## 2.4 The sweeping alleged exception: self-defence and necessity

In the end, however, after having dealt with specific exception and limitation provisions associated with the relevant norms, the Court still deals with the general and sweeping legal argument used to justify the wall as a security measure: self-defence and state of necessity.

As to self-defence, the Court rightly considers it to be irrelevant in the present context. Self-defence is a justification for the use of force to defend a State against an attack coming from the outside. It has no relevance as a yardstick for measures taken by a State in a territory over which it has control (para. 139).

As to the state of necessity, the Court has serious doubt whether it can be applied at all as a general and sweeping circumstance precluding the wrongfulness of an action concurrently with the specific limitation or exception clauses already discussed (para. 140). But even if the state of necessity applied, it would be a very limited justification. The Court is not convinced that the narrow conditions for the application of this circumstance precluding wrongfulness exist in the present case, that is, that the measures in question really constitute the only means to preserve the security interests of Israel.

The Court concludes this part by a general statement on safeguarding security interests that deserves to be quoted in full because it is of general importance well beyond the case of the wall:

The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty to respond. The measures are bound nonetheless to remain in conformity with applicable international law.

## 3. The question of the status of the Palestinian territory

All territories taken by Israel in 1967 are occupied territories, not Israeli territory. They constitute the territorial basis of the right of self-determination of the Palestinian people and, thus, of the Palestinian State being created. The wall aggravates the problem that a number of measures, in particular the settlement policy, de facto undermine this basic position and stand therefore in the way of the Palestinian people exercising its right to self-determination and endanger the viability of the Palestinian State.

As to this problem, the legal yardstick of the measures taken by Israel is also twofold: first, general rules of international law are at issue, namely, the right to self-determination and the prohibition of annexation; and second, international humanitarian law.

In respect of both types of norms, the Court's holding is very clear. The fact that the wall effectively cuts off relevant parts of the Palestinian territory amounts to a forbidden de facto annexation (para. 121). The right of the Palestinian people to self-determination is clear beyond a doubt. The existence of a "Palestinian people" having this right – as the Court expressly states – "is no longer an issue" (para. 118). By forcing Palestinians to leave encircled areas, by fragmenting the Palestinian territory, the wall "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" (para. 122).

As to the questions of international humanitarian law, the relevant provision is, as already indicated, Article 49 of the Fourth Convention. The Court confirms in clear terms the position taken by the Security Council that the massive transfer of Israeli population into the occupied territories in the pursuance of the settlements policy constitute a violation of that provision (para. 120) and that the wall is part and parcel of this unlawful design.

#### 4. Conclusion

The Opinion of the Court is very important, for the international legal order, for the Palestinian people, as well as for peace in the Middle East. It has all the more weight as it is, as a matter of practical substance, a unanimous decision. The one Judge who voted against makes it clear, in his Declaration, that he agreed with the Court on most substantive issues, including a number of holdings which are important for the Palestinian cause.

The Court continues to adopt a restrictive stance in the interpretation of rules legitimizing the use of force or measures asserting de facto unilateral control. It thus strengthens the role of peaceful, negotiated settlements.

The Court recognizes that a number of aspirations formulated by the representatives and allies of the Palestinian people are well founded in law, and that the grievances of the Palestinian people are indeed violations of international law.

Frustration is an obstacle to peace. If Israel did what follows from the Opinion, namely if it destroyed the existing parts of the wall and desisted from further construction, it would relieve many frustrations and bitterness which stand in the way of peace. By clarifying questions of the status of the territory, the Court also facilitated, as it has often done in the past, a solution based on a genuine accommodation of conflicting interests by mutual concessions.

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#### Responses in Israel to the advisory opinion of the International Court of Justice on the legal consequences of the construction of a wall in the Occupied Palestinian Territory

First, I would like to express my gratitude at being given the opportunity to participate in this conference before such an esteemed forum. I have been working as a human rights attorney for the Association for Civil Rights in Israel for three years. The association is Israel's leading civil and human rights organization, and the only organization dealing with the entire spectrum of rights and liberties issues.

The issue I have been asked to address today is the West Bank separation barrier, its impact on protected persons, and its position vis-à-vis international law, specifically in relation to the recent ruling of the International Court of Justice in the Hague. The severity of the human rights violations that are inherent to the barrier's construction is reflected by the enormous amount of time the issue has taken up the litigation work of the association over the last year.

The huge amount of litigation against the route of the separation barrier that has been submitted by both non-governmental organizations and numerous individuals and municipal councils, can be divided into two categories. The first can be defined as principle litigation. This litigation refers to the impact of the barrier on the Palestinian population as a whole in the areas adjacent to the section that has been already built in the north of the West Bank. Two such petitions were submitted to the Supreme Court by the association: one referring to the policy regarding the limited opening of the gates in the separation barrier that allow the passage of Palestinians; the second petition challenged the legality of the permit regime instituted to regulate the movements of protected persons in and to the enclaves created by the route of the separation barrier.

The principle petitions were of particular importance as they provided a means to increase awareness, in both the public and legal spheres, of the severe human rights violations resulting from the barrier's construction.

We used the petitions to effectively elucidate the meaning of those violations for the local Palestinian population and to provide a firm basis upon which to base our subsequent litigation opposing the sections of the barrier that are yet to be constructed.

The second category of litigation relates to the dozens of petitions that have been submitted on behalf of smaller population sectors, particular villages or groups of villages. Most of those petitions have resulted in court rulings either challenging the route of the barrier, temporarily halting construction, or ultimately, as a result of the ruling on a petition relating to the village of Beit Sourik, bringing about wide changes in the route of the barrier.

In the Beit Sourik ruling, a petition that was submitted by my esteemed colleague – Muhammad Dach'le, the court found that the motive behind the construction of the barrier is security-related and not political, and therefore the State is authorized to construct such a barrier, even on occupied territory.

It should be noticed that Chief Justice Barak left an open door for further discussion in this question, noting that the parties had not put it in the centre of their litigation.

However, it rejected 30 km of the 40 km of the length of the barrier northwest of Jerusalem because the route does not strike a proportionate balance between security needs and the human rights of the local Palestinian residents.

Following the Beit Sourik ruling, litigation before the Israeli High Court was frozen to some degree for several months while the State worked on a revised route for the barrier.

Two weeks after the Beit Sourik ruling, the International Court of Justice issued its advisory opinion.

The ruling of the International Court of Justice presented a unique dilemma to the Israeli political leadership. They could not ignore such an emphatic and high-profile Opinion, but adherence to it would be in complete contradiction to its political agenda.

The political leadership in Israel tended at first to dismiss the opinion of the International Court of Justice. Prime Minister Sharon declared in response to the Opinion: "We have our court and we are committed to abide by its ruling," thus declaring the International Court of Justice Opinion as irrelevant. On the other hand, legal responses were more mixed. Senior members of the Attorney General's staff warned the Government of the dangers of ignoring or relating dismissively to the advisory opinion of the International Court of Justice. Furthermore, the suggestion was raised in the Ministry of Justice that Israel's position that the Geneva Convention has no de jure application in the occupied territories should be re-examined. Foreign Ministry officials were outraged when this information appeared in the press.

In the past two weeks, two important developments occurred. First, the Government approved a new route for the barrier, which they claim will reduce the Palestinian land on the Israeli side of the wall to 6 or 8 per cent, as apposed to the figure of 16.6 per cent cited in the advisory opinion of the International Court of Justice. It seems that this figure does not include East Jerusalem and its surroundings. The gap between the 6 per cent and the 8 per cent reflects the "Ariel finger". Ariel is a Jewish settlement in the heart of the West Bank. It seems the Government intends to surround it by the wall, but at least in this stage is unwilling to admit it.

However, although the new route also reduces to some degree the scope of human rights violations resulting from the barrier, it still significantly infringes on the human rights of the Palestinians residing in its vicinity. The locations where the route of the barrier deviates from the Green Line and enters Palestinian land are generally dictated by a desire to include Jewish settlements in those areas on the Israeli side.

In two petitions I have filed, for example, regarding the villages of Ni'lin and Deir Qaddis, the route of the barrier still passes through the villages' olive orchards, simply because they are situated adjacent to Jewish settlements. Those two petitions are still pending, and one of these days we anticipate being informed of the exact final route in the area. However, we have been negotiating with the army's counsellors and we know for sure that the new route still invades the villages' orchards.

Furthermore, we were notified by the office of the Attorney General that Israeli parties object to any change in the route that might move the wall closer to the adjacent settlements. The councils of these settlements (Modi'in Elit and Hash'mona-im) and Israeli contracting companies claim that such a new route will impede their plans to expand the settlements.

The second development that took place recently was that the Israeli Government submitted to the High Court of Justice its position regarding the International Court of Justice opinion and its implication on two petitions pending before the court.

In the first hearing conducted by the Israeli High Court following the International Court of Justice opinion, on those two petitions, the President of the Court made it clear that the Court could not ignore the International Court of Justice opinion. The court therefore asked the State to specifically consider the opinion in its response to the two petitions.

In its response, submitted at the end of February 2005, the State emphasizes the non-binding nature of the International Court of Justice opinion. In addition, the State claims that the opinion is only a secondary source of international law. However, the State recognizes, at least in rhetoric, the status of the International Court of Justice as an important international tribunal, and therefore presented its detailed position regarding the opinion and its legal ramifications.

The State's principal claim is that the whole opinion is flawed since it is based on paltry, outdated and inaccurate evidence, especially as regards the route of the barrier. As a result of Israel's decision not to submit its arguments before the International Court of Justice, the opinion, says the State, is based on unbalanced factual information and on a partial picture of the regional situation, which formed the background for the construction of the barrier.

Furthermore, the State claims, since the opinion was issued, the route of the barrier has been substantially revised, and therefore the findings of the opinion are no longer relevant to the new route.

On the normative level, the State prefers to rely on the legal analysis of the Israeli High Court in the Beit Sourik ruling. Here the State decides to evade the major legal issue of the legality of settlements in occupied territory, and states that the differences between the Israeli court's analysis and that of the International Court of Justice are irrelevant to the two cases in which the State's opinion is filed. Here I should emphasize that in those two cases, as opposed to numerous other petitions pending before the court, the issue of settlements does not arise.

The State's response does criticize some of the assumptions and conclusions of the International Court of Justice. For example, the State rejects the International Court's finding that the barrier creates de facto annexation of Palestinian territory. In addition, the State claims that the situation in the Occupied Territories is a situation of war, and therefore the law of belligerent occupation is not the only applicable law, and that international law regarding combat situations is applicable as well. The State also claims that regardless of the legality of the Israeli settlements in the opinion of the International Court of Justice, the State is obliged by international law to protect its citizens wherever they reside, and that this obligation was even recognized in the bilateral agreements with the Palestinians.

The association is currently preparing its response to the State's position regarding the International Court of Justice opinion. Of course the ideal position would be to call for the implementation of the opinion and all its provisions. However, tactically, and given the unlikelihood that such a position would be adopted by the Israeli court, we will also try to take the legal findings of the International Court of Justice and argue for their applicability for the barrier cases before the court. The association will argue that the Advisory Opinion reflects international law and the correct interpretation of international conventions, particularly the Geneva Convention. As noted above, the main cause for the barrier's encroachment on the occupied territories is to ensure that the Jewish settlements remain on the Israeli side. Therefore, we will argue that the determinations of the International Court of Justice regarding the illegality of the settlements in international law and the effect of the barrier creating de facto annexation should be adopted by the court.

I would like to conclude with a few remarks regarding the institutional and political context in Israel, which will affect the way in which the International Court of Justice opinion might finally be received by the Israeli judiciary.

Supreme Court justices are constantly criticized in their attempts to find a balance between ensuring the rule of law and overstepping their role by encroaching on the executive mandate of the Government. The court is also subject to a great deal of pressure both from the political leadership and the general public. The large number of petitions against the barrier, the serious consideration of them by the court and the delays imposed are frustrating political ambitions to complete the barrier. A recent expression of this frustration was articulated last week in a statement by the Prime Minister, Ariel Sharon: "You enter the territory (to build a fence), and within minutes a petition is filed. The problem is the court system, their use of the word 'proportionality'". In the public sphere, every time a terror attack occurs that could, in theory, have been prevented if the barrier had been completed, the public places a certain amount of blame on the court.

The unequivocal opinion of The Hague revealed the court's dilemma on this highly politicized issue: in light of the Hague opinion, it has become more difficult for the court to continue to avoid a principle decision regarding the legality of the barrier, especially in the light of its connection to the annexation of settlements.

Until now, the court has refused to rule on the legality of the settlements, seeing the issue as non-justiciable and the subject of direct negotiations between Israel and the Palestinians. The barrier has created a different reality, as the major human rights violations caused by the barrier are the result of a route intended to annex, de facto, occupied territory on which Israeli settlements have been established.

Since the State continues to claim that the construction of the barrier is consistent with both international and Israeli domestic law, and in the light of the definitive opinion of the International Court of Justice on the legality of the barrier, one may now expect that the Israeli court will rule on the question: how far can the State go in order to sustain illegal settlements in occupied territory, in clear breach of international law?

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Advisory opinion of the International Court of Justice  
on the legal consequences of the construction of a wall  
in the Occupied Palestinian Territory:  
significance and implications

On 9 July 2004, the International Court of Justice rendered its advisory opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory. The opinion was given in response to the request of the General Assembly vide its resolution ES-10/14. On most of the issues, the opinion was carried by 14 votes against the vote of Judge Thomas Buergenthal. A total of 44 States, including Israel, two international organizations, the League of Arab States, the Organization of the Islamic Conference and Palestine filed written statements. Curiously enough, Israel's written submission did not directly deal with the legality of the wall; it rather indulged in arguments involving jurisdiction and propriety. It argued that the main reason for building the wall was to frustrate attempts of suicide bombings inside Israel.

I. Significance of the advisory opinion

The advisory opinion incorporates the most authoritative interpretation of the law applicable to the Occupied Palestinian Territory. All of the Court's findings run against Israel's legal arguments that have been in circulation ever since the War of June 1967. Israel's High Court of Justice has been instrumental in giving the occupation military authorities the necessary "legal licence" to avoid their legal limitations. Describing the role of the High Court, Professor David Kretzner of the Hebrew University said it has been to legitimize Government actions in the Territories".<sup>4</sup>

1. The status of the Palestinian Territory

Israel has been ambivalent about the status of the Palestinian Territory that it occupied in June 1967. For a very short period after the occupation, the military governor issued Military Order No. 3 in which he directed the military courts to "apply the provisions of the Geneva Convention ... with respect to judicial procedures. In case of conflict between this Order and said Convention, the Convention shall prevail." This order was superseded four months later by virtue of Order No. 144.<sup>5</sup> Aside from this incident, Israel was calling the Occupied Palestinian Territory either "liberated"<sup>6</sup> or "administered"<sup>7</sup> or "contested"<sup>8</sup> and at a later stage, the "area" or "the territories." Israel went further to even change the name of the Occupied Palestinian Territory to "Judea and Samaria".<sup>9</sup>

In spite of over 30 resolutions adopted by the United Nations Security Council and the General Assembly asserting that the Occupied Palestinian Territory is "occupied" and subject to the Fourth Geneva Convention and that Israel is the occupier, Israel remains indifferent to those international resolutions. The Court addressed the issue of the status of the Occupied Palestinian Territory and held that:

"The territories situated between the Green Line ... and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories ... have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power." (para. 78)

This decisive interpretation will certainly have a multifaceted impact. First, it is now legally decided that the area between the Green Line and the Mandatory eastern border of historical Palestine is "occupied" and that Israel remains a belligerent occupant. This does not, however, imply that the Green Line has become the legally recognized boundary of Israel. The Court was not requested to delineate boundaries or define the exact location of the Green Line. It simply defined where the territories occupied by Israel are.

Second, the widely circulated argument by Israeli officials and jurists that Security Council resolution 242 (1967) does not call for the withdrawal of all Israeli forces from all the occupied territories should now be put to rest. In justifying that argument, they rely on the absence of the article "the" before the word "territories" that occurred in paragraph 1(i) of the resolution.<sup>10</sup> This argument drew support from a few non-Israeli jurists.<sup>11</sup> The advisory opinion comes to put an end to such false arguments. With the definition of the Occupied Palestinian Territory made by the International Court, there is now no room left for the "the" jurists.

Third, the fact that the Occupied Palestinian Territory is "occupied" and that Israel is an occupier necessarily means that there is a corpus of treaty rules, the great majority of which have already become customary and universally recognized as humanitarian principles that are now applicable to territories occupied by a belligerent occupant.<sup>12</sup> Those rules are expressed mainly in the Hague and Geneva Conventions and customary international humanitarian law. One of the main aspects of those rules deals with the administration of the occupied territories, the conduct of the occupation armed forces and the treatment of the civilian population.

Israel has been consistent in rejecting the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory. The Israeli High Court of Justice reasoned that there was no domestic law to make that treaty an Israeli law.<sup>13</sup> This finding was consistently upheld (until very recently)<sup>14</sup> by the Israeli court. Israel, furthermore, disputes the applicability de jure of the Convention to the Occupied Palestinian Territory because such territory does not belong to a sovereign and therefore it is not a territory of a High Contracting Party (para. 90).

The advisory opinion rejected that position and the Court "finds that the [IV Geneva] Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories." (para. 101). The court however noted that Israel had ratified the Convention on 6 July 1951 and without any reservation (para. 91).

Needless to add that Israel, which remains in occupation of the Occupied Palestinian Territory, is subject to the international legal limitations imposed upon all belligerent occupants. Those limitations are set out not only in international humanitarian law, but also in human rights instruments which the Court asserts are applicable in times of peace as well as in times of war (paras. 107-113).

## 2. East Jerusalem

The Court ruled that the Occupied Palestinian Territory includes East Jerusalem. It clearly said that “All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power” (para. 78).

The Israeli expansionist policies were better reflected in its territorial designs for Jerusalem. Soon after Israeli armed forces secured control over the West Bank and East Jerusalem in the June War of 1967, Israel immediately began implementing such policies. It amended its Law and Administrative Ordinance (Amendment No. 11) Law<sup>15</sup> to allow the Government of Israel to extend “the law, jurisdiction and administration of the State ... to any area of Eretz Israel.” That Amendment was applied immediately by incorporating East Jerusalem into Israel's body. The area of Jerusalem was enlarged to about seven times its original size. Several other laws were subsequently enacted involving Jerusalem, including the law of 1980, which declared Jerusalem as Israel's capital.<sup>16</sup>

In spite of the voluminous number of United Nations resolutions against Israel's actions and legislation involving Jerusalem, Israel goes ahead with its policies with no consideration of the position of the world community. What compounds the problem and feeds Israel's intransigence is the supportive position of the United States of America. In 1989, the United States Government signed with Israel a Land Lease and Purchase Agreement<sup>17</sup> the gist of which is the relocation of the United States Embassy to Jerusalem and the construction of the embassy partly on *waqf* land (a religious trust). The United States Congress, furthermore, passed several resolutions urging the State Department to move the United States Embassy to Jerusalem. Finally, the Congress passed the Embassy Act of 1995, which provides “for the relocation of the United States Embassy in Israel to Jerusalem...”.<sup>18</sup>

The advisory opinion on East Jerusalem should make its immediate impact on the legislatures of both Israel and the United States. Both States will now have to reconcile their domestic legislations with the World Court opinion, which is based on international law.

## 3. The wall

In the *dispositif*, the Court held that:

“The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, are contrary to international law;

“Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this opinion;” (para. 163, A and B).

The opinion leaves no room for interpretation or guessing. The wall is illegal and must be dismantled. The Court noted that it “gravely infringe[s] a number of rights of Palestinians ... the construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments” (para. 137).

The Court noted Israel's argument that the wall's sole purpose was to enable it to combat terrorist attacks, that it is a temporary measure, that it does not annex territories, that it is not a border and that it does not change the status of the territory in any way (para. 116). However, it is obvious that the Court was not impressed by any of Israel's apparent defences. The Court replied that it “is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives” and that the infringements inflicted upon the Palestinians' rights “cannot be justified by military exigencies or by the requirements of national security or public order” (para. 137). The Court was not oblivious to the fact that the route chosen for the wall, by enclosing Palestinians and incorporating Israeli settlements, “would be tantamount to de facto annexation” (para. 121). Even Judge Buergenthal, in his declaration annexed to the opinion, “agree[d] that the means used to defend against terrorism must conform to all applicable rules of international law and that a State which is the victim of terrorism may not defend itself against this scourge by resorting to measures international law prohibits.”

The Court pointed out the infringements resulting from the construction of the wall, including the restriction on the free movement of Palestinians, the serious repercussions for agricultural production, the restrictions on access to schools, clinics, workplaces and water wells. All such measures are in violation of human rights laws. Above all, the regime contributes to demographic changes that contravene the prohibition prescribed by Article 49(6) of the Fourth Geneva Convention (paras. 132-134).<sup>19</sup>

The wall, therefore, was nothing but another form of colonization of Palestinian land. Israel used several techniques to colonize parcels of the Occupied Palestinian Territory. One tool was to declare a piece of the land a closed military area, a public land, a green area, a security zone and the like. Now, it is a wall the length of which is immaterial if one considers the route it is taking. It keeps winding in a deliberate way to secure both more land and Jewish settlers and to exclude Palestinians. It is, as in policies adopted by all settler colonies, a blatant exercise of apartheid.

## II. Implications of the advisory opinion

The advisory opinion will have, and should have far-reaching implications. The Court has set out a wide range of consequences that are to be set in motion. It addresses Israel, individual States and the United Nations. The Court finds that Israel, by constructing the wall on the Occupied Palestinian Territory, is violating the Hague Convention of 1907 and the Regulations annexed thereto, violating the Fourth Geneva Convention, which Israel ratified, violating the human rights conventions that Israel has also ratified, and violating the right of self-determination of the Palestinian people. With such an extensive list of violations, Israel appears to be the “rogue State” of the world. No other State has accumulated so long a list of legal violations as Israel. It is still in occupation of the Palestinian Territory and commits violations on a daily basis with determination and arrogance.

Israel's audacity in persisting in stripping the Palestinian people of the basic rights accorded to people under occupation should bring into play the role of the United Nations. The Court emphasized that the General Assembly and the Security Council “should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present advisory opinion” (para. 160). The lessons of South Africa's experience should be recalled and utilized. The implementation of sanctions should be the beginning of the list of actions that must be initiated; otherwise the 190 States parties to the Geneva Conventions would be reckless in not ensuring respect of the Convention by Israel.

Finally, if law, at the domestic and the international level, is the alternative to violence and disorder, this Opinion is guiding us to apply the law in order to bring peace to all the peoples of this tortured area. The Palestinian – Israeli conflict has been subject to all kinds of constraints, from that of military coercion to more sophisticated methods of diplomacy and power politics. All of them have failed. One tool has never been used, and that is the instrument of law. It is time to utilize the law as set out by this decisive and daring opinion. The Court remarked on a vision for the future as follows:

“Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's 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)” (para. 162).

### III. Sequel

The first step taken in the light of the opinion was the convening of the Tenth Special Emergency Session of the General Assembly which adopted resolution ES-10/15 on 20 July 2004. In that resolution, the Assembly demanded that Israel “comply with its legal obligations as mentioned in the Advisory Opinion” and requested all States Members of the United Nations “to comply with their legal obligations” as set out in the Opinion. The resolution further requested the Secretary-General to “establish a register of damage caused to all natural or legal persons concerned in connection with paragraphs 152 and 153 of the advisory opinion.” It appears that the Secretary-General is currently preparing his plan in order to launch the register. In this respect, the Palestinian National Authority should also establish an independent body to be the counterpart to the body that the Secretary-General is planning. So far, no concrete steps have materialized.

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Cessation, restitution and reparation in the advisory opinion  
on the legal consequences of the construction of a wall  
in the Occupied Palestinian Territory

The advisory opinion of the International Court of Justice on the Legal consequences of the construction of a wall in the Occupied Palestinian Territory is remarkable in many ways. This presentation is limited, however, to commenting on the way the Court addressed issues of compliance, cessation, restitution and reparation.

After having considered that Israel’s responsibility “is engaged under international law” (para. 147) because the “construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, are contrary” to international law, the reasoning of the Court on issues of compliance with international law, cessation, restitution and reparation is limited to five short paragraphs (149 to 153). Neither the separate opinions of six of the judges nor the declaration of Judge Buergenthal discusses those issues. This lack of debate might give the impression that the opinion is of little interest with regard to remedies. This comment suggests the opposite view.

#### 1. Duty to comply

Paragraph 149 stresses “first” that Israel has the duty “to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory”, that is, those obligations dealt with by the Court in its preceding paragraphs 114 to 137. There is no need to detail those obligations here, or to recapitulate the reasoning of the Court in that regard. In brief, the Court rules that “Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law. Furthermore, it must ensure the freedom of access to the holy places that came under its control following the 1967 War” (para. 149).

This duty to comply with existing international obligations that are breached by the very fact of building the contentious wall is not repeated in the operative paragraph 163 of the opinion: as such, obeying existing rules is not a specific legal consequence of building the wall. To respect the right of the Palestinian people to self-determination and uphold international humanitarian and human rights law are obligations binding on Israel as the occupying power, independently of the construction of the wall. The fact that building it breaches Israel’s duty to respect such general obligations does not imply that putting an end to the construction would automatically ensure respect for them. Building the wall is just a specific violation of the same obligations that must still be fulfilled and respected.

#### 2. Cessation

In contrast to the duty to comply, the “obligation to put an end to the violation of [Israel’s] international obligations flowing from the construction of the wall in the Occupied Palestinian Territory” (para. 150) is a specific legal consequence of the illegality of that construction. By quoting its jurisprudence, the Court recalls that the obligation of any responsible State to cease an act violating its international obligations is “well established in general international law”.<sup>20</sup> Hence, according to the Court, Israel’s duty to put an end to the violations resulting from its construction of the wall entails three different concrete obligations:

- (a) The obligation “to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around Jerusalem” (advisory opinion, paras. 151, 163(3)B;
- (b) The obligation to “dismantle forthwith the structure therein situated” (ibid., para. 163(3)B;
- (c) The obligation to “repeal or render ineffective forthwith all legislative and regulatory acts relating” (ibid.) to the construction of the wall and its associated regime, “except insofar as such acts, by providing compensation or other forms of reparation for the Palestinian population, may continue to be relevant for compliance by Israel with” (ibid., para. 151) its obligations to compensate the damages suffered as a result of the wall’s construction.

#### A. Halting the construction of the wall

The fact that the Court deals with the question of halting future constructions under the notion of cessation, rather than under the duty to comply with existing obligations, suggests the importance given to the act that occasions the question of the General Assembly. That act is considered to be an ongoing (illegal) Israeli project, which encompasses past, present and future constructions. In the advisory opinion, it is clear that the Court does not limit its analysis of facts and law to the sections of the wall that have already been built, but takes the question of the General Assembly as relating to a construction project, be it partly or entirely achieved. Since important sections of the wall were actually already built by the time the General Assembly requested the advisory opinion, it is speculation to ask whether the mere intent of building such a wall, with all its preparatory planning, could have been considered as a wrongful act.

#### B. Dismantling the wall

The Court understands cessation as including also the duty to dismantle existing sections of the wall (B) and the duty to repeal Israeli legislation relating to the construction of the wall (C). By doing so, the Court reaches substantially the same conclusions as Palestine, but on a different legal ground. In its written statement, Palestine argued that it is because Israel has a duty to make reparation for the damage arising from its illegal conduct that it must, in the form of restitution, demolish the portions of the wall already built and annul its legal acts associated with the construction (ibid., para. 145).<sup>21</sup>



Why is it important that the Court did not follow the Palestinian submissions regarding the dismantlement of the wall on the basis of restitution, but considered the removal and destruction of the illegal sections of the wall as flowing from the duty to put an end to the violations resulting from its construction? Even if the Court did not give any explanation to that change, two reasons appear to be decisive in that regard.

First, founding the dismantlement of the wall on cessation is a way to reaffirm the continuous character of the breaches committed by Israel. The very fact of building the wall is no doubt a process, a behaviour which extends over time. But once the entire wall is built and the construction finished, there nevertheless remains a continuous breach of the same obligations. In other words, it is the presence of the wall — which is designed to be manned — and not only its construction over the years, which violates international law. As long as the wall is there, partly or completed — not only as long as the wall is being built — Israel does not comply with its obligations. Calling for the dismantlement of the wall on the basis of restitution does not allow to take fully into account the temporal dimension of the breaches, and hence the real nature of the underlying obligations.

Secondly, founding the dismantlement of the wall on cessation rather than on restitution prevents various arguments that otherwise could be made by Israel to complicate the issue in order to drag it out as long as possible, so as to keep the wall in place.

On the one hand, not being a form of reparation, cessation is not subject to the exceptions that exist in case of restitution.<sup>22</sup> By founding dismantlement on cessation rather than on restitution, the Court avoids in advance any arguments in that regard.

On the other hand, more importantly perhaps, because dismantling the wall flows from the duty to put an end to its illegal conduct, Israel could never pretend to “buy” its wrongful act. Restitution is indeed just one of the forms in which the damage can be made good; the other form, alternative or cumulative, is compensation. Seeing that the Court considers Israel’s obligation to make good the damage to exist to the direct benefit of the concerned individuals, there is a risk that, if Palestinian victims of the wall accept compensation instead of restitution, Israel could argue that the preference given by the victims to compensation exempts it from dismantling the wall. That argument would be ill-founded since compensating for the land taken does not necessarily make Israel owner of that land, and certainly never sovereign of it: as such, compensation for a wrong committed<sup>23</sup> is not the price of a purchase and, being not sovereign but only owners, landlords cannot transmit a right they do not hold. Nevertheless, those distinctions between ownership and sovereignty, and compensation and purchase price, which are easy to make for any lawyer, are not so clear for the general public. The Court was probably aware of the great sensitivity of this issue of compensation among the Palestinian people, where accepting money from Israel for any piece of land taken or property destroyed is considered as a shameful betrayal of the national cause because it is understood as a renunciation to any title or claim on that land or property. Hence, by founding the dismantlement of the wall on cessation rather than on restitution, the Court prevents all those arguments from being made and keeps this issue at an international level, to avoiding its being mixed with reparation issues at a more domestic level where individuals could prefer compensation to restitution. So, if well explained to the Palestinian public, the Opinion could help victims present reparation claims to the Israeli authorities by overcoming their natural reservation against accepting any compensation. The popular psyche and the law are sometimes quite difficult to reconcile. Be it voluntary or not, the Court undoubtedly made an effort to try to overcome those difficulties by defining legal consequences that are very protective of the Palestinian population from Israel and also from itself! In other words, the preference given in that regard to cessation over restitution is not only legally logical but also politically, or even sociologically, sensible — even if it has some strange paternalistic flavour. Despite departing from the Palestinian submission, it is actually very beneficial to the Palestinian substantial claim: the wall must be removed, whatever the compensations paid by Israel.

