

# Reply

TO:

THE ADVISORY OPINION OF 9 JULY 2004  
— IN THE MATTER OF THE —

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

— AS SUBMITTED BY THE —  
INTERNATIONAL COURT OF JUSTICE

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**No distinction rests between genocide and the undoing of the State of Israel by the International Court of Justice at the Hague.**

**To suggest denying Israel's right for self-defence in favor of Palestinian terrorism, is a crime against humanity.**

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***Eli E. Hertz***

January 2006

**Enhanced Edition**  
Myths and Facts, Inc.  
New York

To my wife Marilyn and my children Etie, Mala and Danny,  
thank you for your love and support

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## Preface

“After a sharp rise in Palestinian *terror attacks* in the spring of 2002”<sup>1</sup> the Government of Israel called for the construction of a barrier in parts of the West Bank.

On October 21 2003, the UN General Assembly adopted Resolution ES-10/13, that among others: “*Demands* that Israel stop and reverse the construction of the wall in the Occupied Palestinian territory, including in and around East Jerusalem.”

On November 24 2003, the UN General Assembly adopted Resolution ES-10/248, concluding that “Israel is not in compliance with the Assembly’s demand that it ‘stop and reverse the construction of the wall in the Occupied Palestinian Territory.’”<sup>2</sup>

On December 3 2003, the UN General Assembly adopted Resolution ES-10L.16, to [among others] “request the International Court of Justice ... to urgently render an advisory opinion” on the legal consequences arising from the construction of the wall being built by Israel.

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<sup>1</sup> See “C. 1. Background to the construction of the Barrier” UN General Assembly Resolution ES-10/248. (10575)

<sup>2</sup> Based on reports by John Dugard, UN Special Rapporteur on Human Rights in Occupied Palestinian Territories.

On July 9 2004, the International Court of Justice delivered its Advisory Opinion on the “legal consequences of the construction of a wall in the occupied Palestinian Territory.”

The International Court of Justice at the Hague (Netherlands) is the principal judicial organ of the United Nations and operates under a Statute which is an integral part of the Charter of the United Nations.

The Court has a twofold role: to settle legal disputes between states that have accepted its jurisdiction, and to give advisory opinions on legal questions referred to it by duly authorized international organs and agencies.

The Court is made-up of 15 judges elected to nine-year terms of office by the United Nations General Assembly and the Security Council. The Bench rendering the Advisory Opinion in this case included: President Shi Jiuyong (China); Vice-President Raymond Ranjeva (Madagascar); Judges Abdul G. Koroma (Sierra Leone); Vladlen S. Vereshchetin (Russian Federation); Rosalyn Higgins (United Kingdom); Gonzalo Parra-Aranguren (Venezuela); Pieter H. Kooijmans (Netherlands); Francisco Rezek (Brazil); Awn Shawkat Al-Khasawneh (Jordan); Thomas Buergenthal (United States of America); Nabil Elaraby (Egypt); Hisashi Owada (Japan); Bruno Simma (Germany); Peter Tomka (Slovakia), and Gilbert Guillaume (France).

14 Judges voted in favor of the Advisory Opinion. Judge Thomas Buergenthal (United States of America) was the only dissenting vote.

## Introduction

In July 2004, Israel-bashing at the United Nations took a new and dangerous turn, including for the first time the UN's judicial machinery, the International Court of Justice. A coalition dominated by oppressive regimes at the UN requested an advisory opinion from the International Court of Justice (ICJ) regarding the "legality" of the security barrier Israel built to impede the movements of suicide bombers from the West Bank into Israel and the "ramifications" of the barrier – on Palestinians only.

*Reply* is not a formal legal brief. It is a critique that focuses on examination of the ICJ's 62-page Opinion – an inquiry that revealed just how far the Bench was willing to go to serve political ends. The Court's attempt to demonize the State of Israel and ignore Jewish rights by rewriting the last 90-year history of the Arab-Israeli conflict, compelled me to expand this critique to include a broader undoctored version of the "*Historical background*."<sup>1</sup>

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<sup>1</sup> See Appendix I. ICJ Advisory Opinion, 9 July 2004, "*Historical background*" in the preamble.

Consider just two of the “myths and facts” that surround the Court’s rationale in its opinion on the ‘Wall,’ a barrier that impedes the movement of Palestinian terrorists into Israel, when it states that:

“... it is the Court’s view that the construction of the wall must be deemed to be directly of concern to the United Nations. The responsibility of the United Nations in this matter also has its origin in the *Mandate* [for Palestine] and the *Partition Resolution* [UN Resolution 181] concerning Palestine” [italics by author].

**Myth** – The ICJ claims that responsibility to bring about “the realization of the inalienable rights of the Palestinian people ... has its origin in the Mandate.”

**Fact** – Had the ICJ Bench examined the six pages of the “Mandate for Palestine” document, it would have noted that the Mandate for Palestine states explicitly the goal of the Mandate: “the establishment of the *Jewish national home* [in Palestine].”

Not once in the entire Mandate for Palestine document are Arabs as a people mentioned. Jews were the only group granted political rights in the area designated as Palestine, the *National home of the Jewish people*. There is a clear differentiation between *political* rights granted Jews, and *civil* and *religious* rights granted members of non-Jewish groups residing in Palestine. The Mandate does not mention the word “Palestinians” or the phrase “Palestinian Arabs” even once, as employed time and again in the ICJ’s Opinion.

**Myth** – The ICJ claims that responsibility to bring about “the realization of the inalienable rights of the Palestinian people” also depends on “the Partition Resolution [UN Resolution 181] concerning Palestine.”

**Fact** – It appears that the ICJ was unaware that in November 1947, all Arab states voted en bloc against UN Resolution 181 and kept their promise to defy its implementation by force. At the same time that the ICJ was re-writing history and building a case against the ‘Wall,’ the Palestinian Authority was rejecting this ‘pillar of Palestinian self-



determination,’ as stated clearly in the PLO Charter<sup>2</sup> vis-à-vis the Mandate and the “Partition Plan”:

**Article 19:** “The partition of Palestine in 1947 and the establishment of the state of Israel are entirely illegal, regardless of the passage of time ...”

**Article 20:** “The Balfour Declaration, the Mandate for Palestine, and everything that has been based upon them, are deemed null and void.”

In another blunder, the Bench was willing to go to extraordinary lengths, undermining fundamental principles of the United Nations, in denying Israel’s rights to battle terrorism. Thus, one encounters the Court’s *fallacious interpretation* of Article 51 of the UN Charter, declaring that Israel cannot claim self-defence against Palestinian terrorism because “the attacks against it are [not] imputable to a foreign State.”