### C. Repealing domestic acts

Cessation is also, according to the Court, the legal ground of the duty to “repeal or render ineffective forthwith all legislative and regulatory acts relating” (advisory opinion, para. 163 (3) B) to the construction of the wall and its associated regime. That obligation does not apply when those acts provide “compensation or other forms of reparation for the Palestinian population” (ibid., para. 151), since Israel has the obligation to compensate the damages resulting from the construction of the wall (cf. *infra*). Here again, by preferring cessation over restitution, the Court departs from the written submissions of Palestine. Palestine’s arguments were undoubtedly influenced by the findings of the Court in the *Arrest Warrant* case.<sup>24</sup> In that case, the cancellation of the arrest warrant issued by a Belgian investigating judge against the acting Minister for Foreign Affairs of the Democratic Republic of the Congo was considered by the Court to be part of the duty to make full reparation, and not as part of the duty to put an end to the wrongful act. How to explain this difference of approach by the Court?

In the case of the arrest warrant, its cancellation could not have been claimed by the Democratic Republic of the Congo on the basis of cessation since Abdoulaye Yerodia did not hold any ministerial office by the time of the ruling of the Court. This is why some judges disagreed with the finding that Belgium, by way of its own choosing, had to cancel the arrest warrant.<sup>25</sup> In that case, the difficulty resulted from the fact that a domestic act — the Belgian arrest warrant — was, at the time it was issued, constitutive of the international illegal fact — the breach of the rule on immunity benefiting acting Foreign Affairs ministers — and that this wrongful fact had ceased to exist while the domestic act, as such, remained in existence. It was only by arguing<sup>26</sup> that full reparation — that is, the establishment of the situation that would, in all probability, have existed had the illegal act not been committed — required the disappearance of the domestic act that was no longer constitutive of an international wrongful fact, that the cancellation of the arrest warrant was granted by the Court. In contrast, in the advisory opinion there was no need to resort to such distinctions between a domestic act and an international wrongful fact. Since Israel’s action is continuous, the duty to cease it carries with it the obligation to repeal or render ineffective its domestic legal basis. In both cases, one sees the International Court of Justice dealing with domestic legal acts and considering the end of their material existence on the basis of the rules of State responsibility for internationally wrongful acts, either as a matter of cessation when the international breach still exists by the time of the ruling, or as a matter of reparation, (usually) in the form of restitution, when it is not the case anymore. It must be noticed that the Court does not list in the Opinion the relevant domestic acts that must be repealed (partially or totally) by Israel, leaving thus some uncertainty as to the concrete scope of its obligation.<sup>27</sup>

### 3. Reparation and restitution

According to the Court, “Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem” (advisory opinion, para. 163 (3) C). It is not so much the existence of an obligation to make reparation, but the scope and forms of the obligation that are of interest. By recalling the famous *Chorzow Factory* formula (ibid., para. 152), the Court clearly intends to stress the predictability of its findings and the classical articulation between restitution and compensation. This said, despite this apparent continuity in the reparation jurisprudence of the Court(s), the advisory opinion is more interesting and innovative than its limited text might suggest, especially regarding the beneficiaries of the duty to make reparation.

The opinion suggests (paras. 147, 152 and 153) that, under the rules of international responsibility, States have a duty to make reparation directly in favour of individuals. This seems to be confirmed by the fact that “the Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall’s construction” (para. 153). The approach of the Court is far from classical. The Court does not consider diplomatic protection as the only way through which damages suffered by individuals as a result of violations of international law may be claimed, allowing individuals to receive compensation eventually and indirectly. On the contrary, the opinion goes so far as to affirm that not only does the duty of the debtor State arise from international law directly in favour of the individuals, but also that the relationship between the debtor (the State) and the creditors (the individuals) is itself regulated by international law, and not by any domestic law.<sup>28</sup> This is both very novel and far-reaching in many ways.

It is novel because, to our knowledge, it is the first time that such an authoritative statement of the law is made in relation to the right of individuals to receive reparation when they suffer from a breach of international law. This topic has been much discussed lately, especially following some important claims,<sup>29</sup> the work of the United Nations Commission on Human Rights<sup>30</sup> and the establishment of international criminal jurisdictions.<sup>31</sup> The opinion clarifies in that regard a basic question of principle.

It is far-reaching because the findings of the Court are made in very general terms and suggest that any breach of international law, including rules that are not to the direct benefit of individuals, may entail a duty to make reparation in favour of individuals, no matter if the obligation breached was especially owed to the victim. In other

words, the only thing that the victim seems to have to prove is that the damage occurred as a result of the construction of the wall beyond the Green Line, which is globally considered as being illegal, for various intertwined grounds. The proof that the damage results more precisely from this or that illegality appears not to be required. This is all the more advantageous to the victims. It does, however, not enlarge beyond reasonableness the notion of causality, which always supposes that a damage stems concretely from an act (building the wall) constitutive of a (or various) breach(es) — and not abstractly from such breach(es).

What is most striking is that all this seems so obvious to the Court that no effort whatsoever is made to try to justify it. Maybe some will say that Israel's duties towards individuals have been affirmed by the Court only to circumvent the difficult question of Palestinian statehood that would have arisen within the framework of diplomatic protection. The clarity of the advisory opinion on those points, and the absence of any discussion of this issue by the judges in their various opinions, suggest, however, that the underlying legal principles of the findings should not be circumscribed by the facts which led to the request by the General Assembly. In this sense, and even if the precise content of the international responsibility towards individuals remains to be seen, the Court gives some concrete content to article 33, paragraph 2, of the 2001 International Law Commission draft articles which, so far, has remained fairly enigmatic.<sup>32</sup> It must be noticed in that regard that the Court seems to limit the right of individuals to the compensation of "any form of *material* damage" (para. 153, emphasis added) they suffered. Moral damages of individuals are not mentioned. This might be explained by the fact that the Court was mainly concerned with the question of property seized for the purpose of the construction of the wall. The apparent reservation of the Court might also be due to a certain fear of unreasonable claims to moral damages amounting nearly to some form of punitive damages. It remains, however, to be seen whether such moral damages of individuals are (or should) *per se* (be) excluded from any compensation.

The words of the law, even when they are those of the principal judicial body of the United Nations, may seem to be pointless before such an exceptional accumulation of mutual grievances and such a long confrontational history. Distrust runs so deep on both sides that the very commonality of the law, which appears to be the prerequisite of its effective application, is itself more and more evanescent. For many lawyers, the forceful findings of the Court will in that context resound as a welcome reiteration of fundamental principles that are in danger of vanishing into thin air. Whereas this is undoubtedly true, it is far from resolving any real problem, and it could actually be more destructive of the law itself and its institutions if, by fuelling high hopes, only angry disillusion comes about. Hence, by its opinion, the Court places great political responsibility on the world community and its main players, even if it concentrates on the legal responsibility of Israel.

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The significance of the advisory opinion rendered by the International Court of Justice  
on the legal consequences of the construction of a wall  
in the Occupied Palestinian Territory

On 9 July 2004, the International Court of Justice issued an advisory opinion in the case concerning the legal consequences of the construction of a wall in the Occupied Palestinian Territory. The event was highly publicized with both the media and the public paying close attention to the whole process. Despite the huge campaign mounted to prevent it from making a pronouncement on the merits of the issue, the International Court of Justice was successful in proving that the law prevails and that its voice can be heard. For the first time in the history of the Palestinian question, a judicial body was able to consider a legal dimension of the question, which would hopefully guide the world community and parties to the peace process in their quest for peace in the Middle East.

The main significance of the advisory opinion is that it is a pronouncement by an authoritative judicial body on the rules of international law and the obligations of States under such a law. For States, including Israel, carrying out their international law obligations, as set out by the International Court of Justice, is not a matter of choice; rather, it is a question of adhering to the rule of law. The international community overwhelmingly supported this conclusion when it adopted General Assembly resolution ES-10/15 on 20 July 2004 by 150 votes in favour and 6 against. This resolution demanded that Israel, the occupying Power, comply with its obligations as mentioned in the opinion. It further called on all States to also comply with their obligations according to the advisory opinion of the International Court of Justice.

**The significance of the advisory opinion**

The General Assembly requested the advisory opinion from the International Court of Justice in resolution ES-10/14. The request followed intensive diplomatic efforts and negotiations at the United Nations on the means to respond to Israel's rejection of the opinion of the international community concerning the construction of the wall. In resolution ES-10/13 of 21 October 2003, the Assembly demanded that Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, which is in contradiction to relevant rules of international law. Here, it should be stressed that no one denies that Israel may build a defensive wall if in fact that is the intention of Israel. But the wall cannot be built by Israel on land that it does not own. Among the legal problems arising from the construction of the wall is that it is being built in territory that Israel has occupied in 1967 and has employed – since then – various measures to annex. This has been in contravention of a normative rule of international law prohibiting the acquisition of territory by force.

The request also came after the Security Council failed to act on the issue as a result of a negative vote by one permanent member of the Council. On 14 October 2003, a draft resolution on the construction of the wall was rejected by the Council and no action was taken by it on the matter since then. Such a failure by the Council to exercise its primary responsibility in the case of the wall was recognized by the International Court of Justice in its advisory opinion. This is significant coming from the body that has consistently refrained from making legal pronouncements on the functions of the Security Council. The Court went further by advising the United Nations, including the Council, to consider what further action is required to bring to end the illegal situation resulting from the wall. Therefore, the Court went beyond the issue of State responsibility for an internationally wrongful act and dealt also with the responsibility of the United Nations arising from the construction of the wall.

One important assertion by the Court, which has a direct impact on the United Nations is that the question of Palestine remains a permanent responsibility of the Organization until it is resolved in accordance with international legitimacy. This responsibility would be an important safeguard for a fair and equitable resolution to the Israeli-Palestinian conflict on the political track.

Turning to the specific significant aspects:

- (a) The Court declared that the territories seized as a result of the 1967 war between Israel and Jordan are occupied territories, that Israel remains an occupying Power and that Israel has the responsibilities of an occupying Power under international law. Accordingly, the court has shut the door on the contention that such territories are "disputed", further stating in the Opinion that subsequent events in the occupied territories have done nothing to alter that situation;
- (b) This is directly related to the status of the settlements in the Occupied Palestinian Territory, which the court unanimously concluded are illegal. Accordingly, no acquired rights may be claimed from the illegal situation of the settlements;
- (c) It should also be noted that the Court, in discussing the rules of international law applicable to the case and to the West Bank, invoked the rules relevant to

aggressive occupation. Among them is Article 2, paragraph 4, of the United Nations Charter and the principles of customary international law on the use of force and the illegality of territorial acquisition by the threat or use of force;

(d) The Court also decided that the Hague Regulations are applicable to the territories. It then went on to add that the Fourth Geneva Convention is applicable de jure to the Occupied Palestinian Territory rejecting Israel's argument to the contrary. The Court considered that the Convention is legally applicable to any territory occupied in the course of a conflict between two contracting parties – in this case Israel and Jordan;

(e) Another important aspect is that, in the Court's opinion, international human rights law and international humanitarian law may apply concurrently in the situations of armed conflict and occupation. In relation to the Occupied Palestinian Territory, the Court concluded that the relevant international instruments, including the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, apply to such territories. Israel has consistently denied their application on the Occupied Palestinian Territory, contending that such instruments only apply in time of peace;

(f) Self-determination: the Court stated that it is a peremptory norm of international law and that the Palestinians indeed have such a right, as recognized by the international community. Among those, the Court underlines, is the right to self-determination. It went on to conclude that the construction of the wall, along with the measures taken previously, including settlements, severely impede the exercise by the Palestinians of the right to self-determination;

(g) The charge of violating an obligation *erga omnes*, that is, the right to self-determination, is a serious charge under international law. This should be read together with other grave breaches of the Fourth Geneva Convention that the Court found being committed by Israel, including: article 49, paragraph 1, on the illegality of forcible mass transfer of protected persons; article 53, which prohibits the destruction of private and public property. Another relevant charge is the violation of article 49, paragraph 6, which prohibits the transfer by the occupying Power of part of its population into the territory it occupies. On this the Court has stated clearly that the wall regime and its route contribute to the demographic changes in the Occupied Palestinian Territory and give expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements;

(h) What the Court is actually stating is its conviction that the wall is not a defensive measure but a policy towards the Occupied Palestinian Territory and its Palestinian population. This was emphasized when the Court rejected Israel's argument of military necessity as grounds to justify the above-mentioned breaches; nor did it find the requirements for derogation under the international human rights instruments fulfilled by Israel. The Court further rejected the self-defence argument stating that, under Article 51 of the Charter, this right is exercised against another State and not in the occupied territory. The Court also was not convinced that the wall along its route was the only necessary means for Israel to guard its essential interests against a grave danger. In the context of legal justifications for the wall, three comments have to be made on the reasons behind the Court's total rejection of such arguments:

(i) The wall regime and its route fall more than 99 per cent within the Occupied Palestinian Territory, not on Israeli territory. The wall further carves in major Israeli settlements and attaches them to Israel;

(ii) Israel's legal contentions were found in the United Nations Secretary-General's report. Accordingly, it was not deprived of the right to present its arguments;

(iii) There was ample information presented to the Court on the factual background of the wall. Thus, the Court was able to make a determination on those facts and reach its conclusion on the legality of the wall and its route.

#### Self-defence

It should be noted that the Court's opinion in paragraph 139 should have an impact that remains to be seen in the current international affairs:

1. The war on terrorism: the Court made it clear that, under Article 51 of the Charter, inherent self-defence exists in the case of an armed attack by another State. That is a significant statement because it negates the right to act against non-State actors without necessarily acting against another State. Accordingly, an armed attack by a non-State actor has to qualify as an attack by a State, that is, to be attributed to that State, before the right to self-defence can be invoked. The mere harbouring of terrorists who commit an attack, without the effective control and direction of the harbouring State over the attack, does not qualify to be an armed attack by the harbouring State, thus triggering self-defence. What the Court has actually stressed is that there exist under international law legal limits to the right of a State to defend itself against terrorism. Self-defence cannot be against anyone anywhere. It has to be directed against another State which launches an attack through its forces or through the non-State actor acting on its behalf. Otherwise, the State claiming self-defence ought to have the approval of the State in whose territory the non-State actor is located before launching an attack against that entity.

2. The treatment of the occupied territory, for the purposes of self-defence, as an extension of the occupying power: the Court has concluded that because Israel is controlling the Occupied Palestinian Territory, it cannot invoke the right to self-defence within that territory. Accordingly, the Court is emphasizing that only the *lex specialis* of international humanitarian law, including the Hague regulations and Geneva Conventions, regulate the rights and obligations of all parties within the occupied territory. This special regime regulates the measures that the occupying power can take to protect its citizens from terrorist and violent attacks.

#### Resolution ES-10/15 and the international reaction

Shortly after the advisory opinion was adopted, the Group of Arab States at the United Nations requested the resumption of the tenth emergency session of the General Assembly and submitted to it a draft resolution which was adopted by the General Assembly on 2 August 2004, as amended, as resolution ES-10/15. The negotiations of the draft resolution, together with the statements made during the emergency session and the content of the adopted resolution, reflect the short-term international reaction to the advisory opinion. Those elements are also particularly important to understanding the significance of the adoption of resolution ES-10/15 by an overwhelming majority (150 to 6), with 10 abstentions.

The draft resolution contained several elements which reflected the following purposes of its drafters:

1. The need for the General Assembly to recognize the advisory opinion as an authoritative statement of the legal obligations and consequences arising from the construction of the wall.

2. That practical measures are being taken to implement the content of the advisory opinion.

3. The continuation of the process within the United Nations system, including the General Assembly.

The subsequent negotiations on the draft with the interested parties were intense, as certain suggestions for amendments would have undermined part of the objectives of the drafters. However, other proposals, which mainly added a political element relating to the implementation of the road map, were acceptable. One proposal that was rejected was to include a provision which reaffirms the inherent right to self-defence under Article 51 of the Charter. This would have sent an implicit message that the General Assembly does not agree with the Court's legal analysis of Article 51 and a legal justification for illegal measures under the pretext of self-defence. The proposal was eventually dropped and instead a general reference was added to the right and duty of States to take only lawful measures to protect their citizens. That reference comes in

fact from the advisory opinion. Other amendments that were added were mostly linguistic and have not undermined the core elements reflecting the objectives of the drafters.

Resolution ES-10/15 demanded that Israel comply with its legal obligations as mentioned in the advisory opinion and called on other States to comply with their respective legal obligations in this regard. Thus, the General Assembly has in fact recognized that the legal obligations spelled out in the advisory opinion are a statement of the law that ought to be adhered to. The resolution also achieved the goal of taking practical measures when it requested the United Nations Secretary-General to establish a register of damages. It also provided for another practical measure by calling on the State parties to the Fourth Geneva Convention to ensure respect by Israel for the Convention. Finally, to guarantee continuity in the process, the Assembly decided to reconvene in the future to assess the implementation of the resolution with the aim of ending the illegal situation resulting from the wall construction. In other words, the Assembly has opened the door to take further measures in case of non-compliance.

As mentioned earlier, the resolution received overwhelming support. Except for Israel, no State which voted against the resolution or abstained questioned the Court's conclusion on the illegality of the construction of the wall or on the consequences of such an act. One State that voted against expressed "concern" about certain aspects of the advisory opinion, mainly the interpretation of Article 51. Another stated that it had objected to referring the whole issue to the International Court of Justice. Others cited political reasons related not to the content of the advisory opinion but to the content of the resolution.

The statements at the emergency session and the explanations of vote reflected several trends. Among them was an assertion about the illegality of the wall along its route and its legal consequences. Another was the support for the advisory opinion and recognition of its content as a reflection of the law. A third trend was the need to resume the peace process and implement the road map. Some members, however, were cautious for various reasons. This is understandable, taking into account that the emergency session was convened only few days after the issuance of the advisory opinion. Some of those States were not sure how to deal politically with the whole process. Others simply wanted more time to reflect on the opinion. However, some States had concerns about the extent of legal obligations that States, other than Israel, and the United Nations have to assume to implement the content of the advisory opinion. Eventually, the agreed language in the resolution provided elements that satisfied those concerns and allowed those countries to vote in favour.

## **Conclusion**

Despite the strong message from the Court and the international community, Israel still maintains that the wall in the Occupied Palestinian Territory is a lawful measure of self-defence. It has declared that, in reaction to its High Court rulings, it will amend the route of the wall and make it closer to the Green Line, taking into account elements of necessity, proportionality and "Palestinian humanitarian needs." Hopefully, the United Nations and the international community will assume their responsibilities as laid out in the advisory opinion to ensure compliance.

There is new optimism regarding the resumption of the peace process. However, any part of the wall that remains in the Occupied Palestinian Territory is an obstacle to peace. We hope that the new developments on the peace process will contribute to the implementation of the advisory opinion, which would truly allow for the existence of two States, Palestine and Israel, living peacefully side by side.

## **IV. Plenary II**

### **Responsibility of Governments and intergovernmental organizations in upholding international law**

- **Primacy of international law**
- **Options for individual and collective actions by Governments**
- **Role of the United Nations**

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Thank you for your kind words and I do apologize in advance if I am somewhat vague. It is because I just landed from New York and my thoughts are not too clear at this stage. The subject of today, which is the responsibility of Governments and intergovernmental organizations according to international law, if taken in abstraction, appears as a very tall order. In our case, however, this subject has been greatly facilitated because the International Court, in its advisory opinion, was very clear on the implications of its findings as to third parties — and by third parties I mean, apart from Israel, the international community at large, whether institutionalized within international organizations or individualized through its component Member States.

Unfortunately, I was not with you yesterday because I was on my way to Geneva from New York. But I understand that my colleagues have explained in great detail the contents of the findings of the Court, first as to the illegality of the building of the wall and of the regime of its operation, and secondly as to the implications of those findings as far as Israel is concerned.

How about the rest of the world, meaning the other States and international organizations? The Court reminds us in its advisory opinion that in international law there are two types of rules. There are the regular rules, which are more or less bilateral in their effects, prescribing what A owes to B, and then there are rules which create what is technically called obligations *erga omnes*, meaning obligations on one party vis-à-vis all the members of the international community, so that every member of the international community is entitled to demand the obligation bearer to execute and to respect this obligation. The Court reminds us that the building of the wall has violated, according to its determination, two types of obligations which fall within this last category. The first is one obligation but a very important one: it is the obligation generated by the right of self-determination of the Palestinian people; and to the extent that the building of the wall has undermined that right and has added obstacles to its materialization, the Court considers that this constitutes a violation of an *erga omnes* obligation vis-à-vis the international community, and not only vis-à-vis the direct bearer of that right, the Palestinian people.

The second category of obligations, which are of this nature, are those derived from international humanitarian law and human rights law. The Court has on previous occasions affirmed this nature of humanitarian law and human rights law obligations, for example in its advisory opinion on the legality of the threat or use of nuclear weapons, as it did in relation to self-determination on three previous occasions as well (the advisory opinions on Namibia and on Western Sahara and the contentious case on East Timor). So it was not really inventing something new. It was simply reiterating and consolidating its previous jurisprudence.

It is important indeed to establish that we have important obligations of a special nature generating rights as well as obligations to all members of the international community.

But what is the content of these rights? What do they imply for third States and for international organizations? The results of violating an *erga omnes* obligation can be summarized in two legal effects. The first is that such a violation should not be left to consolidate with the passage of time so as eventually to create a new *status juris* – a new legal status. How can you pre-empt such a process, which is admitted in traditional and international law according to the legal maxim *quieta non movere* (what is quiet should not be disturbed)? This is achieved through a very important obligation, one of non-recognition, that is, that any situation resulting from the violation of an *erga omnes* obligation, which derives in its turn from an imperative rule of international law, a *jus cogens* rule, should not be recognized and that the obligation of non-recognition is permanent. It cannot fall by the passage of time, and this is one way of preventing from the beginning the process of consolidation, at least in terms of law, of such an illegal situation.

It was very important that the Court gave that ruling a few days after a major Power had sent a letter to Israel saying that it was impractical to change certain established facts. The Court was very clear on that point. But is that enough? Obviously not; international law provides for something more which, in turn, can be summarized in two obligations. One is a passive obligation of abstention of all States from doing anything that implies direct or indirect recognition of the illegal situation, as well as from anything that can help maintain or consolidate, that is, help the continuation of the illegal situation. That means, in our specific case, that any supply of materials, or any supply of money which could go into the building of the wall or into the management of its regime should be stopped. If you consider that this regime is part of the military spending of Israel, that means that all contributions, whether private or public, that go to help the military budget, which is part of the general budget, should fall under this obligation.

The second part is a positive obligation to do something. It is the obligation to do all that States can, individually and collectively, in order to put an end to the illegal situation. That covers all *démarches*, whether diplomatic or otherwise, individual or collective, as long as they respect international law — we are not speaking of illegal acts, but of all legal means of putting pressure. Those cannot be considered here as unjustified interventions, as they are undertaken in fulfilment of a legal obligation as countermeasures to an illegal situation.

This brings me to what international organizations should do or could do. We hear a lot now — particularly from that august organ of the United Nations, the Security Council — about what States should do and how diligent they should be about controlling every cent that crosses a boundary in the context of the struggle against terrorism. Now, if there is an obligation, as the Court affirms, to cut funds that may go into the building and maintenance of the wall, international organizations, and particularly the Security Council, should use the same diligence in stopping the flow of such funds. If the United Nations and its family of Organizations are serious about respecting the advisory opinion of the Court, which is after all the principal judicial organ of the United Nations and which answered questions put to it by the General Assembly, they should try to create the appropriate mechanisms effectively to achieve this result.

The General Assembly has done something already, which was to establish a register of all the properties that were destroyed or taken in the process of the building of the wall; that at least would preserve the rights of the individual Palestinians who are prejudiced by the building of the wall. But things can be done on a much larger scale to cut the financing of the wall which, according to Israel's published estimates, will cost several billion dollars, much of which, as well as much of the materials that go into the building of the wall, come from abroad. This is why I think the United Nations can decree and enforce an embargo. But such an embargo has to go through the Security Council, and the five permanent members should be called upon by the civil society of their own countries to uphold their obligations – not only their political responsibility but legal obligations – under the Charter to abstain from doing anything that consolidates and helps to continue this illegal situation and to do all they can to reverse it.

That is merely one example of what can be done. Just declaring illegality is not enough; things have to go further. That is one way of proceeding further, through *démarches*, through cutting financing, if possible, and so forth.

In sum, legally speaking, the responsibilities are very clear. Unfortunately, international law is not self-enforcing; it has to be enforced by the members of the international community. If some of them drag their feet, the only way to make them honour their legal obligations is through internal pressure from their own constituencies, and in this respect, international public opinion can play a very important role. We have seen great indignation and great moral reaction to natural disasters, such as the Indian Ocean tsunami in December 2004. When there is a strong international feeling in international public opinion, States do react. Very important States, which started by giving cents, ended up by giving hundreds of millions under the pressure of their own public opinion, as well as international public opinion. So that is also a dimension which has to be factored in, in trying to create a movement, not only to dismantle the wall — which, as the Court itself has said, is only part of a larger picture — but also to reach a lawful and just solution to the conflict that constitutes this larger picture.

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Advisory opinion of the International Court of Justice regarding  
Israel's West Bank barrier and the primacy of international law

The advisory opinion issued by the International Court of Justice on 9 July 2004 (*the Wall opinion*)<sup>33</sup> raises important questions about the legal status of the ruling and the principle of the primacy of international law, which it is my honour to address today.

It was precisely that fundamental principle of international law which convinced me, as a former United Nations official and staff lawyer of the International Court of Justice, to serve on Palestine's team in the Court proceeding. There is nothing "anti-Israeli" or "pro-Palestinian" about supporting that principle. I side not with Israel or Palestine, but with international law. There also is nothing inconsistent about condemning suicide bombings and colonial settlements in occupied territory simultaneously, as I do. My involvement with Palestine has remained limited to the International Court of Justice proceeding, and these remarks are made in my individual capacity as an International Court of Justice expert.

Before I address the issue of primacy in more detail, it must be underscored that the International Court of Justice case signalled the first time that an international judicial organ has ruled, based on objective facts documented in United Nations reports, on a prominent aspect of the Israeli-Palestinian problem. The Court did so in application of the rules of international law. In the past, only the General Assembly and the Security Council, which are the political organs of the United Nations, had pronounced themselves on aspects of the problem.

The Court acknowledged that the Security Council, by its resolution 1515 (2003), had endorsed the road map to a permanent Two-State solution to the Israeli-Palestinian conflict. However, the International Court of Justice pointed out that neither the road map nor resolution 1515 contains any specific provision concerning the construction of the West Bank barrier, or "Wall," such that it might prevent the Court from pronouncing itself on that structure's legality. It bears repeating, therefore, that in the Court's view, the wall is outside the road map.

To be clear, nobody questions Israel's right to protect its citizens against violent attacks that the Palestinian leadership unequivocally has condemned, so long as Israel complies with international law. Noting that "Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population," the Court recognized explicitly that Israel "has the right, and indeed the duty, to respond in order to protect the life of its citizens. (para. 141)" At the same time, however, the Court reminded Israel that "any measures taken are bound nonetheless to remain in conformity with applicable international law"—a requirement that the wall, in its location and operation, fails to meet according to the International Court of Justice (*ibid.*). The words I just quoted are routinely ignored in reporting about the Court ruling, even though they constitute the very essence of the ruling and its emphasis on the applicability of international law.

It bears reminding that the case really was about the course of the wall. There would have been no case before the International Court of Justice had Israel built a security fence entirely on Israeli territory along the Green Line, as opposed to constructing 99 per cent of the wall around illegal settlements in what the world community considers to be occupied Palestinian land.

Let me turn to the legal status of the Court's advisory opinion as it relates to the primacy of international law. It is true that advisory opinions of the International Court of Justice, formally speaking, are non-binding under the Court's Statute. It would be a mistake, however, to claim that this non-binding character means that such opinions are without legal effect, for the legal reasoning embodied in them reflects the Court's authoritative views on important issues of international law. In arriving at these views, the International Court of Justice follows essentially the same rules and procedures that govern its binding judgments issued in contentious cases between sovereign States. An advisory opinion derives its status and authority from the fact that it is the official pronouncement of the principal judicial organ of the United Nations.

Indeed, Dame Rosalyn Higgins (United Kingdom), Judge of the International Court of Justice, stated in her separate opinion that "the Court's position as the principal judicial organ of the United Nations suggests that the legal consequence for a finding that an act or situation is illegal is the same" as a binding decision of a United Nations organ acting under Articles 24 and 25 of the United Nations Charter (according to Article 25 of the United Nations Charter, "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter"). The Court's ruling contains a clear finding of illegality by concluding that "the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, are contrary to international law (Advisory opinion of the International Court of Justice, para. 163 (3)(A))." It also includes a clear finding that "the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law (ibid., para. 120)." The sole dissenting judge essentially concurred in that finding of illegality.

International law includes both regular norms and obligations of a higher order. The advisory opinion of 9 July 2004 differs from other non-binding rulings in that it features key findings on the highest-ranking norms of international law. The International Court of Justice concluded that the obligations violated by Israel's construction of the wall are essentially of an *erga omnes* character. In other words, they are obligations in whose protection all States have a legal interest and which constitute intransgressible principles, or "super-rules", of customary international law (ibid., para. 157). This means that those obligations by their very nature transcend, as it were, the non-binding Opinion which refers to them (ibid., paras. 88, 155, 157). This includes the Palestinian people's right to self-determination and fundamental principles of international humanitarian law, such as the prohibition against the deportation or transfer of civilian population. This prohibition in turn includes settling parts of an occupying Power's population in occupied territory taken by force. Those principles are intrinsically superior to domestic law. They belong to the category of obligations States have towards the international community as a whole. They are imperative rules of international law from which no derogation is permitted and the existence of which cannot be denied by any State. As intransgressible principles, those obligations can be said to apply to Israel and other States independently of the Court's opinion.

In its resolution ES-10/15, the General Assembly acknowledged the advisory opinion and demanded not that Israel and all States Members of the United Nations comply with the non-binding ruling of the International Court of Justice, but that they comply with "the legal obligations as mentioned in the advisory opinion." Those words, which convinced 150 United Nations Member States to vote in favour of the resolution, underscore that the focus should not be on the International Court of Justice as the messenger, but on those legal obligations.

This development means that we now know the legal position regarding core aspects of the Israeli-Palestinian problem, including the wall and the settlements, as judicially determined by the Court in its advisory opinion and as acknowledged by the General Assembly, the United Nations organ entrusted with primary responsibility for the question of Palestine. As a free handbook issued by the International Court of Justice Registry explains, "the authority and prestige of the Court attach to its advisory opinions and ... where the organ or agency concerned endorses that opinion, that decision is as if it were sanctioned by international law."<sup>34</sup>

The Court's opinion, in conjunction with the Assembly's resolution, thus represents what Israel's leading international law scholar, Shabtai Rosenne, has called the law at large recognized by the United Nations.<sup>35</sup> That law represents the will of the international community. As a United Nations Member State, Israel must obey that law, just like any other Member State.

Resolution ES-10/15 specifically considered that "respect for the International Court of Justice and its functions is essential to the rule of law and reason in international affairs." In a world under the rule of international law that Israel professes to observe, it should neither surprise nor trouble anyone that the policies and actions of even the region's super power are subject to review under well recognized international legal standards.

Indeed, Israel's Supreme Court consistently has ruled that Israeli law consists of both domestic law and customary international law. "Law" also means international law (including, especially, intransgressible principles) binding on Israel. Israel cannot claim immunity from international law, and its administrative, legislative, and judicial organs must respect the primacy of that law.

What does "the primacy of international law" mean in this specific context? In another prominent advisory proceeding involving Palestine, namely, the *PLO Mission* case of 1988, the International Court of Justice recalled "the fundamental principle of international law that international law prevails over domestic law."<sup>36</sup> The Court noted that this principle "was endorsed by judicial decision as long ago as the arbitral award of 14 September 1872 in the Alabama case between Great Britain and the United States, and has frequently been recalled since ...."

One aspect of the primacy of international law is recognized in the constituent instrument of this organization. Article 103 of the United Nations Charter provides that in any case of conflict of obligations between the Charter and any other international agreement, the obligation under the Charter is supreme and shall prevail.

In assigning superiority to obligations under the Charter over other treaty obligations, Article 103 as such does not cover obligations derived from general international law.

But the legal position is the same at least in the case of *erga omnes* or "super" rules of international law. International Court of Justice Judge Stephen Schwebel (United States) pointed out in his individual opinion attached to the *PLO Mission* ruling that "on the international legal plane, national law cannot derogate from international law ... a State cannot avoid its international responsibility by the enactment of domestic legislation which conflicts with its international obligations."<sup>37</sup> It is recalled that the International Court of Justice found in July 2004 ruling that "all legislative and regulatory acts adopted with a view to [the wall's] construction, and to the establishment of its associated regime, must forthwith be repealed or rendered ineffective [by Israel]" (para. 151). In addressing this point, there is no margin of discretion left for the Israeli Government. It has no choice but to comply fully with this finding.

That obligation extends to Israel's judicial organs. In light of the Court's ruling, Israel's Supreme Court no longer can conclude in good faith that the wall satisfies the necessity criterion that international law attaches to State actions which derogate from fundamental rules of humanitarian and human rights law. This argument was explicitly rejected by the International Court of Justice in its advisory opinion (para. 136). And if the necessity criterion is not satisfied, the twin criterion of proportionality, on which the Israeli Supreme Court rulings rely, becomes moot. The Court found that "Israel is under an obligation ... to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, [and] to dismantle forthwith the structure therein situated ..." (ibid., para. 163 (3)(B)). That obligation is rooted in international law. It is not simply a matter of the "adjustment" of the course of the wall, as the decisions of Israel's Supreme Court suggest.<sup>38</sup> In light of the primacy of international law, there is no margin of appreciation left for Israel's courts. They must recognize and enforce the ruling of the International Court of Justice on this point.

On 25 January 2005, Israeli Foreign Minister Silvan Shalom complained on American public television that "Israel has suffered so much from the attitude of the United Nations."

<sup>39</sup> Law-abiding nations need not suffer from International Court of Justice rulings versed in international law. It cannot credibly be said that Israel was treated unfairly in the International Court of Justice proceeding or that its ruling is one-sided. The Court emphasized that "both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law," and that "illegal actions and unilateral decisions have been taken on all sides ...." (para. 162). Indeed, both sides must respect the



primacy of international law, including in addressing acts of individual or State terrorism, lest there be continuing conflict and lack of trust in the region.

Useful lessons can be learned from history. Namibia, which once was occupied by South Africa against the will of the international community, gained independence in 1990.

This was 19 years after the International Court of Justice issued its advisory opinion which paved the way for Namibian statehood. The Court's ruling of 9 July 2004 explicitly refers to the Namibia precedent. While there are important differences between the Namibian situation and the Israeli-Palestinian crisis, there is no reason why the Court's latest ruling should not prove to be a similar catalyst for change in the situation between Israel and Palestine and lead to what the principal judicial organ of the United Nations described as "the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region" (para. 162). Most important, the International Court of Justice in this context referred to the need to achieve a negotiated solution "on the basis of international law." (ibid.)

In evaluating how to respond to the adverse ruling of 9 July 2004, Israel and other States should consider that countries which are the target of International Court of Justice rulings invariably comply to avoid being seen as "rogue" States defying international law and undermining the Court's authority. To disregard the Court's ruling, the Court altogether, would place non-complying States in the notorious company of countries like Iran and apartheid-era South Africa, which defied prior International Court of Justice rulings that went against them. No State is immune from international law, and the Court plays an essential guardian role in protecting the primacy of the intransgressible principles of international law identified by it.

In sum, the Court's findings in the Wall opinion are rooted in international law and have the strength of that law. The ruling constitutes a most powerful reminder that the question of Palestine, in all its aspects, is subject to international law. Existing and aspiring nations alike should strive to uphold its primacy.

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Responsibility of Governments and intergovernmental organizations  
in upholding international law

I am speaking here as an independent academic and, in that capacity, like all international law specialists, I am convinced of the importance of the advisory opinion of 9 July 2004. The request made to the International Court of Justice for a ruling on the legality of the wall built by Israel in Palestine has placed the Court at the centre of one of the major conflicts of our time. Given its duration, its intensity, and its regional and even global impact, the Israeli-Palestinian conflict is a knot that ties together all the strands of the crisis in international law. The indicator of that crisis is the marked hiatus between, on the one hand, the considerable advances that have been made in the formulation of international law and, on the other, the failure to implement it in many specific situations. This gap between the law in all its consistency and the extent to which it is violated is particularly flagrant in the case of Palestine.

It is, therefore, useful at the outset to underscore the general scope of an advisory opinion and the way in which, in this particular opinion, the Court indicated very specifically the intended consequences of the opinion that it had been asked to deliver. Subsequently, I will try to illustrate, in this very brief presentation, what specific legal consequences can be inferred from the opinion by States and intergovernmental organizations.

I. Asked for a ruling on a specific question, the Court carefully focused its response on the issue submitted to it, but also extended its reasoning as far as possible in order to provide a broad basis for that response, by tying Israel's obligation to tear down the wall to the obligation to respect the Palestinian people's right to self-determination.

Furthermore, while the Court has certainly given an opinion, it has, in its detailed analysis of the consequences of that opinion, given, as never before, a lapidary account of the rights and obligations of each party with regard to the question at issue, so that no one can any longer fail to be aware of what must be done to comply with international law. The Court's determination that international law must be observed invites comparison with its determination in the *Lagrand* case. The Court was careful there to confirm forcefully the binding nature of its rulings involving interim protection measures,<sup>40</sup> thereby voicing its justifiable concern over the persistent violations of international law by certain States.

The Court's preoccupation with detailing the specific consequences of the observance of the law is no doubt a way of recalling that the word "advisory", which qualifies its opinions, does not mean that they are devoid of enforceability. Advisory does mean that enforceability is not implied. But a distinction must be made between enforceability and declaratory value. While opinions obviously do not imply the former (otherwise, they would be indistinguishable from judgements), they do not lack the latter. Having been "consulted", the Court will rule on the question before it with all the care, reasoned consideration of the submissions and objectivity for which it is known. Thus, through the text of the opinion, the law has been set out by the highest judicial authority. It can no longer be contradicted. Opinions incorporate "one of the elements composing any jurisdictional act, namely, the ascertainment of the law in force".<sup>41</sup>

But the question then arises: who is affected by this statement of the law that is imbued with authority? As we know, Israel tried to challenge the competence of the Court by claiming that the advisory procedure would be misused in resolving a bilateral dispute in which it refused to enter into a judicial settlement. The Court, rejecting this argument, extends the scope of the consequences of its conclusions far beyond the two main protagonists in the conflict. The opinion was requested by the General Assembly and it is addressed to the General Assembly, particularly since the question raised "is located in a much broader frame of reference than a bilateral dispute" (para. 50).

But the legal effects of the opinion will not concern the General Assembly alone. For one thing, a number of its findings have a bearing *erga omnes*. For another thing, the Court's conclusion — that the wall is illegal — entails consequences for a great many actors: Israel, but also Palestine and, beyond that, all States and also international organizations. All those actors are clearly implicated by the Court in respect of their duties in the context of the situation at issue. The opinion, like all advisory opinions, is legally declaratory, but it is intended for all subjects of international law.

II. States are thus reminded of certain obligations. The main ones are recalled for the benefit of Israel. The duties incumbent upon Israel are enumerated in minute detail, underscored emphatically and clearly and, if any doubts remained, the Court's opinion draws attention to the characteristic, massive and prolonged violations of international law committed by that State and which are reinforced by the construction of the wall: violation of the Palestinian people's right to self-determination, an extremely detailed series of violations of humanitarian law and another series of human rights violations. The Court calls on Israel to put an end to those violations and to provide compensation for all the injuries caused by its actions. But I will not go into any more detail about those obligations, which have been laid out in other reports. Nor will I detail the obligations incumbent upon Palestine. The Court recalls (para. 162) that Palestine, like Israel, is under an obligation to observe international humanitarian law.

But the issue of concern to the whole international community relates to the fact that, since the issuance of the opinion, the construction of the wall is continuing with the most insolent disregard for the principles of law it affirmed and with a rarely equalled sense of impunity. This is why the obligations incumbent upon other international actors, States or international organizations arising from the Court's statements have great significance. The opinion lacks enforceability. It is thus through the intervention of those other actors that the Court's findings can be given an effectiveness that the category of "opinion" does not allow, namely, the effectiveness of standards, which is essential for the cohesiveness of a society. From this standpoint, all States are expected to bring their actions into line with international law. I will emphasize three main areas here:

a. First, the area of respect for the Palestinians' right to self-determination. The Court reaffirms that this is a right *erga omnes* (para. 88). But, above all, it bases the illegality of the wall on the fact that it impedes the exercise of that right (para. 122). This is certainly the most remarkable contribution of this opinion. The judges could, in fact, have condemned the wall and declared it to be illegal on the basis of the first-degree violations, namely the violations of humanitarian law or human rights. They took a much more demanding approach.

But what next? If, for the Palestinians, this right has a value *erga omnes*, all those comprising the *omnes* are involved. Israel resorts to all kinds of tactics to prevent Palestine from acquiring the status of a State. But all States must respect the principle of self-determination. And many of them, while not following Israel's lead in not recognizing Palestine as a State, violate that right by abstention, by hesitating to recognize Palestine as a State, which they are in no hurry to do. Since 1988, the Palestine Liberation Organization has declared itself the State of Palestine and has been recognized as such by many States. Many others may still take that step. As we know, the theory of international law leaves States free in their sovereignty to recognize or not recognize a new State. However, we also know that all the progress made in the field of international law within the framework of United Nations action against colonialism resided in the powerful affirmation of the right of peoples to determine their own fate. Thus, if the sovereignty of each State allows it a discretionary power in the area of recognition, a reading of the opinion suggests that the use of that discretionary power may run counter to a duty to respect the right of a people. Furthermore, the Court very subtly sets an example. While pursuant to its statute (article 66), only States and international organizations are permitted to appear before it during advisory proceedings, Palestine was authorized to do so. Although that decision was based on the fact that Palestine has been granted observer status with the United Nations, the decision is still surprising. Article 66 of the statute does not mention observers. If Palestine was allowed to appear before the Court, it is because the latter views it as a potential State. In so doing, the Court is speeding up the transition from a virtual situation to a real one.

b. The other major finding of the Court that should oblige States to act in specific ways to ensure their compliance with international law relates to the nature of Palestine as an occupied territory (para. 78). This condition, recognized unequivocally in the opinion of 9 July 2004, leaves no room for the arguments put forward by Israel, which, since the beginning of the conflict, has tried to escape the obligations incumbent upon an occupying Power. Referring to the great principles of international law which oppose the acquisition of territories by force, the Court brings the situation in the occupied territories into the sphere of humanitarian law governing armed conflict. Consequently, the whole body of law developed over decades is applicable here.

The Court then examines the construction of the wall and its impact on the fate of the Palestinians in light of the principles drawn up in the Hague in 1907 (which are applicable to Israel on account of their customary nature) and of the law as set out in the Geneva Conventions (to which Israel is a party). It cannot fail to acknowledge the series of violations (para. 120 et. seq.) of those provisions as a result of the construction of the wall: protection, and doubtless the ultimate incorporation into Israeli territory, of the settlements through which parts of the population of the occupying Power are transferred to the occupied territory; failure to comply with many other obligations, including that of ensuring public order and life, non-interference with workers' rights and with the freedom of movement, and respect for movable and immovable property. Each finding is based on citations from the relevant texts and on reference to the facts as set out in the case file. Accordingly, "the construction of such a wall constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law instruments" (para. 137).

What are the consequences of these violations for all States? The opinion serves as a reminder of their duty to ensure respect for the Geneva Conventions, a duty unequivocally laid out in paragraph 158. But how can third States contribute to the enforcement of humanitarian law? Admittedly, the enforcement mechanisms established by the Conventions lack effectiveness. At the heart of the matter is universal jurisdiction, defined in article 146 of the Fourth Geneva Convention. States signatories are under the obligation to search for and bring to justice "persons alleged to have committed, or to have ordered to be committed, any of the grave breaches" of the Convention.

Since States lack the means to pursue offenders outside their own borders, they should come together to fight against impunity. If all States comply with article 146, offenders will not evade prosecution. However, for the moment this mechanism is clearly ineffective. For a number of reasons, which will not be discussed here, States and their judicial systems are not very active in this area. One reason for this is the difficulty of investigating illegal acts committed abroad. The courts have limited resources.

As a result, victims are reluctant to bring cases before foreign jurisdictions. The Court's opinion goes some way towards alleviating that problem. Domestic proceedings are made easier, since all the evidence and legal arguments have already been brought before the Court. If an Israeli official responsible for the decision concerning the wall or for its construction is in the territory of a third State and a complaint against that official is brought before the courts of that State, there is no need to show that humanitarian law is applicable in the occupied territory and there is no point wondering whether or not that law has been violated. The opinion of 9 July 2004 can serve as a point of reference.

States thus have a very clear duty: to align, where necessary, their legislation with their commitments under the Geneva Conventions, to refrain from impeding any judicial proceedings which may be brought before their courts and even to inform their courts of the existence and content of the opinion. This would contribute in no small measure to ensuring that those responsible for such unlawful acts are punished and that the Court's view that "all States parties ... are under an obligation ... to ensure compliance by Israel with international humanitarian law as embodied in that Convention" (para. 159) is respected. Legal proceedings against those responsible may be the only way of inducing Israel to consider demolishing the wall.

c. The Court has spelled out a further obligation for States, namely "not to render aid or assistance in maintaining the situation created by such construction" (para. 159). All States, whether or not they are Israel's neighbours, must carefully review all forms of commercial, financial, economic, technical, or military cooperation with Israel to ensure that no one is indirectly complicit, however passively, with activities based on a violation of international law. In this regard, this meeting could provide an opportunity for States to exchange information on the measures that they have taken since July 2004 in order to comply with the opinion. It is clear that the mechanisms of the World Trade Organization to promote free trade do not apply here. This point brings us to the obligations incumbent upon international organizations as a result of the Court's findings.

III. The Court mentions the role of the United Nations in putting an end to the unlawful situation in paragraphs 160, 161 and 162 of its opinion

In its resolution ES-10/15, the General Assembly adopted the Court's findings. However, the General Assembly lacks effective enforcement measures. For that reason, the Court (para. 160) underscores the role of the two principal bodies responsible for the maintenance of peace. In paragraph 162, it refers to the need to implement the relevant Security Council resolutions. But who, other than the Council itself, is in a position to do so? The Court has stated the law, which, in large part, is based on the resolutions of the Security Council and the General Assembly. The explicit strengthening of this body of law should now pave the way for the use of the mechanisms for the maintenance of peace provided for in the Charter. The Security Council's silence, which is a result of the role of certain States and their enduring leniency towards Israel, is no longer acceptable. At a time when the international community as a whole is insisting that the principles enshrined in the Charter should be respected in the case of Lebanon, a widespread movement, deriving its legitimacy from the Court's findings, should not hesitate to call for sanctions against Israel to force it to comply with the law. The time has come in this conflict to make use of the possibilities afforded by Chapter VII of the Charter. Such is the obligation incumbent upon the Security Council.

Two other international organizations should take appropriate measures to reflect the Court's findings. First, the European Union, which has an association agreement with Israel covering various fields, including trade, can no longer ignore the fact that implementation of article 2 of that agreement is contingent upon respect for human rights and democracy. The Court's opinion forcefully stresses the human rights violations resulting from the construction of the wall. The association agreement should be denounced on account of Israel's failure to comply with article 2. Furthermore, the World Trade Organization, like its predecessor, the General Agreement on Tariffs and Trade, operates on the basis of the principle of free trade and the prohibition of trade barriers. However, the obligations arising from the Charter take precedence over all other international obligations (see Article 103) and the obligations reiterated by the Court's Opinion are indeed obligations arising from the Charter. The World Trade Organization must therefore, as stated earlier, ensure that it does not force States to engage in free trade because they are under an obligation to cease all trade in goods, capital and services with Israel if such trade is related to the construction of the wall.

In conclusion, I should like to say that I have welcomed the opportunity given to me here to present a brief analysis of the obligations of States and international organizations. This meeting has brought the suggestions discussed here to the attention of representatives of States and international organizations, who will be able to convey them to their Governments and superiors. Those suggestions correspond to the responsibility of States and international organizations in the implementation of the law.

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### The wall and the settlements

#### I. Introduction

The international community has spoken frequently and, at times, sharply, about the legal requirements necessary to end the military occupation and create a just and durable peace between Israel and the Palestinians. According to international law and the pronouncements of the United Nations (Security Council resolution 242 (1967), the acquisition of territory by military conquest is prohibited; the 38-year-old occupation has been rife with a myriad of serious human rights violations (see E/CN.4/2004/6); Palestinian refugees have the right to return to their homes, with restitution and compensation (General Assembly resolution 194 (III);<sup>42</sup> the unilateral annexation of East Jerusalem is unlawful (Security Council resolution 252 (1968), para. 2); the demographic and physical transformation of the occupied territories through settler implantation is a war crime (A/Conf.183/9, Art. 8(2)(b) (viii)); the construction of a separation wall on occupied land violates the legal obligations of a belligerent occupier (see A/ES-10/273); and the Palestinians have the right to self-determination, including the creation of a viable and sovereign State in their homeland (General Assembly resolution 3236(xxix) of 22 November 1974, Security Council resolution 1397 (2002), and General Assembly resolution 58/292 of 6 May 2004). As the United Nations Secretary-General Kofi A. Annan, said in his address to the Summit Meeting of the Arab League in March 2002: "There is no conflict in the world today whose solution is so clear, so widely agreed upon, and so necessary to world peace as the Israeli-Palestinian conflict." But such a solution, as he implied, would have to be anchored in the inherent rights of the individuals and peoples who live there, rather than permitting the inequities of power politics to continue pushing the Middle East deeper into a morass.

Yet, in the face of all this, the Israeli-Palestinian conflict remains a zone of legal exceptionalism. Binding resolutions are scorned, Security Council investigations are rebuffed, Advisory Opinions of the International Court of Justice go unheeded, and the obligations of international conventions and treaties are dismissed. This obstructionism fails not only the requirements of law, but also the demands of realism. No conflict can be transformed into an equitable and viable resolution where one party can successfully plead exemptions and special entitlements forbidden to others. The lack of political will to enforce compliance with international law and universally recognized rights – the result of Israeli obstinacy, American obeisance, the paralysis of the international community, Arab schisms, and Palestinian impotence – has allowed the matter to fester for almost six decades. Besides debasing the efficacy of international law, the irresolution of this conflict has destabilized the entire region, fuelled the tensions between the West and the Arab and Muslim worlds, perpetuated the world's largest and longest-lasting refugee problem, adversely affected the global economy, and consumed an inordinate amount of diplomatic oxygen.

However, a regime of legal exceptionalism does not necessarily mean that legal strategies and concrete remedies are beyond the reach of those who support a rights-based approach to compassionately resolving the conflict in the Middle East. This paper will discuss the availability of an underappreciated yet likely effective legal strategy to challenge the entrenchment and continuation of the Israeli settlements project and the separation wall. This legal strategy, which would focus on those countries that have enacted the Statute of Rome into their domestic legislation, probably presents the best available legal opportunity to effectively implement, albeit indirectly, the ruling of the International Court of Justice on the separation wall, and to meaningfully sanction Israel as long as it maintains its settler-implantation project on occupied Palestinian land in defiance of world opinion and international law.

#### II. International obligations

The separation wall and the Israeli settlements in the West Bank and East Jerusalem are inseparable projects. If there were no settlements, Israel would not have built the wall within the occupied territories. The route of the wall, 90 per cent of which is destined to be built on occupied land, is designed to maximize the number of Jewish settlers and settlements on its western side, and maximize the number of Palestinians and their communities on its eastern side.<sup>43</sup> As Daniel Seideman, an Israeli lawyer who represents Palestinians whose lands have been confiscated because of the wall has recently said that Israel says nothing is irreversible and that the fence can be removed but that it is not the fence that creates irreversibility, it is the interface of the wall with the settlement activity."<sup>44</sup> The settlements are the principal Israeli strategy by which to extend demographic control over much of the occupied territories,<sup>45</sup> and the wall is an integral political tool to ensure that the largest settlement blocs and the lands surrounding them remain under Israeli sovereign control in any final peace agreement.<sup>46</sup>

That the Israeli settlements are illegal and contrary to international law has been universally accepted, with the exception of Israel, the United States and a handful of other nations.<sup>47</sup> The transfer or encouragement by an occupying power of the settlement of parts of its civilian population to settle on occupied lands has been implicitly prohibited by international law since the Hague Convention and its Regulations,<sup>48</sup> and has been expressly forbidden since the adoption of the Fourth Geneva Convention of 1949.<sup>49</sup> Subsequently, the international interdiction was strengthened in 1977 to state that settler implantation projects amounted to a "grave breach" of international humanitarian law.<sup>50</sup> With this body of international law in mind, the United Nations Security Council has held on a number of occasions that the Israeli settlements are contrary to international law (Security Council resolutions 446 (1979), 452 (1979), 465 (1980), 471 (1980), 476 (1980).<sup>51</sup> So has the United Nations General Assembly.<sup>52</sup> The International Court of Justice, in its July 2004 advisory opinion on the legality of the separation wall, ruled that: "...the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law" (para. 20).

Settlement implantation projects have been prohibited by the international community because they invariably result in indigenous civilian dispossession, environmental destruction, apartheid-like social and legal structures, segregated labour markets, political instability and significant human rights violations.<sup>53</sup> Above all, they are condemned in international law because they abrogate the right of the indigenous people to self-determination,<sup>54</sup> which is, after the right to life, perhaps the single most important human right of all because no other rights are possible without it. The rupture between an indigenous community and its territories is not only the frequent consequence of settler implantation, but invariably its very purpose. This is achieved either by the swamping of the territory through settler encroachment in order to create a new majority,<sup>55</sup> or, at the very least, by the establishment of a critical mass of settlers so that the dominant power can justify a sustained military and political presence to maintain 'security' for the privileged minority.<sup>56</sup>

Illustrative examples from history include the British settlement of Scottish and English Protestants into Catholic Ireland, the French in Algeria, the Dutch and the British in South Africa, the transfer by the Nazis of German-speaking peoples into newly conquered lands during the Second World War, the Soviet Union's infusion of Russians into the Baltic republics, and the export of Moroccan settlers into the Western Sahara.

The legal prohibition against settler implantation projects took a significant step forward with the adoption of the Statute of Rome in 1998. The achievement of the

Statute has been to create, for the first time, a permanent international court with jurisdiction over genocide, war crimes and crimes against humanity, with a focus on individual, rather than State, responsibility. Article 8 of the Rome Statute provides the Court with jurisdiction over an extensive list of codified war crimes “in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.” Among the proscribed war crimes, as detailed in article 8(2)(b)(viii), is:

The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.

Respecting settler implantation, article 8(2)(b)(viii) is very similar to the language found in article 49(6) of the Fourth Geneva Convention, with one visible addition. The provision adds the term “directly or indirectly,” which broadens, or at least clarifies, the express scope of the original provision to include any active or passive support by the occupying power of a settler implantation project.<sup>57</sup>

The significance of the Statute on this issue is that the world community’s opposition to the practice has been elevated to a war crime, among the ultimate of interdictions in international criminal law. In Rome, Israel voted against the adoption of the Statute, and subsequently refused to ratify it because of the probable consequences of article 8(2)(b)(viii).<sup>58</sup>

Without the ratification, Israel’s citizens lie outside of the purview of the Statute and the jurisdiction of the International Criminal Court. As such, Israeli officials responsible for the implementation or administration of the settlements programme in the occupied territories cannot foreseeably be indicted under the Statute.<sup>59</sup> Another limitation of the statute is that it applies only to proscribed acts committed after 1 July 2002, the date on which the Court formally came into existence. Thus, even if Israel had submitted itself to the Statute and the Court, individuals in Israel who had played a culpable role in the formation and growth of the settlement project prior to the implementation date of the Court could not be indicted under the Statute for actions committed before that date.

### III. Domestic remedies

Following the adoption of the Statute of Rome, a number of States have enacted legislation that incorporates all of the International Criminal Court crimes listed in the Statute into their domestic legal system. Persons who are alleged to have committed a proscribed act falling within the definitions of genocide, war crimes or crimes against humanity, and who are either citizens or residents of the State, or who are physically on the soil of that State, can be indicted and tried under the domestic laws of the State for breaches of international criminal law. In effect, those States have created a parallel national legal structure that both complements and supplements the International Criminal Court. Among the States that have enacted legislation to codify the Rome provisions into their criminal law system are Australia,<sup>60</sup> Canada,<sup>61</sup> Germany,<sup>62</sup> the Netherlands,<sup>63</sup> New Zealand,<sup>64</sup> South Africa,<sup>65</sup> and the United Kingdom.<sup>66</sup>

Among the features of this national incorporation of the Statute of Rome definitions of international crimes is a universal jurisdictional aspect not present in the International Criminal Court. Those domestic statutes are not limited in their application by the refusal of another State to have ratified the Statute. Rather, the crimes are deemed to have universal scope and apply to any individual physically present in the State for any offence stated in the legislation, regardless of where the offence occurred.<sup>67</sup>

Thus, a citizen of a State that has not subjected itself to the jurisdiction of the International Criminal Court can nevertheless be indicted and tried for a proscribed international crime in one of the States that has incorporated the Statute, should the individual otherwise come within the jurisdiction of that State (such as being present on the soil of that State) and consent for prosecution has been given by the designated legal official.<sup>68</sup>

Canada possesses a second advantage over the Statute of Rome that is not found in the other national statutes. For International Criminal Court crimes committed outside Canada, the Crimes Against Humanity and War Crimes Act permits retrospective application, provided that the crime was recognized under customary international law at the relevant time. In contrast, the International Criminal Court is restricted in its jurisdiction to defined crimes that occurred only after 1 July 2002. The other national statutes do not contain any retrospective feature for war crimes.<sup>69</sup> However, none of the statutes contains any prospective time limitation periods that would restrict an indictment for an international crime that occurred any time after the enactment of the national statute.

All of the States that have incorporated the Statute of Rome into their domestic legislation have included the provision that stipulates a war crime as the transfer of the civilian population of an occupying power into the territory it occupies. For example, Canada’s Crimes against Humanity and War Crimes Act defines a war crime that has occurred outside of Canada in the following terms:

S. 6(1) Every person who, either before or after the coming into force of this section, commits outside Canada  
(c) a war crime  
is guilty of an indictable offence and may be prosecuted for that offence

6(3) The definitions in this subsection apply in this section.  
“war crimes” means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war s crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

6(4) For greater certainty, crimes described in articles 6 and 7 and paragraph 2 of article 8 of the Rome Statute are, as of 17 July 1998, crimes according to customary international law, and may be crimes according to customary international law before that date. This does not limit or prejudice in any way the application of existing or developing rules of international law.

Schedule 2(1) of the Act incorporates virtually the same list of prohibitions against genocide, war crimes and crimes against humanity that appears in the Statute of Rome. This includes the prohibition against settler implantation, with precisely the same wording as in the Statute:

(viii) The transfer, directly or indirectly, by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.