Ironically, by the same logic, the British judge on the Bench, Rosalyn Higgins (who voted in favor of adopting the Opinion as written), should now advise her Government to refrain from any act of self-defence, since the four terror attacks that rocked London’s public transportation system on July 7 2005, that left 56 people dead and over 700 injured, were not “imputable to a foreign State,” and originated “within a territory over which ... [Britain] ... exercises control ...”

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<sup>2</sup> See Appendix G. The PLO Charter.



“A recommendation’s significance will not least depend on the moral authority of the adopting organ.

“Only the maintenance of high and impartial standards of decision-making in the international organ will endow its recommendations with persuasive force for all sectors of the international community.

“The application of politically motivated double standards or the use of general resolutions to champion positions in political quarrels are liable to undermine the credibility of the international organ even in areas of relative agreement.”

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More than two decades ago, in his volume *Israel and Palestine: Assault on the Law of Nations*, jurist Professor Julius Stone quoted a warning issued by Professor Christoph H. Schreuer in 1977 regarding the state of international law, written against the backdrop of a growing tendency within the General Assembly to adopt double standards and the waning credibility of the General Assembly’s resolutions as a result. Schreuer’s words are particularly relevant today vis-à-vis the International Court of Justice. For more about Professor Schreuer see: <http://www.austria.org/oldsite/oct95/quit.htm>. (11028)

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# 1 **Testimony Testifying Against Israel**

In preparation for its hearing on the issue of Israel's security fence, the ICJ invited a series of anti-Israeli terrorist organizations that openly champion and justify use of force and terrorism as a means of achieving their objectives as "likely to be able to furnish information on the question submitted to the Court."<sup>1</sup>

It is revealing just whom the ICJ believed could *contribute* information under its limited, fact-finding apparatus of written affidavits and oral presentations.

The ICJ heard testimony from the PLO, the Organization of Islamic Conference (OIC), and the Arab League, while refusing to hear any input from Israeli victims of terrorism.

The ICJ approved requests from the League of Arab States (which is officially in a state of war with Israel; see pages 18 and 20 for some of the League Resolutions), and the Organization of the Islamic Conference

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<sup>1</sup> See Appendix I. ICJ Advisory Opinion, 9 July 2004, paragraph 6.

(OIC) to participate.<sup>2</sup> The ICJ’s decision to honor the requests of these two Arab ‘international bodies’ (i.e., accepting that they have something to contribute to the question at hand) is allowed under Article 66, Clause 3 of the ICJ’s Charter. Yet, the decision to invite them is in stark contrast with the fact that the ICJ did not consider it fitting and proper to invite the Organization of Casualties of Terror Acts in Israel to present evidence – a step offered under Article 66, Clause 2 of its own Charter, which makes provisions for its own judicial procedures:

“To ... notify any state entitled to appear before the Court or *international organization* considered by the Court ... as likely to be able to furnish information on the question” [italics by author].

A request on the part of Israeli terror victims’ families to participate in oral hearings was rejected by the ICJ on the eve of oral hearings on the grounds that the families do not represent a country and therefore should not take part in the hearings.<sup>3</sup> This was doubly ironic, for prior to this the ICJ decided in the Order of its docket, Resolution 2 (December 19 2003) that it is fitting and proper for the ICJ to permit ‘Palestine’ – which does not represent a country – to “submit [to the Court] a written statement on the question ... taking into account the fact that the General Assembly has granted Palestine a special status of observer and that the latter is co-sponsor of the draft resolution requesting the advisory opinion...”<sup>4</sup>

Dr. Pieter H. F. Bekker, a member of the American Society of International Law and former staff lawyer at the ICJ, dryly described the

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<sup>2</sup> “OIC at Hague: Link between suicide attacks, Israeli ‘terror’” at: <http://www.jafi.org.il/education/actual/conflict/fence/6.html>. (11352)

<sup>3</sup> “ICJ rejects terror victim’s families participation,” *The Jerusalem Post*, February 21 2004 at: <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/Printer&cid=1077351468319>. (11353)

<sup>4</sup> Order December 19 2003, at: [http://www.mefacts.com/cache/pdf/wallruling\\_/11354.pdf](http://www.mefacts.com/cache/pdf/wallruling_/11354.pdf). (11354)

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ICJ's decision to invite a non-state "a novelty."<sup>5</sup> In a move reflecting a dubious regard for justice, the Court utilizes the PLO, a terror conglomerate, that in 1972 murdered 11 Israelis at the Munich Olympics<sup>6</sup> and whose UN-sponsored website to this very day features the "Palestinian National Charter" calling for the destruction of Israel by armed struggle as an evidentiary source.<sup>7</sup>

Taking the 'fence issue' to the International Court of Justice was a controversial step from the start. The voting in the General Assembly on the resolution to request an advisory opinion passed the General Assembly, but not with the typical near-unanimous anti-Israel vote. The resolution failed to receive an absolute majority among 191 member states. There were 90 in favor, 8 against and 74 abstentions, including most of Europe.<sup>8</sup> 19 delegations didn't even show up to vote.<sup>9</sup>

According to Article 66 of the "International Court of Justice's Charter," "... any state[s] [are] entitled to appear before the Court." Nevertheless, one is struck by the fact that 23 out of the 26 states who chose to present affidavits are categorized as "Not Free" by the human rights monitoring organization, Freedom House.

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<sup>5</sup> Pieter H. F. Bekker, "The UN General Assembly Requests a World Court Advisory Opinion on Israel's Separation Barrier," American Society of International Law, December 2003, at: <http://www.asil.org/insights/insigh121.htm>. (11355)

<sup>6</sup> This and a host of other atrocities, including a 1970 attack on an Israeli elementary school bus that killed 12 children and adults. For details of the Munich massacre, see: [http://www.palestinefacts.org/pf\\_1967to1991\\_munich.php](http://www.palestinefacts.org/pf_1967to1991_munich.php). (11356)

<sup>7</sup> Appendix G "Palestine National Charter 1968." Also see: [http://www.pna.gov.ps/Government/gov/plo\\_Charter.asp](http://www.pna.gov.ps/Government/gov/plo_Charter.asp). (10366) There is no 'revised text' of the Charter, as promised in 1993.