The other States that have incorporated the Statute into their domestic laws have adopted the same prohibition against settler implantation in identical or substantially similar language. All of them, except one, have specifically defined “population transfer” as a war crime in the same or similar language as the Statute of Rome. New Zealand’s International Crimes and International Criminal Court Act of 2000 provides no specific definitions, but simply refers to the crimes as defined in the Statute of Rome, which arrives at the same result.

All of the incorporated statutes contain a broad definition of liability for the commission of proscribed acts. The Canadian and New Zealand statutes provide that “every person” who commits a war crime is guilty of an indictable offence, while the United Kingdom and Australia use the term “a person”. South Africa employs the term “any person”, and the English translation of The Netherlands statute uses “anyone.” While domestic legislation in these countries might grant temporary immunity to heads of State or Government or to senior diplomatic officers, the incorporated legislation on international crimes would appear to apply to any other political, military, or administrative operative who has played a significant contributory role in the establishment, administration, perpetuation, or defence of a settler implantation project. Upon a conviction of an international crime under the national statutes, substantial criminal penalties may be imposed by the domestic courts.<sup>70</sup>

#### IV. Conclusions

There are a number of strategies that can be invoked by civil society to campaign against the wall and in support of the fulfilment of the July 2004 advisory opinion of the International Court of Justice. Legal strategies can often form an important part of a broader political and social campaign, if the foundation in law exists to effectively advance the legal and public features of the issue. However, within the realm of the law, the possibility of directly challenging the wall through either national courts or through an international tribunal, and thereby yield an applicable and meaningful remedy, appears remote. No foundation exists in most national legal systems to enforce or apply the advisory opinion of the Court, and no international tribunal or body, short of the United Nations Security Council or the General Assembly, can provide either an effective remedy or an obligatory direction for united action which could insist that Israel heed the requirements of international law and dismantle the wall, or otherwise face international approbation and sanctions.

But an effective and available legal approach does exist within the national legal systems of a number of respected States that can respond to the absence of political will, and the unavailability of a direct legal basis, to challenge the wall and its patent illegality in international law. The wall is intimately tied up with the Israeli settlement project. The international community has long accepted that the settlements are illegal, as per the general application of the cornerstone conventions of international humanitarian and human rights law, as well as the specific pronouncements of the United Nations and significant regional bodies such as the European Community. The long-standing prohibition against population transfers by an occupying power has now been elevated to a war crime by the 1998 Statute of Rome, and this specific interdiction has been incorporated into the domestic legislation of at least seven States. This is little legal doubt that the Israeli settlements fall squarely within the Statute's prohibition against population transfers.

The domestication of the Statute of Rome and, specifically, the inclusion of "population transfer" as a war crime in these national legal systems, is much more than an elegant sentiment or a noble statement of intentions. Rather, it has become both a political commitment and a legal obligation. The task now becomes how to realize these commitments and obligations. The obvious route would be to mount the necessary legal and evidentiary case in order to establish that the Israeli settlements, and those Israeli political, military and settlement movement leaders who have engineered the ongoing settlement project, fall within these domestic prohibitions against population transfer. As long as Israel remains outside of the jurisdiction of the International Criminal Court, nothing can be done at an international criminal law judicial forum. But much can be done at the national level, because these domestic statutes provide an available political route and an accessible legal forum to litigate the promise of international criminal law: that war crimes and crimes against humanity should know no immunity.

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The advisory opinion provides the legal framework  
for the Israeli-Palestinian conflict

#### I. The advisory opinion is already influencing the situation on the ground

1. The advisory opinion of the International Court of Justice of 9 July 2004 marks an important milestone in the Middle East conflict. For the first time, the international community has a legal analysis of the fundamental aspects of the conflict, prepared by the principal judicial organ of the United Nations. The advisory opinion goes beyond the specific question of the construction of the wall to give an opinion about key issues in the Israeli-Palestinian conflict, such as the inadmissibility of acquisition of territory by force, the right of the Palestinian people to self-determination, the applicability of the Fourth Geneva Convention, the status of the West Bank as occupied territory, the illegality of the settlements, and Israel's right, and even duty, to defend its people, but in accordance with international law. On some of these questions, the opinion of the Court was unanimous. Indeed, even the only judge to vote against the decision to comply with the request of the General Assembly and all the items of the *dispositif* relating to the merits stated in the declaration that he appended to the Opinion that he considered the Fourth Geneva Convention to be applicable and the settlements to be illegal.

2. On 20 February 2005, the Government of Israel decided to approve the continued construction of the separation barrier, while modifying its route.<sup>71</sup> This is a unilateral measure which is unlawful as regards that part of the barrier that passes through the Occupied Palestinian Territory, even though the new route is closer to the Green Line than the route defined previously. Although the Israeli Government justified the new route by citing the need to comply with the decisions of the Israeli Supreme Court (in particular the Beit Sourik decision of 30 June 2004), it is undeniable that the advisory opinion of the International Court of Justice of 9 July 2004 has had an impact on the question that the Israeli Government cannot ignore.<sup>72</sup>

3. In this presentation, I shall focus on the link between the Advisory Opinion of 9 July 2004 and the Quartet road map, which was approved by the Security Council in its resolution 1515 (2003), with respect to the question of the frontiers between the State of Palestine and the State of Israel.

4. In its advisory opinion the Court states:

"Whilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature ..., it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudice the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers 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."

"The Court recalls moreover that, according to the report of the Secretary-General, the planned route would incorporate in the area between the Green Line and the wall more than 16 per cent of the territory of the West Bank. Around 80 per cent of the settlers living in the Occupied Palestinian Territory, that is 320,000 individuals, would reside in that area, as well as 237,000 Palestinians. Moreover, as a result of the construction of the wall, around 160,000 other Palestinians would reside in almost completely encircled communities (...)" (paras. 121-122).

5. Even if the new route decided upon by the Israeli Government on 20 February 2005 improves these figures,<sup>73</sup> it nonetheless remains the case that the decision to continue with the construction of a wall in the Occupied Palestinian Territory defies the findings of the International Court of Justice and the General Assembly and threatens to undermine the hopes raised by the new situation created by the election of Mahmoud Abbas as President of the Palestinian Authority.

6. Phase II of the road map foresees the creation of a Palestinian State with provisional borders with Israel and mentions: "as part of this process, implementation of prior agreements, to enhance maximum territorial contiguity, including further action on settlements (...)".

7. I would like to make two comments in this regard. The first concerns the need to interpret the road map in the light of the advisory opinion of the International Court of Justice. The second concerns the interest of the two parties in finding a permanent solution to the conflict that does not include the phase of “provisional” borders.

II. The road map should be considered in the light of the Advisory Opinion of the International Court of Justice

8. The road map can be implemented only on the basis of international law. The International Court of Justice has clearly established the illegality of the settlements established by Israel in the Occupied Palestinian Territory and defined the latter in accordance with the Green Line. When the road map refers, in its phase III, to ending the conflict through a “final and comprehensive permanent status agreement,” it says that this agreement “ends the occupation that began in 1967.” Ending the occupation involves not only military disengagement but also the dismantling of the settlements. The provisional line of separation that currently exists is the Armistice Demarcation Line of 1949 (Green Line). Provided that it is not altered under a future agreement, this will remain the only valid line. The provisional borders referred to in the road map can only be those deriving from a new agreement or, in the absence of such an agreement, those established by the Green Line.

9. Consequently, the route of the separation barrier decided upon unilaterally by the Israeli Government cannot constitute the “provisional border” referred to in the road map, unless Palestine agrees to it.

III. It is in the interests of both parties to find a permanent solution to the territorial question

10. Although the road map was produced with the commendable intention of facilitating a negotiated settlement in a context of serious confrontation, it introduced the legally questionable notion of the “provisional border.” By definition, borders are not provisional; they are stable and permanent. The International Court of Justice stated in 1962 that “in general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality”.<sup>74</sup> In 1994, it stressed what it called “the fundamental principle of the stability of boundaries.”<sup>75</sup> For a boundary to be stable, no agreement relating to it can be regarded as having only a provisional validity. It is not possible to conceive of a treaty that establishes a frontier for a limited time period. In this case, the parties agreed on a line of demarcation that does not have the character of a boundary. This is why the armistice or ceasefire agreements expressly state that the agreed lines do not constitute territorial boundary lines and are without prejudice to the future boundaries of the States concerned. “Provisional borders” would merely be the equivalent of new armistice lines. As such, they can only sow the seeds of new frustrations and new conflicts.

11. As the above makes clear, it is in the interests of Israel and Palestine to put an end to the provisional nature of the demarcation lines and move forward with the negotiation of a comprehensive agreement that establishes not provisional borders, but stable and permanent boundaries.

IV. The United Nations and third States must adopt a consistent position

12. Unlike the other three members of the Quartet, the United Nations does not pursue national or regional interests. The United Nations acts within the framework of the purposes and principles set forth in Articles 1 and 2 of the Charter. This essential difference gives the United Nations its own particular responsibilities within the framework of the Quartet’s actions, one of which is the responsibility to ensure scrupulous respect for international law in the road map process.

13. Moreover, the United Nations would gain in credibility if it took the same firm line with regard to all situations of occupation. States would also gain in credibility if they condemned all situations of occupation with equal force or if, in those cases in which they are directly responsible for the situation, they put an end to that situation unconditionally and as rapidly as possible. In the Middle East, this applies to Palestine and also to Iraq and Lebanon. Outside the region, the United Nations must not forget its fundamental responsibility to ensure that the occupation of Western Sahara is brought to an end and that the Saharawi people can exercise their right to self-determination.

14. Another aspect that must not be forgotten is that the justification for the separation barrier put forward by Israel is based on a real situation: the terrorism targeted at the Israeli population.

A majority of the Palestinian people clearly condemned terrorism when they elected their President. The responsibility of third States must include not lending aid or assistance, in any form whatsoever, whether directly or indirectly, to terrorism. If nothing justifies occupation, nothing justifies terrorism, either. Terrorism is not defined by the real or presumed motives of its perpetrators. Terrorism is always an unlawful, unjust, inhuman, and cowardly method of combat, regardless of who practices it. Even if the advisory opinion does not use the word “terrorism,” it clearly stipulates Israel’s right and duty to defend its people against such attacks (para. 141). Third States must not undermine the current efforts of the Palestinian Authority to put an end to terrorism.

## **V. Plenary III**

### **Role of parliaments and civil society in advocating adherence to international law**

- **Parliaments and international law**
- **Impact of inter-parliamentary organizations**
- **Response of civil society**
- **Engaging the media**

**Daniel Vischer**  
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The wall erected by Israel is a breach of international law and human rights:  
it must be torn down!

Ariel Sharon's real goal, which is consistent with the thinking that led to the construction of the wall, is not so much to reinforce security as it is to proceed with an



annexation that violates international law, to create a fait accompli for the benefit of the settlements in the West Bank in the context of the implementation of the road map.

The idea of building the wall was announced by Ariel Sharon on 15 April 2002. Beginning in June 2002, properties were confiscated and trees were uprooted to give way to the first section of the wall, west of Jenin. Shortly after that, Mr. Sharon explained that the wall would be extended along the Jordan valley so as to give Israel full control over the Jewish settlements – in violation of international law – in that area. Ariel Sharon's intentions became clear to the whole world.

By the end of 2004, the wall was already more than 200 km long. I was in the West Bank and the Gaza Strip in September 2004 with some fellow parliamentarians, and I can assure you that standing in front of this structure, one realizes not only the monstrosity of the undertaking – which is reminiscent of the Berlin Wall – but also its appalling humanitarian consequences for the Palestinian population.

Allow me to bring to mind a few statistics:

When it is finished, the wall is expected to have a total length of 832 km, that is, it will be twice as long as the Green Line.

Only six per cent of the wall – a fact that is crucial from the standpoint of international law – was built along the Green Line. The construction of the wall is tantamount to a de facto confiscation by Israel of 47.6 per cent of the territory of the West Bank.

Approximately 89.5 per cent of the Palestinian population will have to live behind the wall, while 249,000 people, or 10.5 per cent of the Palestinian population of the West Bank, will live between the wall and the Green Line, in complete isolation.

The facts speak for themselves: the construction of such a wall is an affront to international law and human rights and an insult to human dignity. This has not escaped the notice of the international community, which has protested vehemently against the project:

In its resolution ES-10/13 of 21 October 2003, the General Assembly demanded that Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. Thus, from the outset, the international community has made it clear that the construction of the wall is a breach of international law to the extent that it departs from the Green Line.

In its resolution ES-10/14, the General Assembly requested the International Court of Justice 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?

Before replying to this question, the International Court of Justice rejected the argument raised by Israel, the United States and certain European States, to the effect that the Court could not give an opinion on the ground that the construction of the wall was not a legal issue and that the advisory opinion could impede a political solution to the Israeli-Palestinian conflict. The Court emphasized that it was for the General Assembly to assess the usefulness of the advisory opinion.

On the question of the legality of the construction by Israel of a wall in the Occupied Palestinian Territory, that is, the substantive issues involved from the standpoint of international law and human rights law, the International Court of Justice referred to the rules and principles of international law. In particular, it cited the United Nations Charter (which establishes, inter alia, the illegality of any territorial acquisition by the threat or use of force, as well as the right of peoples to self-determination), the Fourth Geneva Convention, which is applicable to the occupation by Israel of Palestinian territory, and to human rights in general. After considering all these texts, the International Court of Justice raised the following points:

1. Approximately 80 per cent of the Israeli settlements would be included within the area between the wall and the Green Line. Anyway, those settlements are already violating international law.
2. The construction of the wall and its associated regime create a fait accompli and are tantamount to de facto annexation of part of the Palestinian territory. The route of the wall entails further alterations to the demographic composition of the area (especially for Jerusalem and the settlements).
3. The wall impedes the exercise by the Palestinian people of its right to self-determination.
4. The wall violates the Geneva Convention because it impedes liberty of movement and the exercise of professional activities, and makes access to hospitals and schools difficult, if not impossible.

Finally, the International Court of Justice found that the security concerns raised by Israel do not justify the application of qualifying clauses of different conventions.

Bearing in mind the aforementioned violations, the International Court of Justice enjoined Israel to respect the right of the Palestinian people to self-determination and to terminate its breaches of international law. It also stressed that the United Nations resolutions offered the only solution to the crisis affecting the region. Finally, the Court drew the attention of the General Assembly to the need for efforts to achieve as soon as possible a negotiated solution and the establishment of a Palestinian State existing side by side with Israel and its other neighbours.

From the legal standpoint, there is nothing more to say: the legal situation is clear, having been established by the only court that is competent to speak on the matter, and it is now up to the international community to draw the pertinent conclusions. That said, the fact that the constitutional court of Israel persists in affirming the legality of the construction of the wall, in violation of international law, is a matter of serious concern from the standpoint of constitutional law.

The General Assembly of the United Nations reacted to the decision of the International Court of Justice in resolution ES-10/15, in which it acknowledged the advisory opinion of the International Court of Justice. In that resolution, the General Assembly, at the suggestion of the Court, called upon Israel and all States Members of the United Nations to comply with their legal obligations and called upon all States parties to the Fourth Geneva Convention to ensure respect by Israel for the Convention.

What is the role of Switzerland in all this? As you know, our country was invited, in its capacity as the depositary of the Geneva Conventions, to conduct consultations and to report to the General Assembly on the matter, including with regard to the possibility of convening a conference of the parties.

Switzerland has accepted that mandate. Thus, Federal Councillor and Minister for Foreign Affairs Micheline Calmy-Rey recently made an official visit to Palestine and Israel. She was able to observe the progress of the construction work on the wall and take note of its repercussions. Ms. Calmy-Rey explicitly affirmed the illegality of this construction and denounced the tragic humanitarian consequences it has had for the Palestinian people. Her statements were met with loud criticism both in Israel and in Switzerland. That reaction, however, was quite exaggerated.

Although Switzerland has good relations with Israel in the economic, cultural and even the military spheres – this latter point having been increasingly criticized, especially by members of parliament – Swiss diplomacy has never wavered in its refusal to recognize the territories occupied in 1967 as part of Israel, and the same is true with regard to East Jerusalem. Nor has Switzerland recognized the Israeli settlements. That explains, for example, why our country did not send an official representative to East Jerusalem for the inauguration last year of a street named after Paul Grüninger, a Swiss anti-Fascist hero of the Second World War.

Switzerland's position on the issue of international law is absolutely clear. Without question, the Swiss authorities will always consider the route of the wall and the consequences of its construction to be in violation of international law. The Federal Council was careful to stress that point in its reply to a parliamentary challenge brought last year by the Green Group, including myself.

In Switzerland, civil society, as it has come to be called, has been increasingly inclined to favour the Geneva Initiative, which is opposed to the construction of the wall. After all, this initiative is an important component of Switzerland's foreign policy and is consistent with the country's efforts to promote a just peace. During her official visit, our Minister for Foreign Affairs expressly reminded both the Palestinian authorities and the Israeli ministers of this position.

Nevertheless, the situation is quite different now. Although the legal status of the wall has been formally established, and it is clear that Israel's political intentions are in violation of all the United Nations resolutions on the question, it is obvious that the Governments – particularly those of the European Union countries – have not acted strongly enough in combating the Israeli project.

Nevertheless, I am still convinced that opposition to the construction of the wall is growing daily, particularly in Switzerland, but also throughout the European Union. Most of the Swiss media, however, have been extremely cautious in their approach to the issue. And many are still hoping that Israel will be excused, either in the name of the Holocaust or for the sake of its special security needs.

I am also convinced that if a just and lasting peace based on the creation of a Palestinian State in all the territories of the West Bank and Gaza – with East Jerusalem as its capital – and on the recognition of the right of return is to be achieved, the international community must apply strong pressure not only on Israel, but also on the American Administration to impose the application of international law to Israel. As Yasser Arafat rightly pointed out on several occasions, the Palestinian people should not have to pay for the consequences of a tragedy – the Holocaust – for which they bear no responsibility. If the Western countries – and I am thinking specifically of civil society in the European States – want to find a just solution, they must step forward.

Civil society plays a key role in changing people's attitudes. In Switzerland, a number of meetings and demonstrations have been held, over the last few years, to denounce Israel's illegal policy. In Zurich, several pro-Palestine organizations have issued an appeal for demonstrations to be held at the end of the month.

At the same time, the national parliaments must also make their voices heard. It is up to them to reinforce pressure on reluctant Governments. In Switzerland, certain groups of members of the National Council and of the State Council, who have a deep respect for international law, are working to that end. In the National Council, several parliamentarians have tabled proposals aimed at speeding up the peace process. Those proposals address such varied issues as the construction of the wall, the prohibition to import Israeli products from the Occupied Territories, the cancellation of European Free Trade Association agreements, the liberation of Marwan Barghouti, who was illegally imprisoned, and even the cessation of military collaboration with Israel, an initiative that fell through by just a small margin.

In conclusion, I will say that I am quite optimistic now. I would like to believe that the decisions of the International Court of Justice and the United Nations General Assembly concerning the construction of the wall have launched a new process that will eventually bring about a lasting peace. But my optimism does not keep me from thinking clearly. I know that Israel, the American Administration and also, unfortunately, some European States, have unrealistic expectations on the issues of land, East Jerusalem and, above all, the right of return.

But I am confident that sooner or later, history will decide otherwise. We are all aware of that – all of us, including Israel.

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Facilitating the work of Parliaments in upholding international law  
with regard to Israel-Palestine and in the light of the advisory opinion  
of July 2004 of the International Court of Justice

## Introduction

In January this year, I was privileged to take part in observing the Palestinian elections. I was accompanying four British Members of Parliament. The day before the elections, we went out and about in the Nablus and rural Salfit areas in the West Bank and met with Palestinian people whose lives had been directly affected by the construction of Israel's so-called security barrier through their land. Accompanied by staff of the Office for Coordination of Humanitarian Affairs of the United Nations Secretariat, whose work in Palestine I greatly respect and admire, we visited the village of Mas'ha in the Salfit district where the barrier snakes into and around Palestinian territory, creating isolated enclaves. We were taken by some local people from nearby Biddya to visit a Palestinian farm house in Mas'ha. We were totally shocked by the scene that awaited us. Literally sandwiched between the barrier, just 10 metres away, and the Jewish settlement of "Elkana", was this one farmhouse, standing alone. The barrier in this area is mainly a fence and not a wall, but along the length of the house the Israelis have made it a wall, 8 metres high and 35 metres wide so that the Palestinian family have had their view over the land and the rest of the village blocked on one side, with the "Elkana" settlement pressing up on the other. At both ends of the wall it became a fence again, with a gate for the family to get in and out. The family has a key to the gate, but above it are electronic sensors enabling the Israeli army soldiers nearby to monitor their every move. Indeed, after we had been there a few minutes, an army armoured personnel carrier rolled up and watched us from a short distance away. This one case, which must be just one example of many, made the Members of Parliament very angry. Upon our return to London, they made a collage from the photographs and showed it to Prime Minister Tony Blair in a meeting they arranged with him to discuss our visit.

In listening to this story, we are reminded that international law is fundamentally about protecting the rights of all people everywhere, within the law, to express their humanity, fully and freely. One of the main theses of my presentation is about the need to get the human story, minus its distortions, out via civil society and parliaments, and finding ways of percolating the story upwards to Governments, alongside the language of international law, which can sometimes become so dry and technical.

If you read the statements of the Government of the United Kingdom on Israel and Palestine, they more often than not are in accordance with international law. Extra-judicial assassinations are denounced, settlement expansion criticized. Unfortunately, the words have not translated into significant political or diplomatic actions at this level.

Despite the frustration at the failure of Government rhetoric to translate into meaningful policy change, there is currently within both Houses of Parliament a crescendo of calls upon the Government to do something about the transgressions of international law in Israel's treatment of the Palestinians. These calls do not divide along party political lines and form a majority and growing consensus. So civil society and parliaments must be doing something right.

True democracies, although they come in all shapes and sizes, have certain attributes considered to be universal. Respect for the rule of law and due process is fundamental. The role of parliaments, as well as to legislate, is of course to hold Governments to account with regard to their adherence to the rule of law, domestically and internationally. The role of organizations such as the Labour Middle East Council is to facilitate Parliament's work in this regard and also to disseminate back out to civil society the actions taken by parliamentarians in fulfilling these responsibilities. At times, the Council lobbies Government directly.

This presentation seeks to provide a practical insight into how organizations such as ours operate within a parliamentary context in the United Kingdom and beyond; the aspects of the Israeli-Palestinian conflict we have sought to draw attention to in our advocating adherence to international law; some of the tools, mechanisms and strategies available to us in the United Kingdom Parliament; what works well; and further ideas about what more we could do – both nationally and across borders – in order to increase the effectiveness of our lobby. This is particularly relevant in the light of the International Court of Justice's Advisory Opinion on the illegality of Israel's separation barrier inside the Occupied Palestinian Territory. The ruling of the Court provides us with an historic affirmation of the applicability of international law to the Occupied Palestinian Territories and to the aspirations of the Palestinian people as a whole to self-determination.

### **Tools, Mechanisms and Strategies**

In gathering thoughts from Members of Parliament and others prior to writing this paper, one consistent observation – while seeming like a truism – was that in order to lobby Parliaments effectively you need first of all to know the system, and secondly to concentrate on asking Parliamentarians to take specific actions using the apparatus available to them rather than request that they make belligerent approaches to Government with long lists of overwhelming demands. I have chosen a few illustrations of how the workings of Parliament can be used effectively to promote respect for international law, and at the same time I issue an invitation to other similar groups from different countries to share things with us that work well in their parliaments.

The Labour Middle East Council briefs Members of Parliament on issues of current concern with regard to the Israeli - Palestinian conflict and formulates suggestions for supplementary questions to be asked during Oral Questions to the Foreign Secretary every fourth Tuesday. The Council provides this service to Members of Parliaments and Peers of all political parties, in fact). This process can be an effective channel for bringing new issues into the public arena, providing useful and digestible data to back up arguments, and helping to shape the type of questions asked. Some parliamentarians would ask such questions and research such data of their own accord; many say they appreciate the prompting and the time it saves them. The more probing the questions, the more detailed the answers that are (hopefully) elicited from Government and go on the record. This in turn enables parliament and lobby groups to hold Government to account.

Early day motions<sup>76</sup> are short written paragraphs containing debating points for which Members of Parliaments seek to gather support and build consensus. Members of all parties can sign the motions (although front bench Members of Parliaments and others – Ministers, Parliamentary Private Secretaries, etc. – do not sign), and they are printed and circulated in Parliament every day. The number of signatories provides an indicator to Parliament and to the Government of the strength of feeling on certain issues. Early day motions that reach over 100 signatories are considered to be widely popular. Early day motion 308 on the International Court of Justice ruling on Israel's separation barrier now has 216 signatories, the third largest of all current motions.

This House welcomes the advisory opinion of the International Court of Justice on Israel's separation barrier; notes its conclusion that the barrier is illegal and that Israel has a legal obligation to dismantle the barrier where it is built on occupied land; welcomes General Assembly resolution ES-10/15 supported by 150 States that demands Israel comply with the advisory opinion of the International Court of Justice; and calls upon the Government of the United Kingdom to urge Israel to dismantle the barrier where built on occupied land and to ensure Israel's full compliance with the Fourth Geneva Convention in respect of the Occupied Territories.

Early day motion 243 on Palestinian Prisoners in Israeli jails currently has been signed by 103 Members of Parliaments, and was tabled to coincide with the launch of a new campaign on Palestinian prisoners (see below). Early day motion 819 on the deportation of Qazan students from Birzeit University is a good illustration of the consultation process among civil society groups and Parliament. A number of groups, including the Labour Middle East Council, were involved in highlighting the issue to parliamentarians and in providing data to the Members of Parliaments who decided to table the motion.

The work of Select Committees in the Parliament is a very effective way of focusing Government attention on important issues. In late 2003, the International Development Select Committee – a cross-party group of Members of Parliaments plus clerks – visited the Occupied Palestinian Territories to assess the humanitarian situation and the need for development assistance. Subsequent to the visit, an evidence-giving session was held in Parliament, during which civil society groups made presentations. The report which followed in 2004, in collaboration with legal and other experts, was forthright in its call for adherence to international law:

Israel's refusal to accept its responsibilities under the Geneva Convention does not, however, relieve the international community from the constraints and conditions of its application in dealings with Israel as an occupying power...we agree with the United Kingdom Government that the Geneva Conventions apply to the Israeli occupation. The Fourth Geneva Convention should remain the standard by which the Government of Israel should perform in the Occupied Palestinian Territory. The United Kingdom Government has its own obligations to uphold the Convention, and monitor breaches of the rules of the Convention as regards the civilian population.<sup>77</sup>

What is important to note is that the genesis of the Committee's visit and report was a previous delegation to the region led by the United Kingdom-based organization Christian Aid, in which the Chair of the Select Committee had taken part. Christian Aid itself has produced two excellent reports on the Occupied Palestinian Territories in the past two years, which were launched in the Parliament.

I believe that cross-party alliances in parliaments are one of the most powerful tools in lobbying Governments. Such alliances are extremely effective in the cross-party delegations to Israel-Palestine that groups such as the Labour Middle East Council organize. There is no substitute for going to see for oneself the situation on the ground. The joint reporting back to the Government usually elicits detailed responses.

### **Thematic/issue-based campaigns and projects**

#### **Palestine refugees**

In contemplating the various themes taken up by my organization, I came up with the concept of popular and unpopular themes in terms of lobbying Parliament. I compared the widespread and almost unequivocal support for the International Court of Justice ruling on the separation barrier and the universal condemnation of Israel's policies, such as demolishing Palestinian homes, the indiscriminate shelling of Palestinian neighbourhoods, with the ambivalence and reticence surrounding the almost taboo attitudes towards the issue of Palestine refugees and the right of return. It is a good example of how the implementation of international law has over decades been made subordinate to political realities to the extent that the political status quo has become entrenched in people's consciousness as the starting point of negotiation. Those advocating consideration of the issue in the light of international law are deemed to be at best utopian, at worst barking mad and dangerous. My contemplation reinforced my conviction of the crucial importance of the work that the Labour Middle East Council has carried out with the Parliament and continues to do, on this issue.

In September 2000, after months of intricate planning, the Joint Parliamentary Middle East Councils conducted a 10-day Commission of Enquiry into Palestinian refugees, visiting refugee camps and other groups in the West Bank, Gaza, Jordan, Lebanon and the Syrian Arab Republic. The Commission recorded primary evidence from the

refugees themselves as to how they envisioned the implementation of their rights embodied in General Assembly resolution 194 (III) of 11 December 1948. Subsequently, it produced a report containing not only the verbatim primary evidence but also their findings and recommendations. A central finding of the Enquiry was that the issue of the right of return of Palestinian refugees lies at the core of the conflict, and that as such, must be substantively addressed by the international community and Israel far in advance of final status talks. Allowing the refugee voices to be heard and the documented verbatim record provided powerful testimony:

We will not repeat the mistake of the Israelis and make our existence in our land dependent on the non-existence of the people who are already living here. Israelis thought that their existence on the soil of Palestine meant the non-existence of the other. We do not consider this so. We do not wish to tell them to leave.

One of the report's recommendations, that mechanisms be established, with the help of the international community, to reconnect the millions of refugees outside the West Bank and Gaza with their Palestinian political leadership, has been taken up by the European Commission. The first stage of the project, to build a database of Palestinian refugee communities and their preferred mechanisms, is already under way.

The Middle East Councils' work in this area provides another good illustration of the dynamism of cross-party alliances and the formation of connections and alliances with parliamentary colleagues in other national parliaments. The Joint Middle East Councils have presented their findings to the parliaments, foreign ministries, and non-governmental organizations, academic and Palestinian communities in Berlin and the Hague. One important thing we have learned from our work in this area is the importance of choosing language carefully. Essentially, the issue of Palestine refugees is not simply one of return and compensation, but of inclusion, participation, representation and democracy-building. Presented in those terms, the issue loses its threatening nature, and it is difficult for Governments concerned with the spread of democracy to argue with the promotion of these concepts. The presentation pack (available from the Labour Middle East Council) is entitled: "Palestinian Refugees: Participating in Peace". Another observation we have made in working with other national parliaments is how the formation of cross-party groups and meetings is not necessarily as straightforward as it is in the British Parliament. This is an area that non-governmental organizations and individual parliamentarians can seek to promote within their own parliaments.