<sup>8</sup> Saul Singer, "Delegitimizing Israel," *National Review* at: <http://nationalreview.com/script/printpage.asp?ref=/comment/singer200401230908.asp>. (11357)

<sup>9</sup> Pieter H. F. Bekker, "The UN General Assembly Requests a World Court Advisory Opinion on Israel's Separation Barrier," American Society of International Law, December 2003, at: <http://www.asil.org/insights/insigh121.htm>. (11355)

Some of these states are rated as the worst offenders of human rights for which:

“Political rights are absent or virtually nonexistent as a result of the extremely oppressive nature of the regime or severe oppression in combination with civil war. States and territories in this group may also be marked by extreme violence or warlord rule that dominates political power in the absence of an authoritative, functioning central government.”<sup>10</sup>

The 26 states include: Algeria, Bahrain, Bangladesh, Brunei Darussalam, Comoros, Cuba, Djibouti, Egypt, Indonesia, Jordan, Kuwait, Lebanon, Malaysia, Mauritania, Morocco, Namibia, Oman, Qatar, Saudi Arabia, Senegal, Somalia, South Africa, Sudan, Tunisia, United Arab Emirates, Yemen and ‘Palestine’ – all of whom submitted scathing ‘finger pointing’ affidavits regarding Israel’s conduct. Nearly one-half of the briefs were from entities that do not even recognize Israel’s right to exist or have no diplomatic relations with Israel.<sup>11</sup>

What other entities were allowed to present affidavits? Clause 2 of Article 66 of the ICJ’s Charter cites that:

“The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court ... as likely to be able to furnish information on the question.”

It is most incongruous that the ICJ, ‘sticking strictly to its mandate’ repeats time and again the “inadmissibility of the acquisition of territory by war” (out of context) but sees nothing wrong with accepting testimony from the PLO, Fateh, the Arab League and the Organization of Islamic States, entities that refuse to recognize Israel, oppose compromise, justify

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<sup>10</sup> Freedom House, an NGO founded nearly sixty years ago by Eleanor Roosevelt, monitors the degree of freedom accorded citizens of various countries according to various parameters, and classifies countries accordingly. For the full report see: <http://www.freedomhouse.org/research/survey2004.htm>. (10783)

<sup>11</sup> Countries that do not recognize Israel: Cuba, Indonesia, Kuwait, Lebanon, Republic of Korea. Malaysia, Pakistan, Saudi Arabia, Sudan, Syria and Yemen.



support for terrorism, champion the use of violence and defy in words and deeds, ‘the inadmissability of use of violence.’

Fateh – the main faction of the PLO to which Arafat belonged and was its founding member – displays its constitution on its website.<sup>12</sup> It calls under Article 12 for the:

“Complete liberation of Palestine, and eradication of Zionist economic, political, military and cultural existence.”

The next Fateh Article calls for:

“Establishing an independent democratic state with complete sovereignty on all Palestinian lands, and Jerusalem as its capital city, and protecting the citizens’ legal and equal rights without any racial or religious discrimination.”

As for how it will achieve its goals, Fateh’s constitution, Article 19, minces no words:

“Armed struggle is a strategy and not a tactic, and the Palestinian Arab People’s armed revolution is a decisive factor in the liberation fight and in uprooting the Zionist existence, and this struggle will not cease unless the Zionist state is demolished and Palestine is completely liberated.”

In the PLO’s testimony to the ICJ, which appears in paragraph 115 of the opinion, the organization claims that the Barrier:

“... severs the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination and constitutes a violation of the legal principle prohibiting the acquisition of territory by the use of force.”

The ICJ addresses this charge with all seriousness.

It is also illuminating to examine the record of the League of Arab States’ resolutions since the founding of the Arab League in 1945, which is hardly a model for peaceful settlement of disputes in the spirit of the

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<sup>12</sup> See Appendix H. The FATEH Constitution.

United Nations. For instance, prior to the establishment of the Jewish state, the League took the following steps:<sup>13</sup>

- In December 1945, the Arab League launched a boycott of ‘Zionist goods’ that continues to this day.<sup>14</sup>
- In June 1946, it established the Higher Arab Committee to “coordinate efforts with regard to Palestine,” a radical body that led and coordinated attempts to wipe Israel off the map.<sup>15</sup>
- In December 1946, it rejected the first proposed Palestine partition plans, reaffirming “that Palestine is a part of the Arab motherland.”<sup>16</sup>
- In October 1947, prior to the vote on Resolution 181 – the “Partition Plan” – it reasserted the necessity for military preparations along Arab borders to “defending Palestine.”<sup>17</sup>
- In February 1948, it approved “a plan for political, military, and economic measures to be taken in response to the Palestine crisis.”<sup>18</sup>

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<sup>13</sup> Listing of the Arab League sessions covering the League sessions between June 4 1945 to November 17 1957 can be found at: <http://faculty.winthrop.edu/haynese/mlas/ALSessions.html>. (11358)

<sup>14</sup> Session: 2, Cairo, Egypt. Resolution 16 (December 16 1945), “The Boycott of Zionist Goods and Products” (Khalil, 2:161) – plans made to establish a committee to enforce the boycott. (11358)

<sup>15</sup> Session 4, Bludan, Syria, Resolution 82 (June 12 1946), “The Higher Arab Executive Committee” (Khalil, 2:162) – Establish the body to coordinate efforts with regard to Palestine. (11358)

<sup>16</sup> Ibid.

<sup>17</sup> Session: 7, Cairo, Egypt, Resolution 181 (October 9 1947), “Defending Palestine” (Khalil, 2:164-65) – Reassertion of the necessity for military preparations along Arab borders. (11358)

<sup>18</sup> Session: 8, Cairo, Egypt, February 1948, Council approved plan for political, military, and economic measures to be taken in response to the Palestine crisis, including withholding petroleum concessions and other possible sanctions against countries aiding the Zionists. (11358)

- In October 1948, it rejected the UN “Partition Plan” for Palestine adopted by the General Assembly in Resolution 181.<sup>19</sup>

On May 15 1948, as the regular forces of Egypt, Trans-Jordan, Syria, Lebanon, Iraq, and contingents from Saudi Arabia and Yemen invaded Israel to ‘restore law and order,’ the Arab League issued a lengthy document entitled “Declaration on the Invasion of Palestine.” In it, the Arab states drew attention to:

“... the injustice implied in this solution [affecting] the right of the people of Palestine to immediate independence ... declared the Arabs’ rejection of [Resolution 181]” which the League said “would not be possible to carry it out by peaceful means, and that its forcible imposition would constitute a threat to peace and security in this area” and claimed that the “security and order in Palestine have become disrupted” due to the “aggressive intentions and the imperialistic designs of the Zionists” and “the Governments of the Arab States, as members of the Arab League, a regional organization ... view the events taking place in Palestine as a threat to peace and security in the area as a whole. ... Therefore, as security in Palestine is a sacred trust in the hands of the Arab States, and in order to put an end to this state of affairs ... the Governments of the Arab States have found themselves compelled to intervene in Palestine.”<sup>20</sup>

The Secretary-General of the Arab League, Azzam Pasha, was less diplomatic and far more candid. With no patience for polite or veiled language, on the same day Israel declared its independence on May 14 1948, at a Cairo press conference reported the next day in *The New York Times*, Pasha repeated the Arabs’ “intervention to restore law and order” revealing:

“This will be a war of extermination and a momentous massacre which will be spoken of like the Mongolian massacres and the Crusades.”