### **Palestinian Prisoners**

In December 2004, LMEC launched a new campaign on Palestinian prisoners in conjunction with the All-Party Parliamentary Group on Human Rights and in co-operation with the Committee in Support of Palestinian Legislative Council Member Hussam Khader (co-ordinated in the United Kingdom by Al-Awda, United Kingdom). The campaign aims to highlight the treatment of all Palestinian prisoners, but to focus on the issue of Administrative Detention of Palestinian prisoners by the Israeli State (detention without charge or trial); the case of women and child prisoners; the issue of torture and inhuman treatment; to lobby for increased media coverage of the issue; to raise the cases of Parliamentarians Hussam Khader and Marwan Barghouti currently in prison in Israel; and to raise all these concerns with the British Government in respect of its role as a High Contracting Party to the Geneva Convention.

The idea is to bring together parliamentarians and lawyers/legal experts in order to form a high-level political-legal campaign focusing on international human rights and humanitarian law. The campaign, launched in December with a meeting in Parliament, will continue with a political-legal delegation to Israel and Palestine in mid-2005, the production of a fact sheet and delegation report to present to the Foreign Secretary, a meeting in the European Parliament and lobbying of United Nations human rights committees and apparatus. The project steering group is also developing links with Palestinian human rights groups working on prisoners' rights with the aim of facilitating placements for British lawyers.

### **Challenges and what we could encourage more of in terms of the role of Parliaments in upholding international law and the Advisory Opinion of the International Court of Justice**

I believe that in the case of the United Kingdom Parliament and its active support for a just solution of the Israeli-Palestinian conflict, it should continue what it is already doing, but that the theme and importance of international law needs to be advocated even more strongly in order to avoid the mistakes of the Oslo years when law was allowed to be sacrificed in favour of the political process, instead of underpinning it. The rest is history, but history is in danger of repeating itself. The advisory opinion of the International Court of Justice is an authoritative statement of the law, which affirmed the legitimate rights of the Palestinians to statehood and to just and humane treatment in the interim. Parliamentarians need to be encouraged to refer to the International Court of Justice ruling in its entirety and not only with regard to the separation barrier.

The challenge for parliaments and civil society alike is in successfully advocating adherence to international law is that of devising effective strategies. Across the international community, with the exception of the United States of America and some other countries, the moral and legal argument in the case of the Palestinians has been won. The challenge is to create the political will to implement the moral and legal arguments. It is not enough to be right; we also have to be clever. To be clever, we need to be strategic. This is a crucial area where civil society and parliaments must work together to devise strategies that co-opt the concerns of the day of Governments, such as security that expose the hypocrisy of Governments in their selective application of international law, and that counteract disinformation.

- We should seek to encourage more cross-party alliances both domestically and within the context of informal networking with other national parliaments (European and international) with a view to lobbying Governments. In contrast to the United States of America, there is a large consensus across much of Europe that international law has been flouted for too long with respect to Palestine, and that diplomatic and economic means should now be employed in order to bring about compliance. This consensus could be converted into a more co-ordinated lobby by such alliances.
- There could be increased and better coordinated lobbying of the Inter-Parliamentary Union transnationally. It is good to be reminded of statements by the Inter-Parliamentary Union in recent years, for example in the Universal Declaration on Democracy adopted at its 61st session held in Cairo on 16 September 1997:<sup>78</sup> "...There is [...] interdependence between peace, development, respect for and observance of the rule of law and human rights" and "To preserve international democracy, States must ensure that their conduct conforms to international law..."
- A more consistent approach could be adopted to insert international law references into the flow of information to Parliamentarians, that is, to include them whenever possible in all briefings, statements, media interviews and so on, in order that those in turn become a natural part of debates with the Government. This is at present a particularly relevant topic domestically in the United Kingdom, as Parliament is trying to assert itself in the face of an increasingly centralized and authoritarian executive intent on overriding judicial norms and practices.
- It is possible to find ways of exposing Government hypocrisy by comparing insistence upon compliance with international law in the case of some poorer countries (e.g., the use of tied aid to good governance, which presupposes respect for the rule of law) with the lax approach to breaches of international law by others.
- Improving media relations and devising and propagating good sound bites, for example, "A State of scattered territories will not work".<sup>79</sup> Some groups are already very effective in this area and we would benefit from more sharing of expertise.
- Encouraging direct links between parliamentarians and intergovernmental bodies and agencies and encouraging Members of Parliaments to sign up to their email lists.
- Facilitating cooperation between parliamentarians and experts on international law to draw up papers/letters/questions.
- Disseminating information back out from Parliament to civil society and particularly the media (the process seems to be working well in the other direction).

### **Conclusion**

In an era when the spread of democracy (while desirable by peaceful means) has become a crusade in the minds of some world leaders, it is right and proper that Governments also receive robust reminders of the absolute necessity of international law in underpinning successful democracies in the long term and the relations between States. The advisory opinion of the International Court of Justice should not be ignored by Governments. It is an authoritative statement of the law, and the law is binding even if the statement technically is not.

Arguments founded on the thinly veiled logic of “it’s too much trouble to reverse the facts on the ground” or “we dare not upset our allies” do not stand up in the light of the readiness of Governments to go to war in order to enforce compliance with international law and United Nations resolutions in some cases. We look to parliaments and those that work with them to insist on universal adherence to international law, ensuring that no individuals, groups or indeed whole nations, are passed over. The advisory opinion of the International Court of Justice provides us with an optimum tool and it is our responsibility to use it, and use it to the fullest. Most importantly, what we need to make sure we communicate via civil society and parliaments is the human story.

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Civil society and international law: protecting and promoting  
human rights in the light of the July 2004 advisory opinion  
of the International Court of Justice<sup>80</sup>

## Introduction

On 9 July 2004, the International Court of Justice issued an historic opinion, advising the United Nations and the international community in general that the nature of the Israeli occupation, and in particular the construction of the wall in the Occupied Palestinian Territories, amounted to grave violations of international law. To quote the Court:

The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and ... cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various ... obligations under the applicable international humanitarian law and human rights instruments.

Both in the period leading up to the historic decision of the International Court of Justice and in the months following, there have been numerous reports and United Nations resolutions emphasizing how Israel’s actions continue to violate international law. The advisory opinion confirmed an existing state of affairs.

The challenges we face now, as civil society, as the United Nations or as States committed to a peaceful resolution of the conflict in Israel/Palestine, are of course very different (each fulfils different roles) but they all point in the same direction. We have a common interest that international law be respected. John Dugard, Special Rapporteur of the Commission on Human Rights, stated in his December 2004 report that: “Israel’s defiance of international law poses a threat not only to the international legal order but to the international order itself. This is no time for appeasement on the part of the international community” (E/CN.4/2005/29).

## Depressing paradoxes (and how to overcome them)

The International Conference of Civil Society in Support of the Palestinian People on 13 and 14 September 2004 addressed many issues that those of us following events closely are painfully aware of. It also revealed a number of equally familiar, depressing paradoxes and the need for a clear strategy on how to overcome them.

While the importance of international law was reaffirmed, Israel’s continuing and belligerent disregard for it was also made clear. There was broad consensus for a need to end the occupation as a prerequisite towards peace (the stated theme of the conference), yet little indication that Israel is remotely prepared to join such a consensus.

Most everyone at the conference agreed that the wall presented a serious obstacle to peace, yet few called for its immediate dismantling, and there was even a suggestion that successfully lobbying for a re-routing of the path of the wall was an achievement. While it was recognized that Palestinian refugees deserve special protection under refugee law, considerable evidence was also presented that they remain as unprotected as ever due to illegal military actions by the Israeli Army, including air strikes in civilian areas, such as refugee camps.

The conference issued a clear message that a joint strategy was needed and suggested that the answers to overcoming those paradoxes lay in the advisory opinion. It was thus agreed that joint strategies on the part of civil society and international community to promote the groundbreaking advisory opinion of the International Court of Justice on the wall must translate its major legal achievements into more concerted efforts by the international community and more deliberate advocacy by civil society.

## Importance of the advisory opinion

The advisory opinion was important in a number of fundamental respects. As with every decision it issues, the Court’s conclusions are more than mere rhetoric. They represent the most authoritative statement of the content and applicability of international law.

The Court clarified that, notwithstanding the nature of the conflict, international human rights and humanitarian law were applicable in the occupied territories. More specifically, Susan Akram and John Quigley, in their very useful report analysing the advisory opinion,<sup>81</sup> have outlined key areas that were highlighted by the Court:

- There is a Palestinian people with a right to self-determination.
- The West Bank and Gaza, including East Jerusalem, are occupied territories under international law, and Israel is an occupying power with legal obligations.
- Israeli settlements breach international law.
- The Conventions of International Humanitarian Law are fully binding on Israel and must govern all Israeli actions in the Occupied Palestinian Territory.
- Israel’s occupation practices violate not only those Conventions, but also the Conventions of International Human Rights Law.

In short, the Court made clear that the construction of the wall in the Occupied Territory including East Jerusalem was illegal and that Israel should not only stop construction immediately, but also begin the dismantling of it.

Beyond the wall itself, the construction of settlements in the Occupied Territory (which Israel claims it is protecting by erecting the wall around them) were also declared illegal. The decision further declared that destruction of housing and property to construct the wall was illegal, and that Israel was obliged to make reparations for all damage caused by its construction.

But the Court did not stop at Israel's obligations. The overwhelming consensus of the Court felt that all States were obliged not to recognize the illegal situation Israel has created and to refrain from any financial support to Israel in maintaining the illegally constructed wall. It also insisted that States parties to the Geneva Conventions of 1949 had "additional obligations to ensure Israel's compliance" with the Conventions. Finally, the Court declared that United Nations General Assembly and Security Council ought to consider further actions against Israel to bring an end to the illegal situation.

Israel responded by declaring that the advisory opinion was irrelevant, ignored its own High Court's order that certain sections of the wall be re-routed and dismantled and continued the wall's construction regardless.

### **Peace should not be at the price of human rights**

It is in this context that illusory talks towards peace began to take place in early February 2005 between Prime Minister Sharon and President Abbas. Meanwhile, the international community has largely remained silent in the face of Israel's continued disregard for international law. Indeed, even though Special Rapporteur Dugard acknowledged, in a recent addendum to his December 2004 report, that in the light of the ceasefire, there had been some important improvements in the human rights situation in the Palestinian Territory, he also identified the failure of Israel to take action on the core issues that lead to human rights and humanitarian law violations, namely "settlements, checkpoints and roadblocks, the imprisonment of Gaza and the continued incarceration of over 7,000 Palestinians" (see E/CN.4/2005/29/Add.1).

Perhaps the most significant aspect of the Advisory Opinion is that respect for human rights and humanitarian law does not depend upon a peace settlement. Indeed, the Court made it abundantly clear that a negotiated solution must be worked out on the basis of international law and that those obligations bind not only Israel, but all States to ensure respect for international law. As such, any suggestion that a peace settlement is needed as a pre-requisite to respect for human rights is in total contradiction to international law. It is essential that any peace initiative take these factors into consideration.

It is furthermore important that a full-fledged peace process involve all parties to the conflict. The Israeli leadership would be well-advised to take note of former South African President De Klerk's famous statement that "it is not possible to choose one's adversaries."

### **Concrete steps are needed**

Sharon's violent policy presents a point of no return for the international community, which has obligations to ensure that Israel's violations of international law are halted.<sup>82</sup> The highest judicial authority in the world has made clear that the international community's political "point of no return" is reinforced by a legal one.

As an authoritative statement of international law, the advisory opinion makes clear the obligations of the international community, and in particular individual States, together with the Security Council, to persistently condemn Israel's violations of international law and to take action against Israel if those violations continue.

To date, that position has unfortunately proved to be little more than rhetoric, responded to by Israel's belligerent position that it is in fact above the law, and inaction by the international community. Concrete measures are needed to reinforce the clear and authoritative position of the International Court. In the case of apartheid South Africa, such measures included military and economic sanctions and even temporary expulsion from the United Nations.

### **Civil society should use the advisory opinion**

Civil society has long been active in confronting the international community with its inaction, continually raising human rights and humanitarian law concerns, many of which came to the Court's attention in considering the advisory opinion. From the very birth of the United Nations, non-governmental organizations have, in the words of Eleanor Roosevelt, been part of a "curious grapevine" of interests, ensuring that human rights be placed at the forefront of consideration by the United Nations.

Formerly part of its creation, Israel and its legal supporters have since ceased to actively engage in international law discussions, insisting that Conventions should be interpreted differently in their case or even that they simply "do not apply." The advisory opinion has, thankfully, laid those arguments firmly to rest.

Human rights advocates should not abandon international law even if Israel has. Just as in the case of South Africa, the advisory opinion has the capacity to give new, authoritative meaning to human rights advocacy.

As Professor Susan Akram of Boston University School of Law stated at the United Nations Conference in September 2004, the advisory opinion not only strengthens human rights guarantees for Palestinians, it places an obligation on States to implement those guarantees.

Civil society organizations should use every opportunity to raise the advisory opinion in articulating their political positions to their own national Governments, in raising awareness among the public or in supporting the position of the United Nations to carry out the work for which it was intended and to urge it to take concrete action.

### **Bringing about change**

Bringing about change in a country that persistently refuses to abide by international law (such as South Africa during apartheid) is not an easy task, but it is by no means insurmountable. As veteran Dutch human rights advocate Adri Nieuwhof has noted, bringing about this change rests on four fundamental principles:

1. A situation of deep crisis.
2. Diplomatic pressure.
3. Economic pressure.
4. Well organized civic structures.

Those principles present a framework for future action on the part of civil society and are worth examining more closely.

### **Interpreting the Crisis**

While it can easily be argued that a situation of deep crisis exists, misinformation abounds in interpreting the crisis. The media obviously plays a central role in this. Both television and print media have been prone to bias and misreporting. Examples of this are legion, covering everything from a failure to use the word "occupation" (in describing the presence of Israel's military in Palestine) to a gross misuse of the words "response" or "retaliation" (in explaining Israel's military aggression).<sup>83</sup>



The challenge to civil society in interpreting this crisis is to reflect the facts on the ground, which some organizations have mostly managed to do successfully,<sup>84</sup> but there is much more work to do.

### **Increasing diplomatic pressure**

While some diplomatic pressure has been exercised by individual States and the members of the Quartet, there has not been nearly enough. In particular, the Security Council has been consistently obstructed by its permanent members, especially the United States of America, from taking concrete steps against Israel and has done little more than express concern or, in rare instances, condemn violations. In this respect especially, it was hoped that the advisory opinion's broad reference would have an immediate impact. So far, it has not.

Further, despite the support of the European Union for a General Assembly resolution acknowledging the advisory opinion, it remains unclear whether European Governments will embark on a more principled strategy of defending international law in the context of the advisory opinion or continue their highly ineffective strategy of quiet engagement, which in view of Israel's flagrant disregard for international law might understandably be seen as appeasement.

Supported by the language of the Advisory Opinion, civil society organizations must continually lobby their Governments to take an uncompromising stance, insisting that the terms of the advisory opinion of the International Court of Justice be respected and implemented and warning that a failure to do so may well mean further diplomatic, and possibly economic, isolation. Civil society must also insist that its Government's commitment to respect for human rights be backed up by concrete actions. When things look bleak, it is important to remember that a strategic campaign can have long-term, cumulative consequences.

### **Stepping up economic pressure**

Beyond the modest efforts exercised by the European Union, there has been little in the way of economic pressure by States or official bodies against Israel. The United States of America continues to subsidize the Israeli economy to the tune of several billion dollars per year. While Israel's enormous military spending, especially the construction of the wall, has caused a serious crisis in the economy, its economy remains stable and trade with foreign countries continues to flourish.

The one notable Government effort taken to hold Israel to human rights standards is a European Union trade agreement, known as the Association Agreement, which has since been amended to insist that products produced in the settlements in occupied areas must be clearly marked as such. Otherwise, they cannot be sold in the European Union. Israeli companies have responded by marking all products as "made in Israel", irrespective of where they were produced, claiming that the Agreement's rules of origin are being complied with.

Efforts by civil society organizations to insist that the European Union correctly apply the Association Agreement have largely proved fruitless. Indeed, there is now even talk of the European Union including Israel as part of its European Neighbourhood Policy. There is, of course, a considerable amount of trade at stake, and it is possible that organizations have seriously underestimated this. However, at the United Nations Conference in September 2004, some activists urged that a clearer message be articulated, abandoning the proper implementation argument and calling for Israel's suspension from the agreement, later confirmed by a conference in London in December 2004.

There is a growing view among civil society organizations that the only realistic way to address Israel's impunity and to stimulate a tougher line on the part of the international community is through citizen actions, such as divestment and consumer boycotts, as a prelude to economic sanctions. A small number of organizations have for years been arguing for a boycott. Other recent initiatives have been undertaken in Denmark and the Netherlands aimed at informing the consumer about the origin of their products, in what might be termed a soft boycott. The Presbyterian Church (USA) voted to divest themselves of any economic association with Israel, and various attempts have been made for by city Governments to divest. However, with the exception of a few voices, there has been reluctance on the part of civil society to endorse a full-scale boycott, let alone sanctions, for various complex reasons, including fear of appearing anti-Semitic.<sup>85</sup>

As with the anti-apartheid movement, when several members of the African National Congress explicitly called for sanctions against South Africa, it may be that civil society is waiting for the Palestine Liberation Organization to explicitly call for economic sanctions against Israel. Once this occurs, it may be that the call for boycotts and sanctions will pick up momentum and that some serious economic pressure can finally be applied. It may also be that solidarity organizations finally take direction from Palestinian civil society organizations, many of which have in fact long been calling for economic isolation.

This may happen sooner rather than later. On 20 August 2004, the prominent Dutch newspaper, *NRC Handelsblad* and the Israeli newspaper *Ha'aretz* reported that the Israeli Supreme Court had insisted that the Israeli Government respond to the Advisory Opinion of the International Court of Justice within 30 days. *Ha'aretz* warned that the consequences of the International Court of Justice Opinion could have potentially considerable consequences for Israel, including Government economic sanctions.

### **Supporting and activating civic structures**

The final factor outlined by Nieuwhof is a complex one in the context of Palestine. During the first intifada, civic structures were effective in a range of mobilizing efforts, from boycotting Israeli products (by growing their own vegetables) to staging well-organized and prolonged peaceful protests, which brought considerable international attention to the plight of Palestinians. Following the Oslo Accords, the Palestinian Authority was established, replacing many of the pre-existing civic structures with local Government structures. Added to this, Israel's increasing stranglehold over the occupied territories has stifled what little existed of these civic structures. Abroad, Palestinians have faced numerous obstacles in finding safe refuge and the community remains deeply fragmented, though in some countries there has been a higher level of organization than in others.

Consequently, there is a great need to support and develop civic structures, both in Palestine and in the diaspora. Donors have been actively supporting non-governmental organizations in the Occupied Territory for many years, though much more support is needed. However, there ought not to be complete reliance on donors - indeed, as the anti-apartheid movement illustrated, some of the most successful and enduring civic efforts have been based on the principles of volunteerism.

For Palestinian communities outside the Occupied Territory, the European Union has begun to support an initiative designed to engage and organize Palestine civic structures, both in refugee camps and in other exiled communities. Known as Civitas, the project is busy developing a database of organizations representing Palestinian people all over the world.

### **Drawing inspiration from other solidarity movements<sup>86</sup>**

Omar Barghouti has argued that, while "not identical ... a sufficient family resemblance between Israel and South Africa exists to grant advocating South Africa style remedies."<sup>87</sup> Barghouti has reflected on the insurmountable hurdles that South Africans faced throughout the anti-apartheid struggle and argued that the militaristic establishment of Israel would eventually weaken, if it were systematically challenged, just as it was in South Africa.

Archbishop Desmond Tutu said in 1989, while the apartheid regime was still choking the South African people, "I am a black South African, and if I were to change the names, a description of what is happening in the Gaza Strip and the West Bank could describe events in South Africa."

Years later, South Africans who were involved in the anti-apartheid struggle paid visits to the occupied Palestinian territories. They have remarked that the situation in Palestine is in many respects far worse than what they faced during the anti-apartheid struggle.

Those who have experienced oppression make the most relevant comparisons between South Africa and Palestine/Israel: the denial of basic human rights, forceful territorial occupation, systematic socio-economic marginalization, planned assassinations, disregard for the rule of law (including international law) and confrontation with an overwhelming police and military force.

### **The importance of perspective**

Of course, this is not to say that there are not significant distinctions to be made. The key to drawing on the relevant experience of previous liberation movements is choosing the proper perspective. The perspective of most Israelis is fundamentally different from that of most Palestinians, as the perspective of most white South Africans was fundamentally different from that of black South Africans under apartheid.

The key to finding a successful political settlement may involve understanding the true nature of the divide and to use that understanding to find bases for compromise on both sides.

It could be very useful to draw on the expertise of seasoned activists who worked to mobilize and influence popular sentiment towards the liberation of peoples in Southern Africa and many other countries. Much of this expertise and experience is still around and may be tapped. Indeed, some of those working today for Palestine were formerly involved in other solidarity movements. As Dennis Brutus, former anti-apartheid campaigner and now a professor in the United States of America, declared at the European Social Forum in London in 2004: Various campaigns against the apartheid regime contributed to creating a climate of international awareness of the nature of the racist and oppressive system of apartheid and led to general outrage and a demand for its international isolations. Something similar should happen in the case of the Palestinian struggle.

### **Conclusion: more is needed**

The authoritative views of the International Court of Justice reinforce what Palestinians have long been advocating – respect for human rights and in particular recognition of their right to self-determination.

Non-governmental organizations, social movements, and other civic structures have a golden opportunity to build on what is arguably the single most important legal development in the history of the conflict. If not ultimately proving to be a turning point, it is nevertheless hoped that solid advocacy strategies will emerge and that States will take concrete action to ensure implementation of the Advisory Opinion.

Inspiration might be needed more than anything else at this crucial moment in history and this might be gained from the success of other liberation movements – including the anti-apartheid movement – in supporting the Palestinian people's long-fought struggle for self-determination.

### **Bruce Gillette**

Moderator of the Committee on Peacemaking for the  
216th General Assembly of the Presbyterian Church (USA)  
Wilmington, Delaware, United States of America

I begin with a note of appreciation for the invitation to participate in this conference. The church that I serve, the Presbyterian Church (USA), has long been concerned about issues of peace and justice, including the importance of international organizations such as the United Nations. Many supportive resolutions have been offered by our church; in addition, a number of our church members have worked to promote international community. The son of an American Presbyterian minister, Woodrow Wilson, had a key role in the creation of the League of Nations. The son of another American Presbyterian minister, John Foster Dulles, had an influential role in the drafting of the Charter of the United Nations. William P. Thompson, who was a long-time Stated Clerk of the General Assembly of the United Presbyterian Church in the United States of America, served as a prosecution lawyer in the war crimes trials after World War II.

Current leaders of the Presbyterian Church (USA) have continued our church's engagement with the United Nations on issues related to Israel, Palestine and the Middle East. Our current Moderator, Rick Ufford-Chase, and one of his recent predecessors, the Reverend Dr. Fahed Abu-Akel, have addressed assemblies similar to this; and the Reverend Dr. Clifton Kirkpatrick, the Stated Clerk of our General Assembly, and the Reverend Dr. Marian McClure, Director of the Church's Worldwide Ministries Division, have personally met with Kofi Annan, the United Nations Secretary-General. We, like several other Christian churches in the United States have national offices that relate to the United Nations on an ongoing basis (see the Presbyterian Church (USA) United Nations Office web site).<sup>88</sup> We hope and pray the new United States Secretary of State, Condoleezza Rice, whose father and grandfather were American Presbyterian ministers, will continue a long tradition of American Presbyterians supporting the United Nations and its vital work for global peace and justice.

The constitution of the Presbyterian Church (USA) states its teaching as calling for people of faith to work for justice and peace:

"Justice is the order God sets in human life for fair and honest dealing and for giving rights to those who have no power to claim rights for themselves. The biblical vision of doing justice calls for

- a. dealing honestly in personal and public business,
- b. exercising power for the common good,
- c. supporting people who seek the dignity, freedom and respect that they have been denied,
- d. working for fair laws and just administration of the law,
- e. welcoming the stranger in the land,
- f. seeking to overcome the disparity between rich and poor,
- g. bearing witness against political oppression and exploitation,
- h. redressing wrongs against individuals, groups and peoples in the church, in this nation and in the whole world.

There is no peace without justice. Wherever there is brokenness, violence and injustice, the people of God are called to peacemaking...

- b. in a world where nations place national security above all else, where the zealotry of religion, race or ideology explodes in violence, and where the lust for getting and keeping economic or political power erupts in rioting or war" (*Book of Order*, W-7.4002-7.4003).

The Presbyterian Church (USA) has been involved in the Middle East for nearly two centuries, and this work is described on our denominational website<sup>89</sup> (the following paragraphs are adapted from the website). The denomination's long-standing work in Israel and Palestine has spanned a range of efforts: contributing to refugee relief and resettlement; combating hunger and poverty; supporting ministries of local churches; sponsoring travel-study seminars; promoting education, health and leadership development; vocational training programmes and self-development projects; programmes supporting peace, justice and human rights movements; engaging in constituency education; and mobilizing to influence public policy. For example, yesterday this meeting recalled that 8 March is International Women's Day. In 1835, American Presbyterians established the "school for girls in the Turkish Empire" in Beirut that is today the Lebanese American University with more than 6,000 students.

Since 1948, Presbyterian General Assemblies have repeatedly addressed the Middle East and particularly Israel and Palestine (information on those actions are available online). The Presbyterian position has consistently been to affirm the right of Israel to exist as a sovereign State within secure, internationally recognized borders and the right of the Palestinians to self-determination, including the right to the establishment of a neighbouring independent, sovereign State, with the aim of establishing a just and durable peace.

The ongoing violence in the region has been of grave concern to the church, particularly as it has escalated to a historic degree during the past four years, since the recent intifada was sparked. Reiterating concern at the deaths of civilians on all sides in this and other conflicts, the Presbyterian Church (USA) condemned again terrorism at its 216th General Assembly in 2004 (this important resolution on terrorism,<sup>90</sup> along with a 76-page study guide, is available online).

Central to violence against innocent civilians, to broad human rights violations (see the church's online *Human Rights Update*<sup>91</sup> with its special section on Israel and Palestine), to the dwindling Christian presence, to fear, humiliation, and anger for both peoples is the ongoing illegal occupation of Palestinian territory. The Presbyterian Church (USA) has repeatedly called for an end to the occupation. The Church's positions have been informed by and are sensitive to the perspectives of Christians in the region and to Christian-Jewish and Christian-Muslim relations. They seek to be in concert with the voices of Israeli, Palestinian and international peacemakers. They try to advance international law and United Nations resolutions. Consistent with its stand over the decades, the Presbyterian Church (USA) took four actions related to Israel and Palestine at its 216th General Assembly in 2004: a resolution confronting "Christian Zionism," a resolution calling for the establishment of a Palestine Mission Network; a resolution condemning the construction of a separation wall; and a resolution initiating a phased process of selective divestment. The first two resolutions deal with internal and church partner concerns about beliefs and the establishment of a network within the church for support, advocacy and economic development for the Palestinian people. My focus for this meeting will be on the latter two resolutions concerning the separation wall and phased, selective divestment.

The resolution on calling for an end to the construction of a wall by the State of Israel was adopted by the 216th General Assembly of the Presbyterian Church (USA) with the comment: "Recognizing that God's love as evidenced in Jesus Christ is for all God's children, and recognizing the human rights of all people to God's resources including land and water and livelihood, the 216th General Assembly (2004) of the Presbyterian Church (USA) requests the Stated Clerk make known to the President of the United States, the members of Congress of the United States, and the State of Israel, and the Palestinian National Authority its opposition to the construction of a wall and other barriers by the State of Israel and further to make known the desire of the Presbyterian Church (USA) that the United States of America make no monetary contribution to the \$1.3 billion cost of the construction of this wall, which has already begun and will continue for several years."

The comment from the Presbyterian Church (USA) General Assembly Council: "The General Assembly of the Presbyterian Church (USA) has approved numerous resolutions on Israel and Palestine, repeatedly affirming, clearly and unequivocally, Israel's right to exist within permanent, recognized and secure borders (for example: in 1969, 1974, 1977, 1983, 1989, etc.). It has deplored the cycle of escalating violence carried out by both Palestinians and Israelis which is rooted in Israel's continued occupation of Palestinian territories (cf. statements of successive assemblies since 1967). Presbyterians have continued to be concerned about the loss of so many innocent lives of Israelis and Palestinians (see "Resolution on the Middle East," approved in 1997, and "Resolution on Israel and Palestine: End the Occupation Now," approved in 2003).

"Because of its deep concern for peace in the area, and how the 'Separation Barrier,' generally referred to as the 'Security Wall,' is impacting the lives of people on both sides, the General Assembly Council expresses grave alarm at the construction of this barrier. Further, given the long-standing, deeply rooted spiritual and programmatic bonds existing between the Presbyterian Church (USA) and its partner churches in the Holy Land, it is particularly concerned that the life and ministry of the dwindling remnant of the Christian community will be severely impeded... Palestinian church partners have expressed the view that they might not object to the construction of a wall if it were built on Israeli land. The current wall ghettoizes the Palestinians and forces them onto what can only be called reservations."

At the Presbyterian Church (USA) General Assembly, Palestinian Christians made clear to American Presbyterians that they would welcome less words and more action. The Reverend Dr. Mitri Raheb, the Palestinian pastor of the Evangelical Lutheran Christmas Church in Bethlehem, told the commissioners of the 216th General Assembly (2004) of the Presbyterian Church (United States of America) that it is not enough to make statements which might be good for discussions within churches, but are not much help to us on the ground. The Anglican Bishop of Jerusalem urged words and actions in support of Palestinians and Israelis working for peace and justice: "[Speaking out] is not anti-Semitic. It's not anti-Jewish. It is anti-Israel-Government policy."