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<sup>19</sup> Session: 9, Cairo, Egypt, October 1948, rejection of partition plan for Palestine. (11358)

<sup>20</sup> For the full text of the Arab League declaration on the invasion of Palestine – 15 May 1948, see Israel Ministry of Foreign Affairs at: [http://www.mefacts.com/cache/html/wall-ruling\\_/11359.htm](http://www.mefacts.com/cache/html/wall-ruling_/11359.htm). (11359)

The League of Arab States continued to oppose peace after Israel's 1948 War of Independence:

- In July 15 1948, the UN Security Council adopted Resolution 54 calling on Arab aggression to stop:

“Taking into consideration that the Provisional Government of Israel has indicated its acceptance in principle of a prolongation of the truce in Palestine; that the States members of the Arab League have rejected successive appeals of the United Nations Mediator, and of the Security Council in its resolution 53 (1948) of 7 July 1948, for the prolongation of the truce in Palestine; and that there has consequently developed a renewal of hostilities in Palestine.”<sup>21</sup>

- In October 1949, the Arab League declared that negotiation with Israel by any Arab state would be in violation of Article 18 of the Arab League.<sup>22</sup>
- In April 1950, it called for severance of relations with any Arab state which engaged in relations or contacts with Israel and prohibited Member states from negotiating unilateral peace with Israel.<sup>23</sup>
- In March 1979, it suspended Egypt's membership in the League (retroactively) from the date of its signing a peace treaty with Israel.<sup>24</sup>

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<sup>21</sup> UN Security Council S/RES/54 (1948), July 15 1948, at: <http://domino.un.org/UNISPAL.NSF/0/2e2bcb7cbafd9b70852560c2005b5eec?OpenDocument>. (10894)

<sup>22</sup> Session: 11, Resolution 250, October 1949, Cairo, Egypt, Declared that any member State negotiating with Israel would be in violation of Article 18 of the Arab League Pact. (11358)

<sup>23</sup> Session: 12, Resolution 312 (April 13 1950) Called for severance of relations with any Arab State, which engaged in relations or contacts with Israel. (11358)

<sup>24</sup> Session: 70, March 1979, Bagdad, Iraq, Resolution to recommend severance of political and diplomatic relations with Egypt. (11358)

More recently, in the Beirut Declaration of March 27-28, 2002, adopted at the height of Palestinian suicide attacks in Israel, the Arab League declared:

“We, the kings, presidents, and emirs of the Arab states meeting in the Council of the Arab League Summit in Beirut, capital of Lebanon ... have conducted a thorough assessment of the developments and challenges ... relating to the Arab region and, more specifically, to the occupied Palestinian territory. With great pride, we followed the Palestinian people’s intifada and valiant resistance. ... We address a greeting of pride and honour to the Palestinian people’s steadfastness and valiant intifada against the Israeli occupation and its destructive war machine. We greet with honour and pride the valiant martyrs of the intifada.”<sup>25</sup>

The Arab League, which has systematically opposed and blocked peace efforts for 60 years, is in a declared state-of-war with Israel, and more recently, proudly and publicly supports the deeds of suicide bombers, is now deemed by the International Court of Justice to have something significant to contribute regarding the propriety of Israel’s security barrier.

Another ‘welcome participant’ in the ICJ’s proceedings was the Organization of the Islamic Conference. The OIC recently held a conference in Malaysia prior to the issuance of the ICJ opinion, dedicated to refuting the connection between the Muslim world and terrorism. In an editorial in *The Washington Post* (“Death Wish,” April 4 2002)<sup>26</sup> the stunned editors of the paper noted the nature of this organization and its agenda:

“57 assembled states adopted a resolution that specifically rejected the idea that Palestinian ‘resistance’ to Israel has anything to do with terrorism ... In

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<sup>25</sup> For excerpts from the text, posted in English translation on the Arab portal al-bab (‘Gateway’), see: <http://www.al-bab.com/arab/docs/league/communique02.htm>. (11360)

<sup>26</sup> Defending Palestinian suicide bombers. Kuala Lumpur, Malaysia, April 3 2002. See: <http://www.mefacts.com/cache/html/islam/11369.htm>. (11369). See also “Malaysia PM: Arm Islam, Fight Jews” at: <http://www.mefacts.com/cache/html/antisemitism/10514.htm> (10514) and <http://www.mefacts.com/cache/html/icj/11482.htm>. (11482)

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effect, the Islamic conference sanctioned not only terrorism but also suicide as legitimate political instruments ... It is hard to imagine any other grouping of the world's nations that could reach such a self-destructive and morally repugnant conclusion ... Muslim spokesmen protest that terrorism is not easily defined. ... And yet it should not be hard to agree that a person who detonates himself in a pizza parlor or a discotheque filled with children, spraying scrap metal and nails in an effort to kill and maim as many of them as possible, has done something evil that can only discredit and damage whatever cause he hopes to advance.”

It continued and warned prophetically:

“That Muslim governments cannot agree on this is shameful evidence of their own moral and political corruption. ... The Palestinian national cause will never recover – nor should it – until its leadership is willing to break definitively with the bombers. And Muslim states that support such sickening carnage will risk not just stigma but also their own eventual self-destruction.”

Nevertheless, the Bench of the International Court of Justice is convinced that such an organization can contribute to its deliberations.

The ICJ also overlooks the existence of Palestinian self-rule<sup>27</sup> and the role of the PA and Arafat in encouraging, financing, directing and even engaging directly in terrorism.<sup>28</sup> It also ignored the solidarity Palestinian society has exhibited in embracing terrorism.

At the time of the hearings, reputable Palestinian pollster Dr. Khalil Shikaki of Ramallah found broad public support for terrorism and the belief that ‘terrorism pays off.’ In late September 2004, following the ICJ opinion that judges terrorism immaterial, Dr. Shikaki’s annual poll found 77 percent of all Palestinians support the double suicide bombing

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<sup>27</sup> See Main Points of Gaza-Jericho Agreement (Oslo) at: <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Main%20Points%20of%20Gaza-Jericho%20Agreement>. (11371)

<sup>28</sup> See IDF report: “Arafat’s and the PA’s Involvement in Terrorism” at: <http://www.intelligence.org.il/eng/bu/financing/pdfs/03.pdf>. (11372)

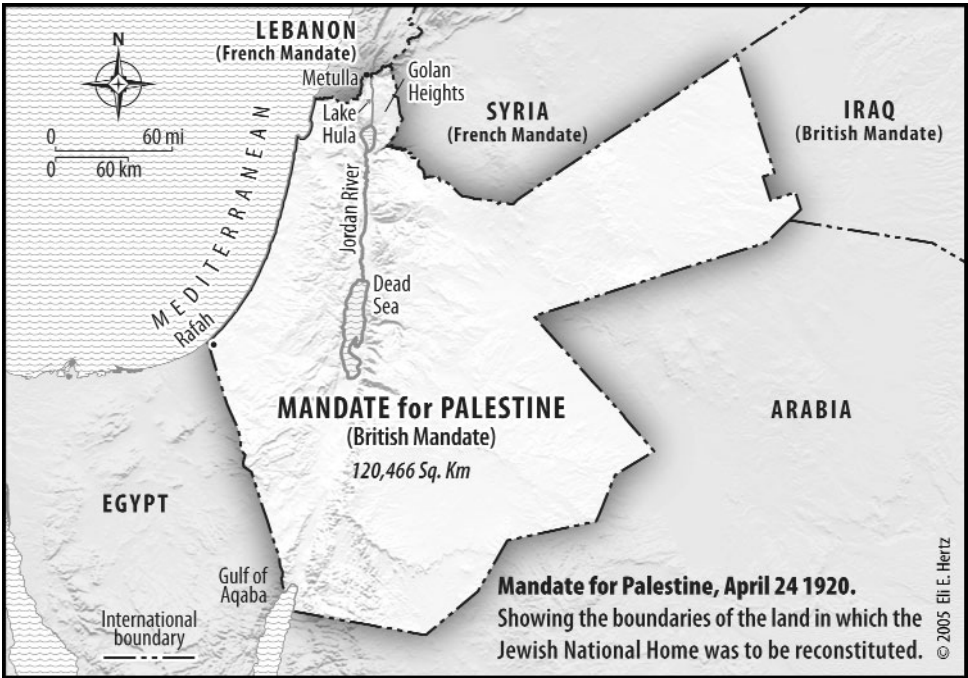
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of two public buses in Beersheba (compared to 75 percent for a similar act at the Maxim restaurant in Haifa in October 2003, before the issuing of the ICJ's opinion); 75 percent support the shelling of Israeli civilian settlements from Gaza; and 64 percent (up from 59 percent in October 2003) "believe armed confrontations have helped Palestinians achieve their national rights in ways that negotiations could not."<sup>29</sup>

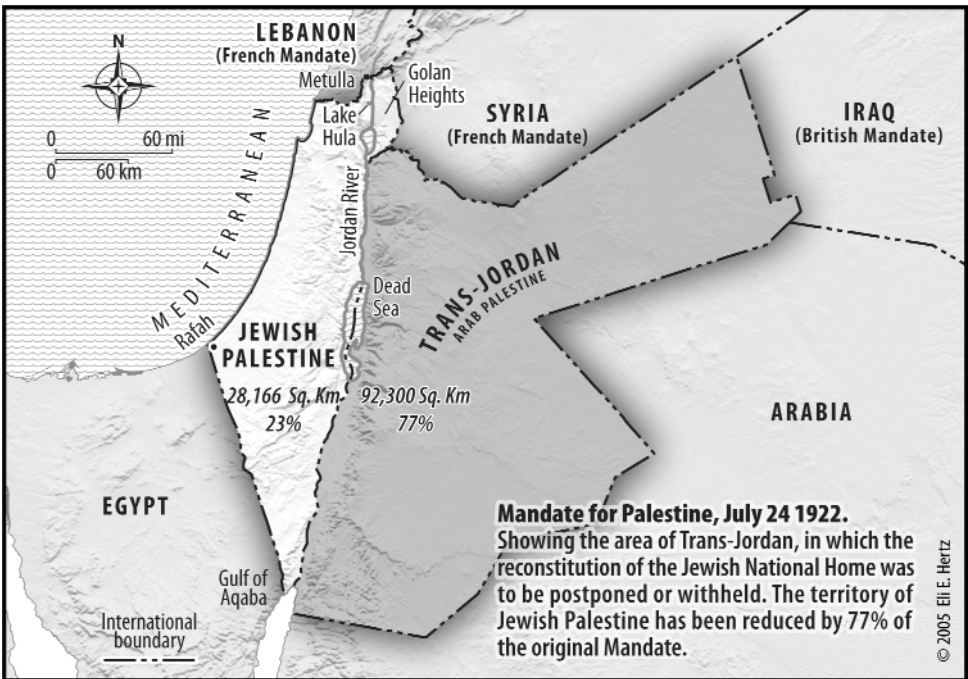
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<sup>29</sup> See polls by pollster Dr. Khalil Shukaki, at: [www.pcpsr.org](http://www.pcpsr.org).

**1920 – Original territory assigned to the Jewish National Home**



**1922 – Final territory assigned to the Jewish National Home**





## 2 The “Mandate for Palestine” Document

The ICJ, in noting it would briefly analyze “the status of the territory concerned,” and the “*Historical background*,” fails to cite the true and relevant content of the historical document, the “Mandate for Palestine.”<sup>1</sup>

The “Mandate for Palestine” [E.H., the Court refers to as “Mandate”] laid down the Jewish right to settle anywhere in western Palestine, the area between the Jordan River and the Mediterranean Sea, an entitlement unaltered in international law and valid to this day.

The legally binding Mandate for Palestine document, was conferred on April 24 1920, at the San Remo Conference and its terms outlined in the Treaty of Sevres on August 10 1920. The Mandate’s terms were finalized on July 24 1922, and became operational in 1923.

In paragraphs 68 and 69 of the opinion, ICJ states it will first “determine whether or not the construction of that wall breaches international law.” The opinion quotes hundreds of documents as relevant to the case at hand, but only a few misleading paragraphs are devoted to the “Mandate.” Moreover, when it comes to discussing the significance of the ‘founding document’ regarding the status of the territory in question – situated between the Jordan River and the Mediterranean Sea, including the State of Israel, the West Bank and Gaza – the ICJ devotes a mere 237 murky words to nearly 30 years of history when Great Britain ruled the land it called Palestine.

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<sup>1</sup> See Appendix A. “Mandate for Palestine.”

All the more remarkable, the ICJ *thinks* that the “Mandate for Palestine” was the founding document for Arab Palestinian self-determination!