In response to these appeals, the Presbyterian Church (USA) 216th General Assembly (2004) approved a resolution on 2 July 2004 that refers to the Mission Responsibility through Investment Committee with instructions to initiate a process of phased selective divestment in multinational corporations operating in Israel, in accordance with General Assembly policy on social investing, and to make appropriate recommendations to the General Assembly Council for action. One week after the Presbyterian action, the International Court of Justice ruled on 9 July that Israel's security barrier violates international law because it violates Palestinians' rights. While we take some comfort in the Israeli Government's 20 February 2005 decision to modify the route of the wall, we still believe that the wall will neither be a just solution nor contribute to peace.

Jacques French describes the committee as one that encourages corporations to be socially responsible, by addressing issues such as environmental problems, exploitation of workers and complete financial disclosure. The committee was created in response to the Presbyterian belief that the investment of church funds is an instrument of mission and includes theological, social and economic considerations (183rd General Assembly, 1971, General Assembly minutes, UPCUSA, 1971, pages 596-612.) The Committee has worked for more than 30 years at incorporating the policies of the General Assembly into ethical investment decisions for the Board of Pensions and the Presbyterian Foundation. Those policies, broadly speaking, are the pursuit of peace, racial justice, economic and social justice, justice for women and achievement of environmental responsibility. Because of the Committee and similar organizations, investors have channelled more than \$2 trillion into socially responsible mutual funds, pension and endowment funds for universities, hospitals and non-profit organizations, and accounts of individual socially responsible investors.

The church's non-violent use of economic tools for justice clearly works. Today I received a letter from our denominational leaders stating that our church's boycott of a popular fast-food chain in the United States of America, Taco Bell, is now over because of the company's agreement to treat migrant workers more fairly.

On 6 November 2004, the Mission Responsibility through Investment Committee of the Presbyterian Church (USA) adopted a classification system and process to identify multinational corporations in Israel and Palestine and to implement the General Assembly policy of phased selective divestment. The Committee will compile a list of multinational corporations operating in Israel and Palestine based on the following criteria:

#### **Classification:**

1. Multinational corporations that provide products or services to or for use by the Israeli police or military to support and maintain the occupation.
2. Multinational corporations that provide products, services or technology of particular strategic importance to the support and maintenance of the occupation.
3. Multinational corporations that have established facilities or operations on occupied land.
4. Multinational corporations that provide products or services, including financial services, for the establishment, expansion or maintenance of Israeli settlements.
5. Multinational corporations that provide products and services, including financial services, to Israeli or Palestinian organizations or groups that support or facilitate violent acts against innocent civilians.

6. Multinational corporations that provide products or services, including financial services, that support or facilitate the construction of the separation barrier.

### Progressive Engagement List

A list of multinational corporations identified for progressive engagement by the Committee will be prepared using the classification system, measured against the following factors:

1. History and nature of involvement in Israel and Palestine.
2. Magnitude and strategic importance of involvement.
3. Acts of corporate opposition to the occupation, direct contributions to the victims of the occupation, support of a viable economy for an independent Palestinian State, and non-discrimination against Israeli Arabs or Palestinians in employment practices.

### Process

1. The Committee will correspond with the leadership of those multinational corporations, expressing the concerns of the General Assembly and pursuing a process to identify desirable changes in the company's role in Israel and Palestine.
2. The Committee will notify the appropriate Presbyterian Church (USA) governing bodies and solicit their involvement in the process of engagement with corporate leaders.
3. In the course of the dialogue with multinational corporations, the Committee may request the General Assembly council to authorize the filing or co-filing of shareholder resolutions with subject multinational corporations using appropriate channels for the filing.
4. The Committee, in cooperation with ecumenical partners, will monitor regularly the progress made with subject multinational corporations.
5. When the Committee is persuaded that a particular multinational corporation, after extensive engagement, remains uncooperative or has refused to be in dialogue with the churches, it may prepare a recommendation to the General Assembly council asking the General Assembly to place the multinational corporation on the divestment/proscription list and urging the Foundation and the Board of Pensions to comply with the action of the General Assembly.

The Presbyterian Church (USA) works ecumenically with many organizations, including the National Council of Churches in the United States of America and the World Council of Churches.

On 14 and 15 February 2005, the Governing Board of the National Council of Churches received the statement of the Council's official delegation to the Middle East (21 January-4 February), and commended it to the Council's 36 member churches for their consideration. The statement, entitled "Barriers Do Not Bring Freedom", states:

"...We understand that the separation barrier is being built as a deterrent against attacks on Israel. However, we learned that 85 per cent of Israel's separation barrier is being built on Palestinian land. Much of this is to include West Bank settlements within the barrier. Quite simply, those settlements should never have been built and must be removed. Like any other nation, Israel has the right to build a barrier; however, one people's barrier should not be built on the land of another people. We call for the removal of the separation barrier from Palestinian territory.

...We ask the international community to invest in Palestinian projects and businesses. We learned of the pressing need for aid to flow to Palestinian communities in East Jerusalem, in addition to other occupied territories...We call on American Christians to contact the President of the United States and their Members of Congress to insist that United States policy be balanced towards both Israel and Palestine. Middle East churches have a vital role to play as bridge builders and peacemakers.

We pledge our solidarity with them as part of the One Body of Christ and we will look for ways to lift up their presence and needs within our churches. We affirm and endorse the World Council of Churches' Ecumenical Accompaniment Programme which assists Palestinians and Israelis in their everyday lives and urge our member communions to support and participate in this programme. We urge people of faith and others in the United States and from around the world to visit the Middle East and better understand the situation for themselves. As people of faith, we affirm life. When ancient olive trees are uprooted from the soil in which they were planted, when access to water is denied, when children's futures are threatened, this does not lead to life in this world as intended by God. Join us in prayer for the peace of Jerusalem and in seeking justice for all people of the Middle East."

The Ecumenical Accompaniment Programme in Palestine and Israel is an initiative of the World Council of Churches under the Ecumenical Campaign to end the illegal occupation of Palestine: support a just peace in the Middle East and is described on the World Council of Churches website: Its mission is to accompany Palestinians and Israelis in their non-violent actions and concerted advocacy efforts to end the occupation. Participants of the programme are monitoring and reporting violations of human rights and international humanitarian law, supporting acts of non-violent resistance alongside local Christian and Muslim Palestinians and Israeli peace activists, offering protection through non-violent presence, engaging in public policy advocacy and, in general, standing in solidarity with the churches and all those struggling against the occupation. Based on its agreed framework, the programme is based on principles of international humanitarian and human rights law, including resolutions of the United Nations Security Council, the General Assembly and the Commission on Human Rights. It is a programme developed in response to Israel's violation of internationally accepted norms and principles of human rights and the rule of law, in particular the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War; the International Covenant on Civil and Political Rights, article 1 of which requires that parties to the Covenant protect the rights of all individuals subject to its jurisdiction, that is individuals under its effective control. Ecumenical Accompaniers, who serve a minimum of three months, work with local churches, Palestinian and Israeli non-governmental organizations, as well as Palestinian communities in various capacities to try to reduce the brutality of the occupation and improve the daily lives of both peoples. Accompaniers will continue to be placed in Bethlehem, Hebron, Jayyus, Jerusalem, Nablus, Ramallah, Tulkarm, and Yanun. Since the programme was launched in August 2002, 168 Ecumenical Accompaniers have participated from more than 30 churches and ecumenical partners in 12 countries: Canada, Denmark, France, Germany, Ireland, New Zealand, Norway, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, and the United States of America."

The non-violent work of the Programme is not without risk; participants have been attacked several times. The latest news of 16 February 2005 was that members of the Italian organization Operazione Colomba (Operation Dove) and the Christian Peacemaker Teams were attacked by Israeli settlers today near Hebron, with one volunteer still in the hospital in Beer Sheva in serious condition with head injuries. The most seriously injured of the volunteers is from Operazione Colomba – a nonviolent peace corps of the Pope John XXIII Community. He was bloodied during the beating and is said to have lost consciousness. He is suffering from short-term memory loss and blurred vision.

On 21 February 2005 the Central Committee of the World Council of Churches met in Geneva and passed an action that encourages member churches to work for peace in new ways and to give serious consideration to economic measures that are equitable, transparent and non-violent; persuades member churches to keep in regular contact with sister churches embarking on such initiatives with a view to support and counsel one another; urges the establishment of more and wider avenues of engagement among Christian, Muslim and Jewish communities pursuing peace; reminds churches with investment funds that they have an opportunity to use those funds responsibly in support of peaceful solutions to conflict. Economic pressure, appropriately and openly applied, is one such means of action.

The work for peace and justice in the Middle East will require more than words and actions, it also needs prayers of all people of faith. I conclude this report with

the prayer attributed to St. Francis with which I led the Presbyterian Church (USA) General Assembly in prayer at the beginning of the Peacemaking Committee's report. I realize there are people present here from many different faiths and perspectives. When offering this prayer, I seek not to impose my faith on others, but to express the spirit in which our church works for peace and justice for all.

Lord, make me an instrument of your peace.  
Where there is hatred, let me sow love;  
where there is injury, pardon;  
where there is doubt, faith;  
where there is despair, hope;  
where there is darkness, light;  
where there is sadness, joy.  
O Divine Master, grant that I may not seek so much  
to be consoled as to console,  
to be understood as to understand,  
to be loved as to love.  
For it is in giving that we receive,  
it is in pardoning that we are pardoned,  
and it is in dying that we are born to eternal life. Amen.

**Mark Lance**  
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United States Campaign to End the Israeli Occupation  
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#### Civil society and civil disobedience: strategy and tactics of solidarity

It is an honour to have been asked to make a contribution to this international meeting and a pleasure to see that you have made room for so odd a creature as a philosopher-activist. I trust you did so in full awareness of the habits of direct, perhaps even undiplomatic, speech common to both vocations. I certainly mean no disrespect in any of my observations, but I feel the situation confronting us calls for honesty and urgency. Indeed, I feel that we owe an answer to the question raised by several visitors from Palestine – that is: what are we going to do about it? Given my time constraints, I begin by detailing without argument what I take to be the plain facts of the current situation, and move from there to strategic implications.

First, as a result of the continued construction of the apartheid wall – itself a culmination of the process of dividing and colonizing the Occupied Territory through settlements, bypass roads checkpoints, and so on – the possibility of a meaningful Palestinian State, indeed of a functional Palestinian society even, is rapidly disappearing. Current negotiations promise no serious discussion of the crucial issues of occupation, focusing merely on how to achieve a “calm” within which the United States and Israel can continue the institutionalization of their respective occupations. It would, indeed, be optimistic even to expect Palestinians to achieve managerial control over the emerging network of Bantustans. More likely is that negotiations will break down and return to earlier levels of violence with the familiar results for both Israeli and Palestinian society.

I say that these are the only realistic outcomes because of the manifest power imbalance. Israel currently holds all the cards – economic, military and political – and enjoys the absolute support of the world's dominant power. In such a situation, hoping for a diplomatic success by the Palestinian Authority is merely whistling in the dark. Nor should we hope for change in political direction from either the United States or Israel. Cosmetic gestures notwithstanding, both regimes are moving toward more hard-line positions regarding fundamental issues.

What of Europe or the United Nations? To be blunt, I see no prospect that either will develop the courage to confront the United States. For nearly four decades the States Members of the United Nations have declared their commitment to ending the occupation and to the right of return, but have left the de facto management of the situation up to the United States. If General Assembly resolutions 194 (III) and Security Council resolution 242 (1967) have not, all these long years, been implemented, I hardly expect an outpouring of action around ruling by the International Court of Justice.

So who might be left to implement international law, to change the political dynamics or to alter the power relations that hold the system of oppression in place? No doubt the Palestinian people will continue to resist in whatever ways they can, some strategic, some merely desperate. But the resistance of a minority population, facing an overwhelming military, economic and organizational imbalance and lacking any sort of serious unified strategic movement leadership will not be successful on its own.

Which leaves us with one answer: civil society, that is, the common people of the world. On the one hand, that is unfortunate. It is a shame that the future of Palestine should be left to that least respected of forces, placed as we are in the latter half of the last session of these meetings (and that, of course, is a far more significant place than we are accorded in most settings). On the other hand, this is for many of us a comforting, even inevitable answer. It was, after all, such common people who provided the necessary solidarity to help end apartheid in South Africa; and reflecting on the history of my own country, one recalls the abolition of slavery, women's suffrage, the end of several wars, desegregation, the 40-hour work week and the end of child labour as not entirely inconsequential accomplishments of grass-roots movements.

If, as I believe, it is clear that grass-roots action is the only way to meaningfully support justice in Palestine, it is also clear that the centre of such action must be in the United States of America. The economic, military, and diplomatic support of the United States is essential to the maintenance of Israeli apartheid. Thus, it is primarily up to the people of the United States to change things; for in the end, what can the people of the rest of the world do? The opinions of their Governments are of limited relevance so long as they are dismissed by my country's officials. Can the people of the rest of the world force their Governments to risk direct confrontation – either economic or military – with the United States? This is not to say that there are not positive actions that can be taken by other Governments, at all levels. I mention some of the most salient below, but the elephant in the room is United States policy, and we would all be wise to be clear about that.

So as I see it, two issues dwarf all others in importance for those of us who are not ourselves Palestinian or Israeli: what is the right course for a solidarity movement centred in the United States, and what is the best way for international institutions to support that movement?

Strategically, our movement should model itself on anti-apartheid solidarity with the South African people. All elements of that movement should be a part of our strategic goal: certainly economic and electoral pressure on Israel and the United States, but in addition the isolation of Israel in cultural, sporting, artistic and intellectual spheres given that the Israeli elite sees itself, as did the South African, as a part of the “enlightened West” rather than as citizens of its geographic region.<sup>92</sup>

Current efforts to build in each of these directions are important, but in my view, such projects are in their infancy and we are in no position to launch any of them in a serious

way. What we are in a position to do is to find a single exemplary target around which to carry out a sort of prototype of activism to come.

A crucial need of the Palestinian solidarity movement is a degree of unity. This is not to say that every group needs to merge or to adopt the same politics, tactics or internal organizational forms - quite the contrary. It is to say, however, that we need to move away from our dysfunctional history of infighting, sectarianism and power struggles. We desperately need an overarching framework within which all of our work can fit, and we must find ways to build on and support each other's projects.

Such a framework in the United States seems to have come into existence for the first time with the formation of the US Campaign to End the Israeli Occupation (USC). The campaign is a coalition of existing local and national organizations and is by far the largest and most diverse grouping ever in the United States to work around Palestine. It now boasts over 250 member organizations around the country from a wide variety of political, ethnic, religious and tactical perspectives, all working to change United States Government and corporate policy within the framework of international law.

But there is another sort of unity that is crucial if this movement is to grow. There is a need for concrete projects to which a wide variety of organizations can contribute. It is all well and good for organizations to join a coalition, sign onto principles of unity, endorse a framework, and so on. Such paper unity comes and goes. What ties us together into a movement, leads to mutual trust and cooperative habits, builds enthusiasm and momentum and allows us to move from one success to the next stage is a shared campaign that is winnable, while at the same time serving as an entering wedge for future work.<sup>93</sup>

For decades the Caterpillar Corporation has supplied bulldozers to the Israeli military for use in home demolitions, the construction of settlements and more recently of the apartheid wall. This corporate support for crimes against humanity has been criticized from the beginning, but it was not until early in the second intifada that the idea of a focused campaign against the Caterpillar Corporation's sales to the Israeli military was proposed.<sup>94</sup>

There are several reasons for centring activist pressure on the Caterpillar Corporation. First, we must be realistic about our level of resources,<sup>95</sup> while recognizing that a concrete success will do more to increase those resources than anything. The Caterpillar Corporation provides a unifying immediate target.

Second, the demand that the Caterpillar Corporation end sales to the Israel Defense Forces is modest enough to generate nearly universal support among United States solidarity activists.

Third, the uses of Caterpillar Corporation equipment in the Occupied Territory are clearly illegal and graphically immoral, providing vivid images of collective punishment against civilians and the theft of land.

Fourth, the Caterpillar Corporation is largely a public company selling to private construction companies, so they are more vulnerable to pressure than a corporation whose work is primarily in the arms trade.

Fifth, the Caterpillar Corporation does only a small part of its business with the Israel Defense Forces, so it is possible for it to meet our demands without doing great harm to the corporation. In particular, the Caterpillar Corporation sells far more equipment to the Arab world than it does to Israel, making for the possibility of highly effective targeted boycotts from that part of the world.

Sixth, a Caterpillar Corporation bulldozer was used to kill American solidarity activist Rachel Corrie. While it is important not to allow ourselves to play into racist assumptions that the lives of white people are more important than those of Palestinians, it would be foolish not to take into account the power of Ms. Corrie's murder as a symbol to the American people.

Seventh, the Caterpillar Corporation has offices in every State of the United States, nearly every large and medium-sized city and most countries around the world. This greatly facilitates local activism, as there will always be targets nearby.

Finally, there is the additional fact that the overwhelming majority of solidarity groups in the United States have been convinced by these considerations to make the Caterpillar Corporation their activist focus. (Not to mention the fact that the Corporation has been singled out for criticism by numerous human rights organizations and targeted by European, Israeli and Palestinian activists). At this point, this momentum itself constitutes an independent reason to work on the Caterpillar Corporation.

To date, our work around the Corporation has involved hundreds of educational forums, protests, street theatre, banner and leafletting, and civil disobedience around the United States, and also in Europe, a massive email campaign organized by Progressive Portal, some tentative investigation into lawsuits under domestic law, a national protest in early 2004, at the Corporation's home office in Peoria, Illinois, on the anniversary of Ms. Corrie's murder, several boycott initiatives and a shareholder's resolution that will be introduced for the second time on 13 April by Jewish Voice for Peace and others at the annual Caterpillar Corporation shareholders' meeting in Chicago, Illinois.

That meeting will form the occasion of a national day of action with protests in over 50 localities, including a large presence in Chicago. The week leading up to this event will see a media blitz, a lobbying campaign and a broad educational effort.

This brings us to the question of what groups in the rest of the world can do to support this effort. In my few remaining minutes, I will give a list, in rough order of difficulty:

1. Write and email to the Chief Executive Officer of the Caterpillar Corporation demanding an end to sales to the Israel Defense Forces.
2. Sign the petition at the website [www.bootcat.org](http://www.bootcat.org).
3. Distribute educational materials about the Caterpillar Corporation. (One can find materials and information on actions at [www.catdestroyshomes.org](http://www.catdestroyshomes.org) and [www.endtheoccupation.org](http://www.endtheoccupation.org)).
4. Raise funds for the work of the United States campaign or member groups. Money can be directed to any aspect of the work, including educational aspects for those who cannot raise funds for more confrontational activities.
5. Demand that pension funds, Governments, universities or anyone else holding shares in the Caterpillar Corporation vote that stock in favour of the Jewish Voice for Peace resolution.
6. Demand that your institutions, corporations, local Governments, national Governments, boycott Caterpillar Corporation equipment in any and all construction projects.
7. Finally, organize a delegation, protest, banner, street theatre or preferably non-violent civil disobedience at local Caterpillar Corporation offices on 13 April and beyond.

My friends and colleagues, this is the only realistic way to implement the ruling of the International Court of Justice on the wall. It is not that we need a movement in addition to, or in support of, high-level implementation of the ruling. Nothing but a movement will do more than offer unenforced resolutions. Grass-roots organizing in the United States has built a nationwide network over the past two years with fewer monetary resources, I would guess, than went into this conference. What I am suggesting is a bold reversal of work to date, one in which we see the work of Governments and international institutions as support for the movement of the people of the world for justice, exactly as we had in the case of South Africa.

I firmly believe that the people of the world can end Caterpillar Corporation sales to the Israel Defense Forces. Such a victory would be a small one, of course, not even ending home demolitions, much less the occupation. But at the same time, it can be that crucial entering wedge, that first stone that begins an avalanche. Once the Caterpillar Corporation takes responsibility for the illegal uses of its equipment, we will move on to a broader corporate campaign. At the same time, this success will provide a strong impetus to initiatives towards cultural, academic and political isolation, all accompanied of course by direct pressure on elected officials in the United States and Israel.

Every social movement looks to early moments that, in retrospect, were turning points – the Columbia University sit-ins for divestment, Stonewall, Selma and Birmingham, the Indian salt marches, and so on. The Caterpillar Corporation can be such a moment in the campaign of solidarity with the people of Palestine.

Today the Caterpillar Corporation, tomorrow comprehensive sanctions, soon a free Palestine.

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#### Palestinian civil society's role in advocating adherence to international law

It is well known that Palestine has a vibrant civil society, with non-governmental organizations working on such varied issues as education, health, human rights, the environment, gender, youth, culture and labour. In the 26 years since Al-Haq was founded as the first human rights non-governmental organizations in the Occupied Palestinian Territory, the number of such organizations has multiplied, and they play an important role in providing services, raising awareness, challenging the occupation and ultimately, in developing the foundation for a Palestinian State adhering to democracy and rule of law.

#### **The role of Palestinian civil society in promoting compliance with international law**

There are four main ways in which Palestinian civil society promotes compliance with international law: gathering and disseminating information; campaigning and advocacy; undertaking litigation; and providing education and training to Palestinian society. Each of these activities seeks to apply strategic pressure in order to increase Israeli compliance with international law.

##### *Gathering and disseminating information*

Among the most important contributions of Palestinian non-governmental organizations are the gathering and dissemination of information about current developments on the ground, serving as a barometer of the human rights situation in the Occupied Palestinian Territory. The backbone of organizations like Al-Haq is their monitoring and documentation staff, for it is those individuals who investigate and verify the abuses of international law. This information is analysed from a legal perspective and relayed to the international community via press releases, interventions and reports. The ability to make credible and up-to-date information about human rights violations readily available is one of the most fundamental tasks undertaken by Palestinian civil society.

Recipients of this information - such as international non-governmental organizations, international organizations, jurists, media and diplomats - use it in their own work and advocacy efforts. Most of those efforts contribute to the process of naming and shaming, a key strategy used in human rights advocacy. Furthermore, each type of recipient can contribute based its special interest or target group, so that consular offices can apply diplomatic pressure, for example, while jurists can utilize information to apply pressure through legal bodies.

A related activity which Palestinian civil society undertakes is assisting others in obtaining access to information. Non-governmental organizations often assist others in their work on the ground, providing them with contacts and access to victims of human rights violations and other essential information-gathering tasks. As with all means of providing access to information, such activities are frequently based on partnerships with other organizations; the contribution of Palestinian non-governmental organizations is essential to the ability of partner institutions to carry out their work.

##### *Campaigning and advocacy*

Palestinian non-governmental organizations regularly utilize direct means of promoting compliance with international law through campaigning and advocacy. Those activities include alerting diplomatic missions in the Occupied Palestinian Territory, advocacy before international organizations, outreach to the international media and undertaking campaigns. Some of this work is done individually, while some is undertaken jointly through coalitions, such as the Palestinian non-governmental organizations network or the popular campaign against the wall. Al-Haq, for example, regularly issues interventions and press releases and raises concerns with diplomatic missions. Over the years, the organization has undertaken campaigns on family unification and house demolition, and currently is focusing on the issue of collective punishment and measures of intimidation, such as the wall.

Those types of activities also contribute to the naming and shaming process. Moreover, they serve as another means to provide information about ongoing human rights violations in the Occupied Palestinian Territory. In some instances, advocacy by Palestinian non-governmental organizations motivates other groups, such as international non-governmental organizations, to undertake more work domestically or internationally on a given issue. In addition, campaigning and advocacy can result in increased diplomatic pressure on the Israeli authorities to stop egregious violations.

##### *Litigation*

A number of Palestinian non-governmental organizations contribute directly or indirectly to efforts to legally challenge Israeli practices that are in breach of international legal norms. Such challenges can be carried out in Israeli or international courts. Using the Israeli courts is a controversial matter, as many Palestinians believe that they cannot obtain justice from the Israeli judicial system. Some organizations will submit only test cases, such as Al-Haq's current test case on the question of Israeli inaction in response to settler violence in Hebron. Other organizations focus a substantial part of their work in using the Israeli legal system to challenge those illegal practices.

Non-governmental organizations involved in litigation also submit legal challenges in various national jurisdictions. Many of those cases utilize the Geneva Convention articles in third party States. One of the best known examples of litigation in third party States was the case in Belgium against Ariel Sharon. Arguably, one of the most difficult aspects of this approach is proving the right of the petitioner to be heard in a particular jurisdiction. It is for this reason that those undertaking such litigation have a

particular challenge in identifying not only the right issue on which to litigate, but the right individuals on whose behalf to petition.

Litigation before national courts plays an obvious role in promoting compliance with international law. At a minimum, legal challenges are important in naming and shaming authorities responsible for Israel's systematic violations of international law. Legal challenges to Israeli practices of house demolition, targeted assassinations, use of Palestinians as human shields and discrimination in family unification have all gotten a substantive amount of attention from the international community, which itself serves as a means of pressuring Israeli authorities. Moreover, this is an area where non-governmental organizations are less limited by the frustrating lack of enforceability of many provisions of international law, as the very purpose of litigation is to enforce law. In some instances, it gives non-governmental organizations an opportunity to challenge fundamental Israeli interpretations of international law, such as the recent petition regarding house demolitions in Rafah, in which petitioners raised the matter of the Israeli interpretation of "military necessity."

In those few instances where a more positive outcome has been realized, it serves to increase the legal pressure faced by Israeli officials. Proponents of this approach state that domestic litigation not only serves the vital legal task of exhausting domestic remedies, but can also unveil important information for future efforts to obtain justice. A significant example was the petition before the Israeli High Court in April 2002 in which the State Attorney admitted that in some instances the Israeli military had begun to demolish some houses even before the residents had left.<sup>96</sup>

While the Court nevertheless dismissed the petition, this admission is something that human rights defenders can use in the future in seeking justice. Lastly, litigation may also result in increased diplomatic pressure.

#### *Providing education and training to Palestinian society*

Non-governmental organizations have an important task in increasing awareness-building of international legal standards in Palestinian society. Many organizations such as Al-Haq include training and education in international human rights or humanitarian law as a substantive part of their programme activities each year. In order for civil society to be able to continue advocating for adherence to international law, it must be informed about it. With this in mind, non-governmental organizations carry out training for many components of Palestinian society. This type of awareness-building is important in training current and future generations of civil society leaders. Like all other means of promoting compliance with international law, this serves to sensitize society about human rights standards. Non-governmental organizations carry out other forms of awareness-building as well, in particular through the dissemination of legal standards and other material on knowing one's rights. Al-Haq also houses an extensive library of international human rights and humanitarian legal texts that is open to the public. Those kinds of activities all play an important role in keeping international law on the agenda.

Having considered each of those means by which Palestinian civil society promotes compliance with international law, it is worth noting that arguably the simplest way in which Palestinian civil society promotes such compliance is by fighting for itself. By ensuring that Palestine continues to have a vibrant civil society, non-governmental organizations are playing an important task in nation-building and promoting respect for the rule of law.

#### **How Palestinian civil society is using the advisory opinion of the International Court of Justice in its work**

The next question is how Palestinian non-governmental organizations are utilizing the advisory opinion of the International Court of Justice in those activities. At the most basic level, Palestinian civil society has adopted the advisory opinion as a reference point in its work to promote Israeli compliance with international law. This can be seen in citations of the Opinion in press releases, interventions, reports and countless other advocacy materials. While the primary focus of the advisory opinion was the wall, its clear references to other key issues, such as Israeli settlements and the Palestinian right to self-determination, are such that the opinion is of relevance to other fundamental human rights struggles in the Occupied Palestinian Territory. With this in mind, Palestinian non-governmental organizations have adopted the language of the opinion in their daily activities.

The use of the advisory opinion as a tool to realize change is also seen in Palestinian partnerships with domestic and international civil society organizations. A key example of such domestic partnerships is the popular campaign against the wall. This campaign was initially established by the network of Palestinian environmental organizations, but has since been structured into a national campaign in which a broader range of organizations is taking part. At the international level, the Palestinian non-governmental organizations network is developing an action strategy, presently aimed at Europe, which uses the Opinion as its focal point. Palestinian non-governmental organizations are also working together with groups such as the Aprovech donor agencies and the Euro-Mediterranean human rights network on advocacy around the wall, the European Union-Israel Association Agreement, and other related matters.

The Advisory Opinion is viewed by a number of organizations as a step in a series of legal measures comparable to those utilized in the struggle against apartheid. It is evident that this is not accidental; indeed, the wording of the referral to the International Court of Justice was drafted in a manner reminiscent of comparable referrals to the Court in regard to Namibia. The advisory opinions and judgements resulting from the question of Namibia were key factors leading to the boycott of South Africa and the ultimate downfall of the apartheid regime. While it is perhaps unwise to view the legal situation in apartheid South Africa as precisely the same as that in the Occupied Palestinian Territory, it is important that Palestinian non-governmental organizations are trying to learn the lessons from their struggle, in particular, how to best utilize opinions of the International Court of Justice.

This being said, it must be noted that Palestinian civil society has not fully utilized this new tool provided by the International Court of Justice. This is perhaps due to a lack of understanding of what is in the advisory opinion or the ongoing cynicism about the United Nations and international law. To some degree, it also relates to concerns about certain aspects of the opinion, in particular the concerns regarding the registry of damages, as there are concerns that financial restitution will serve as a substitute for halting the wall's construction and the dismantling of those sections built to date. Nevertheless, it is submitted that civil society must take action on the advisory opinion because civil society itself is one of the key components necessary to effect change on the ground. Making increased practical use of the opinion remains one of the key tasks ahead for Palestinian civil society.

It is particularly important for Palestinian civil society to be utilizing the advisory opinion in light of the Israeli response to the Opinion itself. While officially continuing to reject the opinion, Israeli authorities are at the very least discomfited by it, and some are acutely aware of the legal vulnerability they now face. One of the most substantive indicators of this shift was the comment of Attorney General Menachem Mazuz, who stated that "[t]he International Court of Justice decision creates a legal reality for Israel, which could serve as an excuse and a catalyst for activity against Israel in international forums, to the point of sanctions."<sup>97</sup>

Israeli High Court judges have also made some interesting comments over the past several months, reflecting an increased interest in human rights reports produced by the United Nations and international human rights organizations. It seems evident that there is concern on the part of Israeli jurists regarding the international perception of Israeli practice and judicial approval thereof.