### **The ICJ’s faulty reading of the “Mandate.”**

“Palestine was part of the Ottoman Empire. At the end of the First World War, a class ‘A’ Mandate for Palestine was entrusted to Great Britain by the League of Nations, pursuant to paragraph 4 of Article 22 of the Covenant, which provided that: ‘Certain communities, formerly belonging to the Turkish Empire, have reached a stage of development where their existence as independent nations can be provisionally recognized, subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.’”<sup>2</sup>

The judges choose to speak of “Palestine” in lieu of the actual wording of the historic document that established the Mandate for Palestine – “territory of Palestine.”<sup>3</sup> The latter would demonstrate that “Palestine” is a geographic designation, and not a polity. In fact, Palestine has never been an independent state belonging to any people, nor did a Palestinian people, distinct from other Arabs, appear during 1,300 years of Muslim hegemony in Palestine under Arab and Ottoman rule. Local Arabs during that rule were actually considered part of and subject to the authority of Greater Syria (*Suriyya al-Kubra*).

The ICJ, throughout its lengthy opinion, chooses to speak incessantly of “Palestinians” and “Palestine” as an *Arab entity*, failing to define these two terms and making no clarification as to the nature of the “Mandate for Palestine.”

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<sup>2</sup> See Appendix I. ICJ Advisory Opinion, 9 July 2004.

<sup>3</sup> See Appendix A. “Mandate for Palestine,” first sentence: “Whereas the Principal Allied Powers have agreed, for the purpose of giving effect to the provisions of Article 22 of the Covenant of the League of Nations, to entrust to a Mandatory selected by the said Powers the administration of the *territory of Palestine*, which formerly belonged to the Turkish Empire, within such boundaries as may be fixed by them.” [italics by author]

## **Palestine is a geographical area, not a nationality.**

Below is a copy of the document as filed at the British National Archive describing the delineation of the geographical area called Palestine:

### PALESTINE

#### INTRODUCTORY. POSITION, ETC.

Palestine lies on the western edge of the continent of Asia between Latitude 30° N. and 33° N., Longitude 34° 30' E. and 35° 30' E.

On the North it is bounded by the French Mandated Territories of Syria and Lebanon, on the East by Syria and Trans-Jordan, on the South-west by the Egyptian province of Sinai, on the South-east by the Gulf of Aqaba and on the West by the Mediterranean. The frontier with Syria was laid down by the Anglo-French Convention of the 23rd December, 1920, and its delimitation was ratified in 1923. Briefly stated, the boundaries are as follows:

North. – From Ras en Naqura on the Mediterranean eastwards to a point west of Qadas, thence in a northerly direction to Metulla, thence east to a point west of Banias.

East. – From Banias in a southerly direction east of Lake Hula to Jisr Banat Ya'pub, thence along a line east of the Jordan and the Lake of Tiberias and on to El Hamme station on the Samakh-Deraa railway line, thence along the centre of the river Yarmuq to its confluence with the Jordan, thence along the centres of the Jordan, the Dead Sea and the Wadi Araba to a point on the Gulf of Aqaba two miles west of the town of Aqaba, thence along the shore of the Gulf of Aqaba to Ras Jaba.

South. – From Ras Jaba in a generally north-westerly direction to the junction of the Neki-Aqaba and Gaza Aqaba Roads, thence to a point west-north-west of Ain Maghara and thence to a point on the Mediterranean coast north-west of Rafa.

West. – The Mediterranean Sea.

Like a mantra, Arabs, the UN, its organs and now the International Court of Justice have claimed repeatedly that the Palestinians are a native people – so much so that almost everyone takes it for granted. The problem is that a stateless Palestinian people is a fabrication. The word 'Palestine' is not even Arabic.<sup>4</sup>

In a report by His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland to the Council of the League of

<sup>4</sup> For more on this subject see, Popular Searches: Territories and Palestinians at <http://www.MEfacts.com>.

Nations on the administration of Palestine and Trans-Jordan for the year 1938, the British made it clear: *Palestine is not a State but is the name of a geographical area.*<sup>5</sup>

The ICJ Bench creates the impression that the League of Nations was speaking of a nascent state or national grouping – the Palestinians who were one of the “communities” mentioned in Article 22 of the League of Nations. *Nothing could be farther from the truth.* The Mandate for Palestine was a Mandate for Jewish self-determination.

It appears that the Court ignored the content of this most significant legally-binding document regarding the status of the Territories.

Paragraph 1 of Article 22 of the Covenant of the League of Nations reads:

“To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.”<sup>6</sup>

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<sup>5</sup> Palestine is a word coined by the Romans around 135 C.E. from the name of a seagoing Aegean people who settled on the coast of Canaan in antiquity – the Philistines. The name was chosen to replace Judea, as a sign that Jewish sovereignty had been eradicated after the Jewish Revolt against Rome. In the course of time, the name Philistia in Latin was further bastardized into Palistina or Palestine. In modern times the name ‘Palestine’ or ‘Palestinian’ was applied as an adjective to all inhabitants of the geographical area between the Mediterranean Sea and the Jordan River – Palestinian Jews and Palestinian Arabs alike. In fact, up until the 1960s, most Arabs in Palestine preferred to identify themselves merely as part of the great Arab nation or as part of Arab Syria.

Until recently, no Arab nation or group recognized or claimed the existence of an independent Palestinian nationality or ethnicity. Arabs who happened to live in Palestine denied that they had a unique Palestinian identity. The First Congress of Muslim-Christian Associations (Jerusalem, February 1919) met to select Palestinian Arab representatives for the Paris Peace Conference. They adopted the following resolution: “We consider Palestine as part of Arab Syria, as it has never been separated from it at any time. We are connected with it by national, religious, linguistic, natural, economic and geographical bonds.” See Yehoshua Porath, “The Palestinian Arab National Movement: From Riots to Rebellion,” Frank Cass and Co., Ltd, London, 1977, vol. 2, pp. 81-82.

<sup>6</sup> See Appendix F. Article 22 of The Covenant of The League of Nations, A/297, April 30 1947.

The Palestinian [British] Royal Commission Report of July 1937 addresses Arab claims that the creation of the Jewish National Home as directed by the Mandate for Palestine violated Article 22 of the Covenant of the League of Nations, arguing that they are the communities mentioned in paragraph 4:

“As to the claim, argued before us by Arab witnesses, that the Palestine Mandate violates Article 22 of the Covenant because it is not in accordance with paragraph 4 thereof, we would point out (*a*) that the provisional recognition of ‘certain communities formerly belonging to the Turkish Empire’ as independent nations is permissive; the words are ‘*can* be provisionally recognised’, not ‘*will*’ or ‘*shall*’: (*b*) that the penultimate paragraph of Article 22 prescribes that the degree of authority to be exercised by the Mandatory shall be defined, at need, by the Council of the League: (*c*) that the acceptance by the Allied Powers and the United States of the policy of the Balfour Declaration made it clear from the beginning that Palestine would have to be treated differently from Syria and Iraq, and that this difference of treatment was confirmed by the Supreme Council in the Treaty of Sevres and by the Council of the League in sanctioning the Mandate.

“This particular question is of less practical importance than it might seem to be. For Article 2 of the Mandate requires ‘the development of self-governing institutions’; and, read in the light of the general intention of the Mandate System (of which something will be said presently), this requirement implies, in our judgment, the ultimate establishment of independence.

“(3) The field [Territory] in which the Jewish National Home was to be established was understood, at the time of the Balfour Declaration, to be the whole of historic Palestine, and the Zionists were seriously disappointed when Trans-Jordan was cut away from that field [Territory] under Article 25.” [E.H., That excluded 77 percent of historic Palestine – the territory east of the Jordan River, what became later Trans-Jordan.]<sup>7</sup>

The “inhabitants” of the territory for whom the Mandate for Palestine was created, who according to the Mandate were “not yet able” to govern themselves and for whom self-determination was a “sacred trust,” were not Palestinians, or even Arabs. The Mandate for Palestine was created by the predecessor of the United Nations, the League of Nations, for the *Jewish People*.<sup>8</sup>

<sup>7</sup> Palestine Royal Report, July 1937, Chapter II, p. 38.

<sup>8</sup> See: Appendix A. “Mandate for Palestine.”

The second paragraph of the preamble of the Mandate for Palestine therefore reads:

“Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favor of the *establishment in Palestine of a national home for the Jewish people*, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine ... *Recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country ...*” [italics by author].

### **The ICJ erred in identifying the “Mandate for Palestine” as a Class “A” Mandate.**

The International Court of Justice also assumed that the “Mandate for Palestine” was a Class “A” mandate,<sup>10</sup> a common, but inaccurate assertion that can be found in many dictionaries and encyclopedias, and is frequently used by the pro-Palestinian media. In paragraph 70 of the opinion, the Court erroneously states that:

“Palestine was part of the Ottoman Empire. At the end of the First World War, *a class [type] ‘A’ Mandate for Palestine* was entrusted to Great Britain by the League of Nations, pursuant to paragraph 4 of Article 22 of the Covenant ...”<sup>11</sup> [italics by author].

Indeed, Class “A” status was granted to a number of Arab peoples who were ready for independence in the former Ottoman Empire, and only to Arab entities.<sup>12</sup> Palestinian Arabs were not one of these ‘Arab peoples.’

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<sup>9</sup> Ibid.

<sup>10</sup> The British Government used the term ‘Special Regime.’

<sup>11</sup> See Appendix I. ICJ Advisory Opinion, 9 July 2004.

<sup>12</sup> Class “A” mandates assigned to Britain was Iraq, and assigned to France was Syria and Lebanon. Examples of other type of Mandates were the Class “B” mandate assigned to Belgium administering Ruanda-Urundi, and the Class “C” mandate assigned to South Africa administering South West Africa.

## The Palestine Royal Report clarifies this point:

“(2) The Mandate [for Palestine] is of a *different type* from the Mandate for Syria and the Lebanon and the draft Mandate for Iraq. These latter, which were called for convenience “A” Mandates, accorded with the fourth paragraph of Article 22. Thus the Syrian Mandate provided that the government should be based on an organic law which should take into account the rights, interests and wishes of all the inhabitants, and that measures should be enacted ‘to facilitate the progressive development of Syria and the Lebanon as independent States’. The corresponding sentences of the draft Mandate for Iraq were the same. In compliance with them National Legislatures were established in due course on an elective basis. Article 1 of the *Palestine Mandate, on the other hand*, vests ‘full powers of legislation and of administration’, within the limits of the Mandate, in the Mandatory”<sup>13, 14</sup> [italics by author].

## The Palestine Royal Report highlights additional differences:

“Unquestionably, however, the primary purpose of the Mandate, as expressed in its preamble and its articles, is to promote the establishment of the Jewish National Home.

“(5) Articles 4, 6 and 11 provide for the recognition of a Jewish Agency ‘as a public body for the purpose of advising and co-operating with the Administration’ on matters affecting Jewish interests. No such body is envisaged for dealing with Arab interests.”<sup>15</sup>

“48. But Palestine was *different* from the other ex-Turkish provinces. It was, indeed, *unique* both as the Holy Land of three world-religions and as the old historic homeland of the Jews. The Arabs had lived in it for centuries, but they had long ceased to rule it, and in view of its peculiar character they could not now claim to possess it in the same way as they could claim possession of Syria or Iraq”<sup>16</sup> [italics by author].

<sup>13</sup> The “Palestine Royal Report”, July 1937, Chapter II, p.38.

<sup>14</sup> Claims that Palestinian self-determination was granted under Chapter 22 of the UN Charter and the ‘pre-existence’ of an Arab governmental structure (of a host of fallacies) can be found in Issa Nakhlah, “Encyclopedia of the Palestinian Problem” at <http://www.palestine-encyclopedia.com/EPP/Chapter01.htm>. (11452)

<sup>15</sup> Palestine Royal Report, July 1937, Chapter II, p. 39.

<sup>16</sup> Ibid. p. 40.

## Identifying the “Mandate for Palestine” as Class “A” was vital to the ICJ.

There is much to be gained by attributing Class “A” status to the Mandate for Palestine. If ‘the inhabitants of Palestine’ were ready for independence under a Class “A” mandate, then the Palestinian Arabs that made up the majority of the inhabitants of Palestine in 1922 (589,177 Arabs vs. 83,790 Jews)<sup>17</sup> could then logically claim that they were the intended beneficiaries of the Mandate for Palestine – provided one never reads the actual wording of the document:

1. The “Mandate for Palestine”<sup>18</sup> *never mentions Class “A” status at any time* for Palestinian Arabs.
2. Article 2 clearly speaks of the Mandatory as being:

“responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the *Jewish national home*” [italics by author].

The Mandate calls for steps to encourage *Jewish immigration and settlement* throughout Palestine except east of the Jordan River. Historically, therefore, Palestine was an ‘anomaly’ within the Mandate system, ‘in a class of its own’ – initially referred to by the British as a “special regime.”<sup>19</sup>

## Political rights were granted to Jews only.

Had the ICJ Bench examined all six pages of the Mandate for Palestine document, it would have also noted that several times the Mandate for Palestine clearly differentiates between *political* rights – referring to Jewish self-determination as an emerging polity – and *civil* and *religious* rights, referring to guarantees of equal personal freedoms to non-Jewish residents as individuals and within select communities. Not once are

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<sup>17</sup> Citing by the UN. 1922 Census. See at: <http://www.unu.edu/unupress/unupbooks/80859e/80859E05.htm>. (11373)

<sup>18</sup> See: Appendix A. “Mandate for Palestine.”