Unfortunately, however, the official response of the State remains the same. Less than two weeks ago, the Israeli Ministry of Justice issued an extensive written brief on the legal implications of the advisory opinion. The main findings of the brief were that the factual basis on which the opinion was based was lacking, inexact and outdated, and irrelevant due to changes in the wall's route and improvements in providing for the needs of affected Palestinians. The Ministry found that the opinion should have no application upon the cases being considered by the Israeli courts. From this, it appears evident that the ongoing Israeli rejection of the application of international legal norms to the Occupied Palestinian Territory, and their accountability under these norms, has not substantially changed.

#### **Recommendations and conclusion**

This rejection and the substantive continuation of Israeli violations of international law in the Occupied Palestinian Territory highlights one of the key challenges faced by Palestinian non-governmental organizations. Many of those measures will serve as leverage to pressure the Israeli authorities to comply with their international obligations,



but it is much harder to actually end the violations themselves. This is, admittedly, a problem faced by civil society organizations around the globe, in light of the difficulty in enforcing human rights legal standards. Despite the Israeli rejection of the Opinion, its value as a tool in implementing new and creative measures to reduce and bring to an end the many violations of Palestinians' fundamental rights should not be underestimated.

It is perhaps stating the obvious to say that civil society in general has a substantive moral interest in and commitment to increasing respect and adherence to international law.

For Palestinian non-governmental organizations, however, the commitment is both moral and personal. Palestinian civil society advocates live with the daily reality of disrespect for international law, and live firsthand with the consequences of that disrespect and its impact both on their lives and their work. This work is not easy, not just because of the difficult environment in which it is carried out, but because of the increasing cynicism on the part of the Palestinians themselves. There is an inherent scepticism about international law, and it is not uncommon to hear Palestinians on the street question whether human rights really exist, in light of the frequency with which Israelis violate them in the Occupied Palestinian Territory. This reflects the general sense of hopelessness that is prevalent on the streets of Ramallah and elsewhere throughout the Occupied Palestinian Territory.

This being said, Palestinian civil society remains committed to international legal norms and the use of advocacy to strive for their respect. Non-governmental organizations are an important link; they serve as a critical component in ensuring the functioning of international law. With regard to advocacy concerning the wall in the aftermath of the advisory opinion, Al-Haq believes that there are several things that Palestinian and international civil society could focus on in order to promote Israeli compliance with international law:

1. Ensure that third-party States are not taking actions that aid or assist in the construction of the wall in the Occupied Palestinian Territory. International civil society organizations should be monitoring the actions of their own Governments to ensure that they are not providing such assistance, either directly or indirectly through domestic corporations. Such actions include the provision of financial assistance to improve the gates in the wall, or governmental inaction with regard to corporations such as the Caterpillar Corporation in the United States or CRH in Ireland, which are assisting in the building of the wall. Civil society organizations in those countries can campaign, lobby and bring legal challenges regarding such violations of their Governments' duties.
2. Monitor and utilize bilateral agreements between Israel and third-party States. Agreements such as the European Union-Israel Association Agreement and scientific or technical agreements can be used as leverage to pressure Israel to comply with its obligations under international law. This includes the use of benchmarks to assess Israeli compliance. Non-governmental organizations should ensure that third-party States involved in such agreements are not taking steps that violate their obligations under international law. As my colleagues have stated over the past day and a half, this includes not only the construction of the wall, but the construction and expansion of Israeli settlements and the entire regime associated with the wall's construction.
3. Third-party States have obligations as High Contracting Parties to the Fourth Geneva Convention, in particular the obligation to respect and ensure respect for the Convention's provisions. While it is recognized that previous meetings have been short in duration, to say the least, the issuance of the advisory opinion gives renewed possibilities for a meeting of the High Contracting Parties.
4. In light of the current sense of optimism regarding the possibility of a solution to the conflict, it is important to stress that the advisory opinion and other aspects of international law must be utilized as a key reference point in political negotiations. This should be borne in mind not just by Israeli and Palestinian officials, but by members of the Quartet and other interested parties involved in the process. A just and durable solution to the conflict must be based on respect for international law; civil society must not concede to efforts to ignore or negotiate away rights and duties.

As has been repeatedly noted by speakers throughout this conference, the advisory opinion has given us an extraordinary tool, one whose underlying message is simply adherence to international law. The task before us now is to work together and, speaking in one voice, to utilize it to its fullest.

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Dakar

## Introduction

First of all, speaking on behalf of my organization, and in my own name, I would like to express our profound gratitude to the Committee on the Exercise of the Inalienable Rights of the Palestinian People for inviting us to this international meeting where we have an opportunity to state our views on the role of parliaments and civil society in advocating adherence to international law.

We cannot begin to address this question without first affirming and reaffirming to the Committee our strong conviction that unless the Palestinian people are able fully and completely to enjoy their inalienable rights, their right to self-determination — which cannot be realized in the presence of the wall built by Israel on 99 per cent of the Occupied Palestinian Territory — peace, security and stability will be a rare commodity in the Near East for a long time to come.

The wall violates the right to self-determination. It changes the demographic composition of the Occupied Palestinian Territory and violates international human rights law, particularly the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The wall represents an intolerable assault against international humanitarian law, including the provisions of the Geneva Convention of 1949.

As you are well aware, we are referring to certain aspects of the advisory opinion of the International Court of Justice. The wall of shame must be destroyed, and the Palestinian people must be compensated.

The time is ripe for that to be accomplished, thanks to the renewal of talks between the Palestinian Authority and the Israeli Government. Destroying the wall could certainly help speed up the peace process and the implementation of the road map.

No one should be indifferent to the issues involved in the question of Palestine — the tragedy and injustice of it all, the many years this has been going on, the high stakes for peace, security and stability in the Near East, and the implications for international relations throughout the world.

National and international opinion must be mobilized so that the world will understand that the primacy of law over force is the only option for building workable and effective regulatory mechanisms in human, social and international relations. We must build a structure for preventing conflict and guaranteeing peace and security in the world.

This is clearly stated in the United Nations Charter:

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

Having reaffirmed those principles, let us now address the substance of the issue.

Israel is under an obligation to respect the opinion handed down by the highest United Nations jurisdiction, namely, the International Court of Justice. This *erga omnes* opinion is universally applicable, according to the Court. This means that Israel has violated the unchallengeable obligations of customary international law (Pieter H. F. Bekker, in *La Responsabilité des Gouvernements et des Organisations intergouvernementales dans le respect du droit international*).

### **The role of Parliaments**

Turning to the subject that concerns us, that is, the role of parliaments and civil society in advocating adherence to international law, the importance and timeliness of the subject are self-evident, as are the involvement and the actions of the stakeholders referred to here.

I will briefly describe the role of parliaments in order to stress the need for synergy, for convergence, for partnership — not only to promote international law, but also to ensure its incorporation into domestic legislation, to further the process of harmonizing texts so that they can be implemented locally.

Deputies, or members of parliament, exercise the power to legislate. This power is enormous in a parliamentary system and not unimportant in a presidential system. Parliamentarians sometimes initiate legislation, and they also adopt, amend or reject bills that are sent to them by the Government. In exceptional circumstances, as in a state of war, emergency or siege, the parliament must approve the decision of the president of the republic before it can be executed. In some countries, parliamentarians serve on a high court charged with judging the chief of State for high treason or removing him or her from office.

In the field of international law, in certain African constitutions, the deputies authorize the president of the republic to ratify or approve treaties, conventions and international agreements. With the power they have as representatives of the people, parliamentarians are in a privileged position to advocate adherence to international law. Where civil society is concerned, the parliament is an ideal partner in advocacy, thanks to its legitimacy as an institution of the republic.

Senegal is aware of the many duties involved in chairing the United Nations Committee on the Exercise of the Inalienable Rights of the Palestinian people.

- The duty of the Parliament of Senegal to remind the Government of its international obligations relating to the decision of the International Court of Justice declaring the wall illegal.
- The duty to challenge the Government of Israel to meet its *erga omnes* obligations, that is, the inevitable obligation of the State of Israel to observe customary international law, namely, respect for the right to self-determination of the Palestinian people, which is incompatible with the construction of the wall.

### **The role of civil society**

What is civil society?

This is not an idle question, considering the controversial interpretations of the meaning of civil society, which is polysemic, as it is understood differently, depending on historical and even geographical context (in Africa, it must be non-partisan), and the nature of the structure concerned, its mandate and its missions.

- For the Italian philosopher Antonio Gramsci, civil society comprises all that is beyond the scope of the State, including labour unions, political parties, youth movements, women's movements and so-called non-governmental organizations;
- For Alexis de Tocqueville, civil society comprises the traditional and customary leaders who are considered members of society.

The current tendency is to restrict the semantic interpretation and the field of action of civil society. It is understood to relinquish any claim, any effort to rule or exercise power at the State level. That is not its role. In any event, more and more, since civil society has entered the arena of partisan politics, or in the conquest of State power, it ruins its credibility, its legitimacy and its effectiveness. And this, nevertheless, is worth reflecting about.

To be brief, it should, on this precise point of its mandate, reassure men in power. Thus, the concepts of neutrality, but above all of independence, are part of the definition of a civil society that has become more and more demanding and more and more professional.

In general terms, I would define its advocacy role as that of promoting a political economy of peace, justice and human security, this being understood as encompassing security of property and of persons, justice and freedom, as well as food security, health security, the enjoyment of the right to education, to employment, to shelter, to a healthy environment — in brief, human rights for all.

A political economy of peace, justice and human security is impossible in the absence of respect for all human rights, which includes civil and political rights, to be sure, but also economic, social and cultural rights, the right to a healthy environment and the right to peace — a fundamental right that has yet to be elaborated.

We must remember that human rights are inseparable, indivisible and interdependent.

### **Civil society as a structure**

What makes civil society effective is its structure, its flexibility, its minimal bureaucracy, its process of less restrictive decision making, its capacities for initiative, innovation and creativity, but above all and mainly, its militancy, its voluntary status and more and more its professionalism, which is affirmed with experience in the field.

### **Mandate**

The mandate of civil society organizations now includes practically the whole field of international law, human rights, international humanitarian law, world trade, illicit arms sales, the environment, and others.

Their role is to promote international legal instruments, monitor their implementation and, whenever possible, to denounce breaches of international law, to remind

States of their international obligations to observe international law, to protect victims when such laws are violated, to ensure that they receive justice, and so forth.

Consequently, advocating the promotion of and respect for those rights is a standing mandate. It is the essence and the *raison d'être* of their action.

In carrying out their advocacy activities, civil society organizations develop effective communications strategies that are conceived in terms of goals, statements, contexts, spaces for communication and other types of linkages.

Clearly, advocacy efforts must be tailored to the intended audience, to the support structures and to the spaces in which a discussion is to take place.

In order to promote international law, we must begin by disseminating it: its content must be widely available; the community must become familiar with it and understand its importance. This entails working with the existing structure to educate and train the public at large, the Government, the media, students, schoolchildren and others. The promotion of international law should not be monopolized by specialists, experts or academics; that is a sure way to create resistance to it. International law must be "tamed," as they say in English. People must become familiar with it; it must be made useful and necessary for social coexistence.

And it is in this context that it people must be made to understand the need to work for the wall to be destroyed, because it represents a breach of international law. As we know, the struggle against apartheid was successful; in that case, it was thanks to the fact that the people of the world joined the international campaign. The same is true of the wall.

To promote international law is to promote its adoption and ratification by Governments, to promote its adoption by parliaments and its incorporation into domestic legislation, to ensure that judges feel bound by its texts. Thus, it is absolutely essential to work with Governments to persuade them to adopt, sign and ratify the relevant treaties and conventions. To that end, we need to persuade the ministers concerned (foreign affairs, justice, environment, defence, etc.) and on occasion, the heads of Government or presidents themselves.

In 1999, Senegal became the first country in the world to ratify the treaty establishing the International Criminal Court. That is because our organization, met directly with the Prime Minister at the time, Mamadou Lamine Loum, in the context of the campaign for the ratification of the treaty. As a result, he decided forthwith to submit the text to the Council of Ministers.

We need to work with governmental, non-governmental, and intergovernmental human rights organizations, the African Commission on Human and Peoples' Rights, the European Commission, the Inter-American Commission or the United Nations Commission.

We need to reach other treaty oversight and implementation mechanisms as well, including the relevant United Nations committees and the various special rapporteurs assigned to study human rights issues (torture, prison, children, women, etc.). The reports produced by civil society organizations enable experts to pose meaningful questions and present critiques to representatives of States reminding them of their international obligations in the field of human rights and international law. When it comes to diplomacy, many countries are eager to protect their image. Thus, the reports on torture in Casamance submitted in 1995 by the *Rencontre Africaine Pour la Défense des Droits de l'Homme* and Amnesty International to the United Nations Committee against Torture resulted in the provisions of the Convention being incorporated into the legislation of Senegal.

Not only do civil society organizations promote and advocate adherence to international law, they also initiate proposals for treaties or international conventions. Thus, they participate actively in the development of new international norms.

They played a key role in the development of the Convention against Torture:

- Amnesty International made a major contribution to the conception, adoption and implementation of this treaty.
- The International Campaign to Ban Landmines was instrumental in the adoption of the Ottawa Mine Ban Treaty.
- The international Coalition for the International Criminal Court played a major role in the adoption of the Rome Treaty on the International Criminal Court.
- Human Rights Watch, the International Court of Justice and the Fédération Internationales des Ligues des Droits de l'Homme also played a part in advocating and promoting adherence to international law;
- Oxfam participated actively in the development of the treaty on the illicit trade in small arms;
- The *Rencontre Africaine Pour la Défense des Droits de l'Homme* and many African civil society organizations contributed to the adoption of the Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, South Africa, 31 August-8 September 2001 against racism, which states that slavery and the slave trade are crimes against humanity.

Nevertheless, we do not see the same efficiency, the same commitment and the same enthusiasm in every case. There are many instances in which international conventions and treaties are violated, as in the case of the Guantanamo Bay detention facility, which is a legal no man's land, and the cases of torture at the Abu Ghraib prison, on which we are still waiting to hear from non-governmental organizations. To that must be added the tragedy that is unfolding in Darfur region of the Sudan, which is still waiting for a coalition of non-governmental organizations to be formed!

What is worse, the attitude of many States towards the Rome Treaty on the International Criminal Court has, unfortunately, had a lot to do with the erosion of universal norms of human rights. The bias evidenced in the fact that terrorism is being combated by the use of illegal means that violate human rights has hampered the effectiveness of international efforts to protect human rights.

The United States of America, the only country in the world that calls for specific and detailed reports on the human rights situation in every country on the planet, has systematically blocked the Security Council from acting against the violation of human rights on the part of Israel.

Many American and Israeli citizens have denounced that systematic blocking of the Security Council's efforts, as well as the violation of international law by the State of Israel.

With regard to the question of Palestine, and hence, of respect for the decision of the International Court of Justice on the wall, national and international non-governmental organizations have not been very active. The United States and Israel are certainly not small fry; one is the world super power, the other a subregional

superpower. That is why a coalition of national and international non-governmental organizations, partnering with national and regional parliaments, must wake up, not only on the issue of the wall, but also on every question that is vital and strategic for the protection of human rights.

## **In conclusion**

Thanks to its flexibility, commitment, capacity for innovation and creativity and its dynamism and expertise, civil society has the potential to become a driving force in promoting international law, advocating adherence to it and ensuring respect for the decision of the International Court of Justice.

Civil society partners have a key role to play in enabling these advocates of the new era to speak with a strong voice for those who have no voice.

## **VI. Closing Session**

**Abdullah Abdullah**

Deputy Minister for Foreign Affairs of the Palestinian Authority  
Representative of Palestine

Once more, it is an honour for me to be before you to express how grateful we are for the timely and important meeting that took place on the subject of the implementation of the advisory opinion of the International Court of Justice. The experts have presented their arguments on the significance of this ruling and the importance of applying this ruling by various means, including, as it was elaborately presented by the able civil society representatives who spoke this afternoon, on guidelines how the general public can take part in influencing their respective Governments to force the application of this advisory opinion on the illegal segregation wall constructed in the midst of the Palestinian Territory.

The gist of the discussion of this meeting cannot be termed as a pro-Palestinian demonstration, nor would it be considered an anti-Israel demonstration. It was a demonstration of adherence, respect and acceptance of international law, international humanitarian law and international human rights law. Therefore, the neutrality of the subject, and the legal aspects of the discussion made all contributions vitally important as they addressed the subject to the core. Therefore, our obligation as Palestinians will be to make your job easier. We will do our homework, we will try to reorganize, revitalize our work in line with the parameters of international law in order to proceed to meaningful negotiations and to assist those who adhere to international law. We ask you to stand by our struggle, to force the occupier, to force the violator of international law to come into line with and to respect the provisions of international law.

The segregation wall is just one aspect of the by-products of occupation. In our initiatives against the construction of the wall, against the principle of segregation, against the infringement on the rights of the occupied people, we will continue our struggle against all manifestations of occupation, including settlements, including violations of Palestinian human rights. I would like to express the hope that our collaboration with those who support international values and principles will lead to the two-State solution with a democratic, independent, viable, territorially contiguous Palestinian State that encompasses the territories of the West Bank, including East Jerusalem and the Gaza Strip, the State for the Palestinian people.

We still count on your adherence to international principles and values and on your support for international law, and together we will overcome.

**Paul Badji**

Chairman

Committee on the Exercise of the Inalienable Rights  
of the Palestinian People

The United Nations International Meeting held on the theme “Implementing the advisory opinion of the International Court of Justice on the legal consequences of the construction of a wall in the Occupied Palestinian Territory – the role of Governments, intergovernmental organizations and civil society” has drawn to a close. During the course of the past two days, we have heard informative, in-depth and thought-provoking presentations by our distinguished experts, as they shared with us their legal analysis of the ruling of the International Court of Justice, analysed the response by the parties, namely the Palestinians and the Israelis, to the advisory opinion, and examined the reaction of the international community. The speakers reaffirmed the primacy of international law as they mapped out viable options for individual and collective actions by Governments, intergovernmental organizations and the United Nations in pursuit of the implementation of the advisory opinion. The participants engaged in a lively dialogue on the opportunities by parliaments to strengthen adherence to the advisory opinion of the International Court of Justice, and explored strategies for mobilizing the response of civil society and engaging the media in support of the Court’s ruling.

The picture that emerged from our two days of deliberations is one of tremendous promise and opportunity, but also one of challenges that still need to be overcome.

The wealth of ideas and insights presented here was perhaps not surprising if we consider for a moment the fact that the event which we have been discussing – the ruling by the International Court of Justice – was truly far-reaching. History will certainly fully appreciate its significance. The advisory opinion reconfirmed the applicability of the basic norms of international law to the Israeli-Palestinian conflict, which simply cannot be ignored by any Government. For the first time in its history, the world’s highest judicial body pronounced itself, in no equivocal terms, on the core issues of that conflict. Our analysis here confirms: the message that the Court delivered, which was grounded in international legality, was loud and clear, and it completely vindicated what the international community, including the General Assembly, have been saying all along: the construction of the wall in the Occupied Palestinian Territory, including East Jerusalem, and its associated regime are illegal; Israel should immediately cease constructing the wall, dismantle the structure, repeal or render ineffective all legislative and regulatory acts relating thereto, and make reparations for all damage caused by construction of the wall.

In the course of our deliberations, the speakers underscored that the Court also had addressed and resoundingly reaffirmed a number of bedrock principles of international legality, which are not only directly related to the construction of the wall, but also have far-reaching implications that go beyond the case at hand. Equally significant was the fact that in the process of arriving at its conclusion, the Court cast aside as lacking legal merit several long-standing arguments and objections raised by the occupying Power to justify its actions. The International Court of Justice reaffirmed that the status of all of the Palestinian Territory occupied by Israel in 1967, including East Jerusalem, was and always has been one of military occupation. The judicial body left no doubt in the ruling it delivered that the Fourth Geneva Convention and other similar instruments are fully applicable to the Occupied Palestinian Territory, including East Jerusalem. The speakers observed that in reaching its conclusion, the Court upheld the principle that the occupying Power owed compensation to the Palestinian people for the damages caused by its actions.

Our discussions also focused on the individual and collective contributions and responsibilities of States, intergovernmental organizations, civil society, inter-parliamentary organizations, the United Nations system and the media. In conclusion, on behalf of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, I would like to express my gratitude to the Representative of the Secretary-General of the United Nations for his message, which considerably stimulated our discussions, and to express my heartfelt appreciation to all of you for your active participation in those deliberations. Allow me to thank our distinguished speakers who have generously shared with us their knowledge of the issues at hand. Our sincere thanks go to the distinguished representatives of Governments, to Palestine and to the representatives of intergovernmental and non-governmental organizations for their interest in this event and their contribution to its deliberations. I would also like to acknowledge and express my appreciation to the media representatives for their excellent coverage of this event.

On behalf of the Committee, I should also like to express our appreciation to the staff of the Division for Palestinian Rights of the United Nations Secretariat, the staff of the Conference Services Division of the United Nations Office at Geneva, and the staff of the United Nations Information Service in Geneva for their hard work.

The report on this meeting will be prepared by the United Nations Secretariat and will be issued, in due course, as a publication of the Division for Palestinian Rights.

I hereby declare closed the United Nations International Meeting on the question of Palestine.

## VII. FINAL DOCUMENT

1. The United Nations International Meeting on the Question of Palestine was held on 8 and 9 March 2005, at the United Nations Office at Geneva, under the auspices of the Committee on the Exercise of the Inalienable Rights of the Palestinian People. The theme of the Meeting was "Implementing the advisory opinion of the International Court of Justice on the legal consequences of the construction of the wall in the Occupied Palestinian Territory – the role of Governments, intergovernmental organizations and civil society." Participants in the Meeting included eminent personalities, internationally renowned legal experts, including Israelis and Palestinians, representatives of States Members of and Observer to the United Nations, parliamentarians, representatives of the United Nations system and other intergovernmental organizations, the academic community, representatives of civil society organizations and the media.
2. The meeting took place against the backdrop of a series of promising developments, including the election of Mahmoud Abbas as President of the Palestinian Authority on 9 January 2005, followed by the Sharm el-Sheikh Summit on 8 February 2005, at which President Abbas and Israeli Prime Minister Ariel Sharon had reaffirmed their commitment to the road map and reached a number of understandings, including a mutual declaration to end violence. A set of concrete trust-building measures on the ground initiated by both sides signalled the emergence of a new spirit of goodwill. The participants expressed strong support for the new positive momentum and urged the speedy implementation of those understandings in order to pave the way for the resumption of the peace process.
3. The participants welcomed the London Meeting on Supporting the Palestinian Authority, hosted by the Government of the United Kingdom on 1 March 2005. They noted that the London Meeting had supported and encouraged steps outlined by the Palestinian Authority and agreed steps for international support to be taken in the areas of governance, security and economic development. They also welcomed the commitment reaffirmed by the participants in the London Meeting to achieving a resolution of the conflict through direct negotiations leading to the goal of two States – a safe and secure Israel and a sovereign, independent, viable, democratic and territorially contiguous Palestine, living side by side in peace and security.
4. While welcoming Israel's intention to withdraw from the Gaza Strip and parts of the West Bank as an initial step to the implementation of the road map, the participants underscored the importance of coordinating this process closely with the Palestinian Authority and implementing it within the framework of the road map. However, the participants expressed serious concern at the continued settlement activities in the West Bank including in and around East Jerusalem, and cautioned against any transfer of Israeli settlers from the Gaza Strip to the West Bank.
5. Furthermore, the participants also expressed serious concern at the Israeli Government's continuation of the construction of the wall in defiance of the advisory opinion of the International Court of Justice and in violation of the Fourth Geneva Convention and United Nations resolutions. They considered that the construction of the wall, if not reversed, might be viewed by Israel as a permanent political boundary, thus predetermining final status negotiations.
6. The participants were also greatly dismayed that the continued construction of the wall further exacerbated the already deteriorating socio-economic situation of the Palestinians. Since the construction began, hundreds of thousands of Palestinians have lost their land, property and access to their work, family, educational and medical institutions. The closure regime associated with the construction of the wall caused untold suffering, particularly for Palestinians living along the route of the wall. More than 60 per cent of households have lost more than half of their income and over .5 million are now completely dependent on food aid. The participants stressed that urgent attention by donor countries and the international community was needed to redress this dismal and unacceptable situation.
7. In view of the gravity of those developments, the participants expressed their appreciation to the Committee for convening this timely Meeting. Welcoming the advisory opinion of the International Court of Justice of 9 July 2004, the participants called it a historic development, noting that it was the first time that the highest judicial body of the United Nations had addressed a substantive issue related to the question of Palestine. They supported the Court's position that the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime were contrary to international law.
8. The participants also welcomed the adoption by the General Assembly of resolution ES-10/15 of 20 July 2004, which highlighted its demand that Israel comply with its legal obligation to cease the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem; to dismantle segments of the wall already built; to repeal all legislative and regulatory acts adopted in view of the construction of the wall; and to make reparation for the damage arising from its unlawful conduct. The participants stressed the importance of the steps taken by the United Nations Secretary-General to establish a register of damage caused to all natural or legal persons concerned. They welcomed the ongoing work for the establishment of the register and looked forward to its early completion. The participants drew attention to the General Assembly's request to all States Members of the United Nations to comply with their legal obligations, as mentioned in the advisory opinion. Moreover, they urged Member States to prohibit individuals or entities under their jurisdiction from assisting in the construction of the wall.
9. The participants called on the international community to adopt measures that would persuade the Government of Israel to comply with international law and the ruling of the International Court of Justice.
10. The participants also supported the continued engagement of the Quartet in efforts to resolve the conflict. In this regard, they welcomed the statement issued by the Quartet in London, emphasizing the need to ensure that a new Palestinian State was truly viable, including with contiguous territory, and stressing that a State of scattered territories would not work. Participants stressed that the Palestinian State should be territorially contiguous along the 1967 borders, which include the West Bank, East Jerusalem and the Gaza Strip. Reiterating the central role of the Quartet in the peace process, the participants called on the members of the Quartet to redouble their efforts at this critical stage and to continue to work closely with the parties, together with other international and regional actors, to implement the road map in order to achieve a comprehensive, just and lasting settlement of the conflict based on relevant United Nations resolutions, including Security Council resolutions 242 (1967), 338 (1973), 1397 (2002) and 1515 (2003).

11. The participants reaffirmed the permanent responsibility of the United Nations with respect to all the aspects of the question of Palestine until it is resolved in conformity with relevant United Nations resolutions and the norms of international law, and until the inalienable rights of the Palestinian people were fully realized.
12. The participants noted with appreciation the deliberations in some national parliaments intended to highlight the advisory opinion and to encourage their respective Governments to adhere to the ruling. They were also apprised of the various initiatives of civil society organizations in support of the advisory opinion and encouraged civil society to continue its efforts in educating public opinion on the issues and to promote a solution of the conflict on the basis of international law.
13. The participants also expressed gratitude to the United Nations Secretary-General for his continued commitment to and support for the work of the Committee and to the Director-General of the United Nations Office at Geneva for hosting this meeting and for the assistance and support extended to the Committee and the United Nations Secretariat in its preparation.

9 March 2005  
United Nations Office at Geneva

## Notes

<sup>1</sup> United Nations, *Treaty Series*, Vol. 75, No. 973.

<sup>2</sup> See Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York), Oxford University Press, 1915).

<sup>3</sup> The author was counsel for Palestine in the International Court of Justice advisory case concerning the legal consequences of the construction of a wall in the Occupied Palestinian Territory. The views expressed are, however, purely personal and do not necessarily represent the views of Palestine.

<sup>4</sup> David Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories* (2002).

<sup>5</sup> Anis Kassim, *Legal Systems and Developments in Palestine*, 1 *The Palestine Yearbook of International Law* 19, (1984).

<sup>6</sup> Allan Gerson, *Israel, the West Bank and International Law*, 111 (1978).

<sup>7</sup> Meir Shamgar, (ed.) *Military Government in the Territories Administered by Israel 1967 – 1980*, Vol. I (1982). The title of this book and some of the works cited therein do use the term “administered” rather than “occupied”.

<sup>8</sup> On Israel’s subtle attitude towards the Occupied Palestinian Territory, see Cyrus Vance, *Hard Choices, Critical Years in America’s Foreign Policy*, New York (1983).

<sup>9</sup> Gerson, *supra*, note 3, at 111. However, in the Oslo accords, the designation of West Bank was used.

<sup>10</sup> Paragraph (1) reads that the Security Council “Affirms that the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

(i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;”

<sup>11</sup> Julius Stone, *No peace – No War in the Middle East*; Legal problems of the first year at 39 (1969); Stephen Schwebel, *What Weight to Conquest?* 64 *American Journal of International Law* at 344, at 364 (1970). However, see Musa Mazzawi, *Palestine and the Law*, 199-238 (1997). Dean Mazzawi has probably written the most comprehensive analysis of resolution c.

<sup>12</sup> See the Court’s analysis in paras. 89-90.

<sup>13</sup> For a thorough analysis of Israel’s Supreme Court on this issue see Kretzmer, *supra*.

<sup>14</sup> The Supreme Court of Israel held on 30 May 2004, that: “The military operations of the [Israel Defence Forces] in Rafah, to the extent they affect civilians, are governed by the Hague Convention IV/Respecting the Laws and Customs of war on Land ...and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949”.

<sup>15</sup> 21 Laws of the State of Israel, 75 (1966/67).

<sup>16</sup> 34 Laws of the State of Israel, 209 (1979/80).

<sup>17</sup> See text in 5 *The Palestine Yearbook of International Law*, 325 (1989).

<sup>18</sup> See text in 9 *The Palestine Yearbook of International Law*, 217 (1996/97).

<sup>19</sup> The Court held that article 49(6) “prohibits not only deportations or forced transfers of population ...but also measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into occupied territory.” (paras. 120 and 135).

<sup>20</sup> The Court refers to its judgments in the *Nicaragua* case (I.C.J. Reports 1986, p. 149), in the *United States Diplomatic and Consular Staff* case (I.C.J. Reports 1980, p. 44) and in the *Haya de la Torre* case (I.C.J. Reports 1951, p. 82). See, also, *Rainbow Warrior*, vol. XX, the *RIAA* (1990), 215, at 270, para. 114; General Assembly resolution 56/83, art. 30 “Cessation and non-repetition”, and commentary in *Report of the International Law Commission on the work of its 53rd session* (2001), A/56/10 (Supp.) and Corr.1, Chap. IV.

<sup>21</sup> See *Written Statement submitted by Palestine*, para. 617 et seq., available at [www.icj-cij.org](http://www.icj-cij.org).

<sup>22</sup> Article 35 of the draft articles on State responsibility, General Assembly resolution 56/83 of 28 January 2002 (emphasis added) and commentary in *Report of the International Law Commission on the work of its 53rd session* (2001), A/56/10, Chap. IV, 237. On the notion of reparation and the various uses and understandings of the notion of restitution, see Pierre d’Argent, *Les réparations de guerre. La responsabilité internationale des États à l’épreuve de la guerre* (2002), 662-699.

<sup>23</sup> This must be stressed: the compensation due from Israel is the consequence of a wrong committed; it is not to be considered as the price of a lawful taking.

<sup>24</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ Reports (2002), para. 76-78, 3. The Palestinian written submissions make explicit reference to that case: see *Written Statement submitted by Palestine*, 284, para. 616, available at [www.icj-cij.org](http://www.icj-cij.org).

<sup>25</sup> See joint separate opinion Higgins, Kooijmans and Buergenthal, I.C.J. Reports 2002, paras. 86-89.

<sup>26</sup> See my pleading in the *Arrest Warrant* case, Verbatim record, CR 2001/10, 22-25 and reference made to the “Preliminary Report on State Responsibility” by Arangio-Ruiz, *Yearbook of the International Law Commission* (1988), vol. II(I), 28, para. 84 a).

<sup>27</sup> It is for instance difficult to assess whether the duty to repeal applies to an Israeli law enacted in 1950, which allows for the taking of the property of Palestinian “absentees” without any compensation. The day before the delivery of the advisory opinion, that law was reactivated in East Jerusalem following the construction of the wall. See *Le Monde*, 23 January 2005.

<sup>28</sup> Compare with European Court of Justice rulings regarding the obligation under Community law for Member States to compensate individuals in case of wrongful breach of EC law. Whereas the European Court of Justice affirms the individual’s right to compensation under Community law, it leaves the regime of the claim up to the relevant domestic law, provided some Community standards are met. See C-6/90 & C-9/90, *Francovich v. Italy and Bonifaci v. Italy*, [1991-9] ECR I-5415, para. 41-43; C-46/93 and C-48/93, *Brasserie du pêcheur v. Germany and The Queen v. Secretary of State for Transport ex parte Factortame Ltd e.a.*, [1996-3] ECR I-1149, para. 52, 66-67.

<sup>29</sup> See the practice referred to in Randelzhofer and Tomuschat (ed.), *State responsibility and the individual. Reparation in instances of grave violations of human rights* (1999); also in Ulrich and Krabbe Boserup (ed.), *Reparations: Redressing past wrongs*, Human Rights in Development Yearbook (2001).

<sup>30</sup> See Van Boven, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report*, E/CN.4/Sub.2/1993/8; *Revised set of basic principles and guidelines on the Right to reparation for victims of gross violations of human rights and international humanitarian law*, E/CN.4/1996/17 and also E/CN.4/1997/104; Bassiouni, *Report on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms*, E/CN.4/1999/65; ‘Basic Principles and Guidelines’ contained in the *Final Report*, E/CN.4/2000/62 and the following reports containing revised ‘Principles and Guidelines’ (E/CN.4/2003/63, E/CN.4/2004/57); finally the Draft ‘Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law’ (Rev. 1 October 2004), submitted to the 61st session of the Commission on Human Rights, meeting in February 2005. See also, Bottiglieri, *Redress for victims of crimes under international law* (2004); Tomuschat, *Current issues of Responsibility under international law*, IV CEBDI (2000), chap. IV.

<sup>31</sup> Compare article 106 of the Rules of Procedure and Evidence of the ICTY and ICTR to article 75 of the Statute of the International Criminal Court.

<sup>32</sup> “This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State”, General Assembly resolution 56/83 of 28 January 2002, and commentary in *Report of the International Law Commission on the work of its 53rd session* (2001), A/56/10, Chap. IV, 234.

<sup>33</sup> For a summary of the *Wall* Opinion, see this speaker’s article entitled *The World Court Rules that Israel’s West Bank Barrier Violates International Law*, an “Insight” contribution to the website of the American Society of International Law available at [www.asil.org/insights/insigh141.htm](http://www.asil.org/insights/insigh141.htm) (July 2004).

<sup>34</sup> The International Court of Justice 87 (4th ed. 1996).

<sup>35</sup> Shabtai Rosenne, 3 *The Law and Practice of the International Court*, 1920-1996, 1756-57 (3rd ed. 1997).

<sup>36</sup> See *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, advisory opinion, I.C.J. report 1988 12, 34, para. 57 [hereinafter the *PLO Mission* opinion].

<sup>37</sup> *PLO Mission* opinion, *supra*, note 13, separate opinion of Judge Schwebel.

<sup>38</sup> See *Beit Sourik Village Council v. the Government of Israel* (Supreme Court of Israel) June 30, 2004, Case HCJ 2056/04, 43 ILM 1099 (2004).

<sup>39</sup> Statement of Silvan Shalom, Foreign Minister of Israel, on *Charlie Rose*, Channel 13, 25 January 2005.

<sup>40</sup> *Lagrand* judgment of 27 June 2001, Germany v. United States of America.

<sup>41</sup> Patrick Daillier and Alain Pellet, *Droit International Public*, L.G.D.J., Paris, 2002.

<sup>42</sup> This resolution, passed in December 1948, has been explicitly re-affirmed by the General Assembly more than 140 times since then.

<sup>43</sup> See the remarks of Israeli Deputy Prime Minister Ehud Olmert in support of the Israeli Government's unilateral disengagement strategy combined with the construction of the wall, quoted and described in *Ha'aretz*, 14 November 2003:

“[The] formula for the parameters of a unilateral solution are: to maximize the number of Jews; to minimize the number of Palestinians; not to withdraw to the 1967 border and not to divide Jerusalem. Large settlements, such as Ariel, would ‘obviously’ be carved into Israel. ... The fence, now being built amid much controversy, would ‘ultimately become part of the unilateral plan’, Olmert says with deliberate vagueness. [H]is unilateralism ‘would inevitably preclude a dialogue with the Palestinians for at least 25 years.’”

<sup>44</sup> Quoted in “Gaza for the West Bank”, *Al Ahram Weekly*, 25 February 2005.

<sup>45</sup> See generally B’Tselem, the Israeli Information Centre for Human Rights in the Occupied Territories, *Land Grab: Israel’s Settlement Policy in the West Bank* (Jerusalem, 2002). A classic statement on the primary rationale for the settlements was given by former Israeli Foreign Minister Moshe Dayan at the time of the peace negotiations with President Anwar Sadat of Egypt in December 1978. He said: “We should make it clear to the Americans and to others, that we intend to stay there [the Occupied Palestinian Territory] permanently, and to make it clear, we must strengthen existing settlements and build new ones.” Quoted in M. Benvenisti, *The West Bank Data Project* (Jerusalem: *The Jerusalem Post*, 1984), at p. 39. The contemporary Israeli leadership has been forthright about its intentions to keep the settlements; Prime Minister Ariel Sharon has recently stated that: “the settlement blocs will remain in Israel’s hands in any final-status agreement no matter the repercussions entailed”, quoted in *Ha'aretz*, 11 April 2005. President George W. Bush, in April 2004, endorsed this position when he wrote to Prime Minister Sharon: “In light of new realities on the ground, including already existing major Israeli population centres... any final status agreement will only be achieved on the basis of mutually agreed changes that reflect these realities.” (available at [www.knesset.gov.il/process/docs/DisengageSharon\\_letters\\_eng.htm](http://www.knesset.gov.il/process/docs/DisengageSharon_letters_eng.htm)).

<sup>46</sup> The Advisory Opinion of the International Court of Justice on the separation wall, *supra* note 6, while not commenting on any final status issues, observed in para. 119 of the majority judgement that: “it is apparent from an examination of the map [of the wall’s route] that its sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem).”

<sup>47</sup> For example, see General Assembly resolution 59/123 of 10 December 2004, which states that: “Israeli settlements in the Palestinian territory, including East Jerusalem and in the occupied Syrian Golan are illegal and an obstacle to peace and economic and social development.” The resolution was adopted by a vote of 155 (yes), 8 (no) and 15 (abstain). The countries voting against the resolution were: Australia, Grenada, Israel, Marshall Islands, Morocco, Nauru, Palau and the United States of America.

<sup>48</sup> Hague Convention IV with respect to the Laws and Customs of War on Land, and Annexed Regulations of 18 October 1907, 36 Stat. 2277, T.S. No. 539. See Articles 43, 46 and 55 of the Regulations.

<sup>49</sup> Article 49, para. 6 states that: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”

<sup>50</sup> Article 85(4)(a) of Protocol I re-affirmed the proscription in Article 49(6): “The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention.”

<sup>51</sup> United Nations Security Council resolution 465 (1980) states that: “all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof, have no legal validity”.

<sup>52</sup> The General Assembly passed its first resolution condemning the Israeli settlement project on 20 December 1971 (General Assembly resolution 2851 (xxvi)). It has passed like-minded resolutions on the issue every year since, always by large majorities.

<sup>53</sup> A Special Rapporteur for the United Nations Economic and Social Council has concluded that: “The range of rights violated by population transfer and the implantation of settlers places this phenomenon in the category of mass violations of human rights... Population transfers violate the gamut of human rights and constitute an anachronism in the light of generally accepted United Nations norms. “Freedom of Movement: Human Rights and Population Transfer” E/CN.4/Sub.2/1997/23, at paras. 16 and 17.

<sup>54</sup> United Nations Economic and Social Council, “The Human Rights Dimensions of Population Transfer, including the Implantation of Settlers”, E/CN.4/Sub.2/1993/17, at para. 202: “Policies and practices of population transfer may be aimed specifically at denying a meaningful implementation of the right to self-determination, for instance, by altering the relevant unit of self-determination through demographic manipulation, or policies which have that effect. Instances include the implantation of settlers and settlements in occupied or disputed territories...”

<sup>55</sup> *Ibid*, at para. 36: “In addition to the occupier’s security claims, the implantation of settlers from the occupying power’s population is sometimes used with a future non-military strategy in mind. In the event that the status of a disputed territory is resolved by eventual referendum or plebiscite, this putatively democratic procedure can be greatly influenced with the participation of the implanted population on an equal footing with the indigenous population.”

<sup>56</sup> *Ibid*, at para. 35: “...the occupying power eventually asserts that humanitarian concerns compel it to remain.”

<sup>57</sup> Many legal commentators have persuasively argued that addition of the term “directly or indirectly” in Article 8(2)(b)(viii) merely clarifies, and does not meaningfully expand, the already extensive scope of its Geneva antecedents. M. Bothe, “War Crimes”, in A. Cassese P. Gaeta & J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, Oxford University Press, 2002), at p. 413: “Neither Article 85(4)(a) [of Protocol I] nor the present provision [Article 8(2)(b)(viii)] add anything to the grave breach provision of the Fourth Convention”; H. von Hebel “Article 8(2)(b)(viii)”, in R. Lee (ed.), *The International Criminal Court: Elements of Crime and Rules of Procedure and Evidence*, (New York, Transitional Publishers, 2003) at p. 159: “Most States considered this additional wording [“directly or indirectly”] as at most a clarification, not an extension of the scope of the relevant provisions.”; R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague, Kluwer, 1999), at p. 113: “After some discussion, “directly or indirectly” were added to this provision. In legal terms, one may, however, wonder whether this additional language has any significant impact.”

<sup>58</sup> Judge Eli Nathan, the head of the official Israeli delegation to the Rome conference that drafted and adopted the Statute, explained his country’s decision to cast a negative vote: “We... fail to comprehend why it has been considered necessary to insert into the list of the most heinous and grievous war crimes, the action of transferring population into occupied territory, as it appears in Article 8, Paragraph 2(b), sub-para. viii... Needless to say, Mr. President, had sub-para. viii not been included, my delegation would have been able proudly to vote in favour of adopting the Statute.” The full statement is available at <http://www.iccnw.org/documents/statements/governments/IsraelatPrepCom17July1998.pdf>.

<sup>59</sup> There is one remote method under the Rome Statute by which Israeli officials could be indicted without Israeli State ratification: if the United Nations Security Council referred the matter of the Israeli settlement project to the prosecutor of the International Criminal Court. Given the present make-up of the Security Council, that is unlikely to happen.

<sup>60</sup> *International Criminal Court (Consequential Amendments) Act 2002*.

<sup>61</sup> *Crimes Against Humanity and War Crimes Act*.

<sup>62</sup> *Codes of Crimes Against International Law*

<sup>63</sup> *International Crimes Act*.

<sup>64</sup> *International Crimes and International Criminal Court Act 2000*.

<sup>65</sup> *International Criminal Court Bill*.

<sup>66</sup> *International Criminal Court Act 2001*.

<sup>67</sup> The United Kingdom of Great Britain and Northern Ireland is an exception. It requires that an individual must, at a minimum, be a resident of the United Kingdom, rather than simply present on its soil.

<sup>68</sup> A common precondition for prosecution in all of these domestic statutes is the written consent of the Attorney General or the equivalent national legal official.

<sup>69</sup> New Zealand does permit retrospective application for genocide back to 1979 (when it became a party to the Genocide Convention), and back to 1991 for crimes against humanity (the adoption of the Statute of the International Criminal Tribunal for the former Yugoslavia). War crimes do not operate retrospectively in its legislation.

<sup>70</sup> For example, in Canada, an individual who commits a war crime is liable for imprisonment up to life: *supra*, note 62,

s. 6(2)(b). The Australian statute mandates imprisonment for 17 years: *supra*, note 61, s. 268.45. The United Kingdom mandates imprisonment for a term not exceeding 30 years: *supra*, note 67, s.53(6).

<sup>71</sup> “Cabinet Approves Disengagement Plan and Security Fence Route,” Cabinet Communiqué, 20 February 2005, available at <http://www.mfa.gov.il>.

<sup>72</sup> See the position of the Israeli Government, in “Unofficial summary of State of Israel’s Response regarding the Security Fence,” available at <http://www.Israel-mfa.gov.il>.

<sup>73</sup> The new route follows the Green Line over a distance of 135 km, while the previous route did so over a distance of 48 km. It incorporates around 7 per cent of Palestinian territory, compared with 12.7 per cent previously. However, if the decision to construct the barrier around the Ariel, Emmanuel, and Ma’aleh Adumim settlements is confirmed, 10 per cent of Palestinian territory will be located on the “Israeli side”. The figures are from the report of 3 March 2005 of Special Rapporteur John Dugard (E/CN.4/2005/29/Add.1).

<sup>74</sup> *Temple of Preah Vihear* (Cambodia v. Thailand), Merits, Judgement of 15 June 1962: I.C.J. Reports 1962.

<sup>75</sup> *Territorial Dispute* (Libyan Arab Jamahiriya/Chad), Judgement I.C.J. Reports 1994, para. 72.

<sup>76</sup> Available at <http://edm.ais.co.uk>.

<sup>77</sup> House of Commons International Development Committee, second report of Session 2003-04, Vol. 1, *Development and Assistance and the Occupied Palestinian Territories*, pp. 13-14.

<sup>78</sup> Available at <http://www.ipu.org/english/cnl-e/161-dem.htm>.

<sup>79</sup> President Bush in his address to NATO in Brussels on 21 February 2005: available at <http://www.whitehouse.gov/news/releases/2005>.

<sup>80</sup> Parts of this article originally appeared in *The Electronic Intifada*, including ‘Beyond the advisory opinion: possible future strategies’, Jeff Handmaker, *The Electronic Intifada*, 20 September 2004, available at <http://electronicintifada.net/v2/article3105.shtml>

<sup>81</sup> Akram and Quigley, *A Reading of the International Court of Justice Advisory Opinion on the Legality of Israel's Wall in the Occupied Palestinian Territories*, July 2004, available at: [http://www.palestinecenter.org/cpap/pubs/update\\_on\\_wall\\_072004.pdf](http://www.palestinecenter.org/cpap/pubs/update_on_wall_072004.pdf).

<sup>82</sup> “Sharon’s violent policy, a point of no return for the European Union”, Adri Nieuwhof and Jeff Handmaker, *The Electronic Intifada*, 28 April 2004, available at <http://electronicintifada.net/v2/article2613.shtml>.

<sup>83</sup> See Palestine Media Watch, available at [www.pmwwatch.org](http://www.pmwwatch.org) and <http://electronicintifada.net/themedias.shtml>

<sup>84</sup> For example, “Facts on the Ground”, Christian Aid, 2004: [www.christianaids.org.uk/middle\\_east](http://www.christianaids.org.uk/middle_east).

<sup>85</sup> Handmaker, J. and Nieuwhof, A., “Israel’s cry of anti-Semitism blocks a critical dialogue” *Electronic Intifada*, 27 February 2004, available at <http://electronicintifada.net/v2/article2461.shtml>.

<sup>86</sup> Drawn from: “Amandla Ngawethu! South Africa and Palestine compared”, Jeff Handmaker, Bangani Ngeleza and Adri Nieuwhof, *The Electronic Intifada*, 8 February 2005, available at <http://electronicintifada.net/v2/article3604.shtml>.

<sup>87</sup> See Omar Barghouti, “Boycott as Resistance: The Moral Dimension”, *The Electronic Intifada*, 28 December 2004.

<sup>88</sup> <http://www.pcusa.org/peacemaking/un>.

<sup>89</sup> <http://www.pcusa.org/pcusa/wmd/ep/country/isrhome.htm>.

<sup>90</sup> <http://www.pcusa.org/pcusa/wmd/ep/country/2004-statement-terror.htm>.

<sup>91</sup> <http://www.pcusa.org/oga/publications/human-rights03-04.pdf>.

<sup>92</sup> The case of Israel is a bit more complicated in this regard, since the Israeli public is not uniform. There are factions – indeed some of the most extreme religious factions – who do not see themselves as a part of the West and find isolation to be a welcome development. Still, the dominant liberal economic and cultural forces in Israel are very much in the western mode.

<sup>93</sup> We have had precious little success in this work. There have been numerous boycotts, divestment campaigns, educational initiatives among others and protests, but few have achieved concrete victories. Such failure saps activist energy and optimism. Interestingly, one of the very few concrete activist successes came in the first intifada, in a campaign very similar to the one I am arguing for here. A range of groups worked together under the rubric of STOPP (Stop Tear-gassing the Palestinian People) to pressure Federal laboratories – a corporation headquartered in Pennsylvania – to end sales of tear gas to the Israel Defense Forces. This campaign was successful in creating a multi-year moratorium, though during the Oslo period, Federal laboratories quietly resumed sales.

<sup>94</sup> Early criticism came, of course from Palestinians, but also from the United Nations, the International Committee of the Red Cross, the Israeli Committee against Home Demolitions, and Christian Peacemaker Teams. Shortly after the start of the second intifada, the current campaign was proposed by the Washington, D.C. chapter of Stop United States Tax-funded Aid to Israel Now (SUSTAIN), though the call was rapidly taken up by other groups as well, notably the Jewish Voice for Peace.

<sup>95</sup> The entire campaign, for example, currently has a paid staff of two, a half dozen interns receiving a minimal stipend and an all-volunteer board.

<sup>96</sup> HC 2977/02, *Adalah v. Israeli Military Commander of the West Bank*.

<sup>97</sup> British Broadcasting Corporation, “Israeli Court Orders Barrier Reply,” 20 August 2004.

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Archbishop Silvano M. Tomasi, Apostolic Nuncio, Permanent Observer to UNOG

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Rev. Fr. Antoine Abi Ghanem, Attaché, Permanent Observer Mission to UNOG

Alessandra Bogliacino, Permanent Observer Mission to UNOG

Entities having received a standing invitation to participate as observers in the sessions and the work of the General Assembly and maintaining permanent observer mission at Headquarters

**Palestine**

Abdullah Abdullah, Deputy Minister for Foreign Affairs of the Palestinian Authority

Mohammad Abu-Koash, Permanent Observer to UNOG

Representative of the Secretary-General of the United Nations

**Sergei Ordzhonikidze**

Director-General of the United Nations Office at Geneva

Delegation of the Committee on the Exercise  
of the Inalienable Rights of the Palestinian People

Paul Badji

Permanent Representative of Senegal to the United Nations, New York

Chairman of the Committee and Head of Delegation

Ravan Farhâdi

Permanent Representative of Afghanistan to the United Nations, New York

Vice-Chairman of the Committee

Orlando Requeijo Gual

Permanent Representative of Cuba to the United Nations, New York

Vice-Chairman of the Committee

Victor Camilleri

Permanent Representative of Malta to the United Nations, New York

Rapporteur of the Committee

Cheick Sidi Diarra

Permanent Representative of Mali to the United Nations, New York

Abdullah Abdullah

Deputy Minister for Foreign Affairs of the Palestinian Authority

Representative of Palestine

Speakers

Georges Abi-Saab

Honourary Professor of International Law

Graduate Institute of International Studies

Geneva

Pierre d'Argent

Professor of International Law

Université catholique de Louvain, Collège Thomas More

Louvain-la-Neuve, Belgium

Pieter H.F. Bekker

Former staff lawyer of the International Court of Justice

Senior Counsel to Palestine in the International Court of Justice advisory proceedings

New York

Michael Bothe

Professor of Law

President of the German Association for International Law

Frankfurt

Monique Chemillier-Gendreau  
Professor of Public Law  
University of Paris VII  
Paris

Bruce Gillette  
Moderator of the Committee on Peacemaking for the  
216th General Assembly of the Presbyterian Church (USA)  
Wilmington, Delaware

Jeff Handmaker  
Researcher  
Netherlands Institute of Human Rights  
Utrecht

Mahmoud Hmoud  
First Secretary  
Permanent Mission of Jordan to the United Nations  
New York

Anis Kassim  
Legal Adviser of the Palestinian Defence Team to the International Court of Justice  
Amman

Marcelo G. Kohen  
Professor of Law  
Graduate Institute of International Studies  
Geneva

Mark Lance  
Professor of Philosophy, Georgetown University  
Member of the Steering Committee, US Campaign to End the Israeli Occupation  
Washington, D.C.

Vaughan Lowe  
Chichele Professor of Public International Law  
All Souls College  
Oxford University

Michael Lynk  
Professor of Law  
University of Western Ontario  
Ontario, Canada

Anne Massagie  
Legal Researcher  
Al-Haq – Law in the Service of Man  
Ramallah

Avner Pinchuk  
Lawyer  
Association for Civil Rights in Israel  
Tel Aviv

Alioune Tine  
Professor at the University of Dakar  
Secretary-General of Rencontre Africaine pour la Défense des Droits de l'Homme  
Dakar

Daniel Vischer  
Member of the National Council of Switzerland  
Bern

Julia Wickham  
Coordinator  
Labour Middle East Council  
London

United Nations bodies and specialized agencies

**International Labour Office**

Taleb Rifai, Director, ILO Regional Office for Arab States, Beirut  
Steven Oates, Senior Adviser, ILO Standards and Fundamental  
Principles and Rights at Work Sector, Geneva

**Special Committee to Investigate Israeli Practices affecting the  
Human Rights of the Palestinian People and Other Arabs of the Occupied Territories**

Ousmane Camara, Permanent Representative of Senegal to UNOG

**United Nations Conference on Trade and Development**

Mahmoud Elkhafif, Economic Affairs Officer, Assistance to the  
Palestinian People, Division on Globalization and  
Development Strategies

**United Nations Development Programme**

James Rawley, Deputy Director, UNDP Bureau for Crisis Prevention and Recovery  
Geneva

**United Nations Population Fund**

Mariam Ali

**United Nations Environment Programme**

Francesca Cenni, Associate Programme Officer  
Post-Conflict Assessment Unit, Geneva

**United Nations Educational, Scientific and Cultural Organization**

Ingeborg Breines, UNESCO Liaison Office, Geneva  
Kerstin Holst, UNESCO Liaison Office, Geneva

**United Nations Children's Fund**

Stefan Toma, Senior Programme Officer

**United Nations Human Settlements Programme (HABITAT)**

Abdalla Abbas, Coordinator, The Special Human Settlements  
Programme for the Palestinian People, Geneva  
Marta Mejia, UN-HABITAT, Geneva Liaison Office

**United Nations High Commissioner for Human Rights**

Darka Topali, Assistant to the Special Rapporteur on  
the situation of human rights in the Occupied Palestinian Territory  
Brigitte Lacroix, Secretary to the Special Committee to Investigate  
Israeli Practices Affecting Human Rights of the Palestinian People  
and Other Arabs of the Occupied Territories

**World Health Organization**

Dr. Kazem Behbehani, Assistant Director-General, External  
Relations and Governing Bodies  
Dr. David Nabarro, Representative of the WHO  
Director-General for Health Action in Crises

Intergovernmental organizations

**African Union**

Masri Khadija, Permanent Observer to UNOG  
Laabas M. Lamine, Minister Counsellor

**Council of the European Union**

Ewa Malz, Intern

**European Commission**

Alexandra Goodlad, Adviser, European Commission Delegation in Geneva  
Marco Paulo Miranda Ferreira, Adviser, European Commission Delegation in Geneva  
Suying Lai, Adviser, European Commission Delegation in Geneva  
Gemma Mortensen, Adviser, European Commission Delegation in Geneva  
Fabio Piana, Adviser, European Commission Delegation in Geneva

**League of Arab States**

Saad Alfarargi, Permanent Observer to UNOG  
Dr. Osman Elhajje, Member of the Mission

**Non-Aligned Movement**

Hsu King Bee, Permanent Representative of Malaysia to UNOG

**Organization of the Islamic Conference**

Abdelaziz Abu Goush, Ambassador, Assistant Secretary-General  
Babacar Ba, Ambassador, Permanent Observer to UNOG

Civil Society organizations

**Afro-Asian People's Solidarity Organization**

Cairo  
Silas C. Cerqueira

**Aide Sanitaire Suisse aux Palestiniens**

Geneva  
Maha Kirata

Jacques Vittori

**Al-Haq – Law in the Service of Man**

Ramallah

Anne Massagee

**All Souls College**

Oxford, United Kingdom

Vaughan Lowe

**Arab Lawyers Union**

Cairo

Brahim Essamlali

**Association for Civil Rights in Israel**

Tel Aviv

Avner Pinchuk

**Association France Palestine Solidarité**

Paris

Bernard Ravenel

Sylviane De Wangen

**Association Suisse-Palestine**

Lausanne

Raymond George

**Centrale Sanitaire Suisse-Romande**

Geneva

Bruno Vitale

**Collectif Urgence Palestine/ECCP**

France - Christophe Delmere

Geneva - Valentina Hemmeler

**Council for the Advancement of Arab-British Understanding**

London

Chris Doyle

**Diakonia Swedish Organization**

Jerusalem

Malin Greenhill

**Graduate Institute of International Studies**

Geneva

Georges Abi-Saab

Marcelo Kohen

Vera Gowlland-Debbas

**HaMoked, Center for the Defence of the Individual**

Jerusalem

Yotam Ben-Hillel

**Health, Development, Information Policy Institute**

Ramallah

Bahia Anra

**Hellenic Youth Council**

Athens

Themistoklis Tzimas

**International Commission of Jurists**

Thoiry, France

Annabelle Regal

**International Forum for Justice and Peace**

Hoevelaken, Netherlands

Ben Smoes

**International Young Catholic Students**

Geneva

Alexandre Owona

**Ireland Palestine Solidarity Campaign**

Dublin

Raymond Deane

**Israeli Committee Against House Demolitions (ICAH)**

Jerusalem

Lucia Pizarro

**Jerusalem Centre for Human Rights (JCHR)**

East Jerusalem

Nizar Ayoub

**Labour Middle East Council**

London

Julia Wickham

**Medical Aid for Palestinians**

London

Belinda Coote

**Netherlands Institute of Human Rights**

Utrecht

Jeff Handmaker

**“No to Sharon’s Wall!”**

Lisbon

Silas C. Cerqueira

**Norwegian People’s Aid**

Oslo

Inger Sandberg

**Palestine Centre for Human Rights**

Gaza Strip, Occupied Palestinian Territory

Eóin Murray

**Palestinian Agricultural Relief Committees**

East Jerusalem

Judeh Jamal

**Palestinian Human Rights Monitoring Group**

East Jerusalem

Bassem Eid

**The Palestinian Independent Commission for Citizen’s Rights**

Ramallah

Claude Barrat

**Palestinian Return Centre**

London

Arafat Shoukri

**PASOK Youth**

Thessaloniki

Athanasios Dagoumas

**Presbyterian Church USA**

Wilmington, Delaware

Rev. Bruce Gillette

**Rencontre Africaine pour la Défense des Droits de l’homme**

Dakar

Alioune Tine

**Secours social palestinien**

Geneva

Françoise Borel

Claire Chimaki

**Spanish Federation of Associations for the Defence and Promotion of Human Rights**

Madrid

Luisa Sirvent

**United Nations Watch**

Hillel Neuer

**Université catholique de Louvain**

Collège Thomas More

Louvain-la-Neuve, Belgium

Pierre d’Argent

**University of Paris VII**

Paris

Monique Chemillier-Gendreau

**University of Western Ontario**

Ontario

Michael Lynk



**US Campaign to End the Israeli Occupation**

Washington, D.C.

Mark Lance

**Women's International League for Peace and Freedom**

Geneva

Edith Ballantyne

Taeko Okada

**World Alliance of Young Men's Christian Association**

Geneva

Melanie Zurlinden

**World Council of Churches**

Geneva

Jonathan Frerichs

**World Vision International**

Geneva

Nicolas Baumgartner

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