<sup>19</sup> Palestine Royal Report, July 1937, Chapter II, p. 28, paragraph 29.

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Arabs as a people mentioned in the Mandate for Palestine. At no point in the entire document is there any granting of political rights to non-Jewish entities (i.e., Arabs) because political rights to self-determination as a polity for Arabs were guaranteed in three other parallel Class “A” mandates – in Lebanon, Syria and Iraq. Again, the Bench failed to do its history homework. For instance, Article 2 of the Mandate for Palestine states explicitly that the Mandatory should:

“... be responsible for placing the country under such *political*, administrative and economic conditions as will secure the establishment of the *Jewish national home*, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the *civil* and religious *rights* of all the inhabitants of Palestine, irrespective of race and religion” [italics by author].

Eleven times in the Mandate for Palestine the League of Nations speaks specifically of Jews and the Jewish people, calling upon Great Britain to create a nationality law “to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine.”

There is not one mention of the word “Palestinians” or the phrase “Palestinian Arabs,” as it is exploited today. The “non-Jewish communities” the Mandate document speaks of were extensions (or in today’s parlance, ‘diaspora communities’) of another Arab people for whom a *separate* mandate had been drawn up at the same time: the Syrians that the International Court of Justice ignored in its so-called “*Historical background*” of the Mandate system.<sup>20</sup>

Consequently, it is not surprising that a local Arab leader, Auni Bey Abdul-Hadi, stated in his testimony in 1937 before the Peel Commission:

“There is no such country [as Palestine]! Palestine is a term the Zionists invented! There is no Palestine in the Bible. Our country was for centuries, part of Syria.”<sup>21</sup>

<sup>20</sup> The League of Nations puts Syria under French mandate. Syria gained full independence on 17 April 1946.

<sup>21</sup> For this and a host of other quotes from Arab spokespersons on the Syrian identity of local Arabs, see <http://www.yahoodi.com/peace/palestinians.html>. (11538)

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The term ‘Palestinian’ in its present connotation had only been invented in the 1960s to paint Jews – who had adopted the term ‘Israelis’ after the establishment of the State of Israel – as invaders now residing on Arab turf. The ICJ was unaware that written into the terms of the Mandate, Palestinian Jews had been directed to establish a “Jewish Agency for Palestine” (today, the Jewish Agency), to further Jewish settlements, or that since 1902, there had been an “Anglo-Palestine Bank,” established by the Zionist Movement (today Bank Leumi). Nor did they know that Jews had established a “Palestine Philharmonic Orchestra” in 1936 (today, the Israeli Philharmonic), and an English-language newspaper called the “*The Palestine Post*” in 1932 (today, *The Jerusalem Post*) – along with numerous other Jewish Palestinian institutions.

Consequently, the ICJ incorrectly cites the unfulfilled Mandate for Palestine and the Partition Resolution concerning Palestine as justification for the Bench’s intervention in the case. The ICJ argues that as the judicial arm of the United Nations, the International Court of Justice has jurisdiction in this case because of its responsibility as a UN institution for bringing Palestinian self-determination to fruition! In paragraph 49 of the opinion, the Bench declares:

“... the Court does not consider that the subject-matter of the General Assembly’s request can be regarded as only a bilateral matter between Israel and Palestine ...[therefore] construction of the wall must be deemed to be directly of concern to the United Nations. The responsibility of the United Nations in this matter also has its *origin in the Mandate* and the Partition Resolution concerning Palestine.<sup>22</sup> This responsibility has been described by the General Assembly as ‘a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy’ (General Assembly resolution 57/107 of 3 December 2002.) ...” the objective being “the realization of the inalienable rights of the Palestinian people” [italics by author].

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<sup>22</sup> See Appendix I. ICJ Advisory Opinion, 9 July 2004, paragraphs 70-71.

To the average reader without historical knowledge of this conflict, the term “Mandate for Palestine” sounds like an Arab trusteeship, but this interpretation changes neither history nor legal facts about Israel.

Had the ICJ examined the minutes of the report of the 1947 “United Nations Special Committee on Palestine,”<sup>23</sup> among the myriad of documents it did examine, the learned judges would have known that the Arabs categorically rejected the Mandate for Palestine. In the July 22, 1947 testimony of the President of the Council of Lebanon, Hamid Frangie, the Lebanese Minister of Foreign Affairs, speaking on behalf of all the Arab countries, declared unequivocally:

“... there is only one solution for the Palestinian problem, namely cessation of the Mandate [for the Jews]” and both the Balfour Declaration and the Mandate are “null and valueless.” All of Palestine, he claimed, “is in fact an integral part of this Arab world, which is organized into sovereign States (with no mention of an Arab Palestinian State) bound together by the political and economic pact of 22 March 1945”<sup>24</sup> [E.H., the Arab League].

Frangie warned of more bloodshed:

“The Governments of the Arab States will not under any circumstances agree to permit the establishment of Zionism as an autonomous State on Arab territory” and that Arab countries “wish to state that they feel certain that the partition of Palestine and the creation of a Jewish State would result only in *bloodshed* and unrest throughout the entire Middle East”<sup>25</sup> [italics by author].

This is not the only document that would have instructed the judges that the Mandate for Palestine was not for Arab Palestinians. Article 20<sup>26</sup> of the PLO Charter, adopted by the Palestine National Council in July

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<sup>23</sup> See doc. at: <http://www.mefacts.com/cache/html/un-documents/11188.htm>. (11188)

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> See Appendix G. Article 20 of the PLO Charter. (10366)

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1968 and never legally revised,<sup>27</sup> and proudly posted on the Palestinian delegation's UN website, states:

“The Balfour Declaration, the Mandate for Palestine, and everything that has been based upon them, are deemed null and void.”<sup>28</sup>

The PLO Charter adds that Jews do not meet the criteria of a nationality and therefore do not deserve statehood at all, clarifying this statement in Article 21 of the Palestinian Charter, that Palestinians,

“... reject all solutions which are substitutes for the total liberation of Palestine.”

It is difficult to ignore yet another instance of historical fantasy, where the ICJ also quotes extensively from Article 13 of the Mandate for Palestine with respect to Jerusalem's Holy Places and access to them as one of the foundations for Palestinian rights allegedly violated by the security barrier. The ICJ states in paragraph 129 of the Opinion:

“In addition to the general guarantees of freedom of movement under Article 12 of the International Covenant on Civil and Political Rights, account must also be taken of specific guarantees of access to the Christian, Jewish and Islamic Holy Places. The status of the Christian Holy Places in the Ottoman Empire dates far back in time, the latest provisions relating thereto having been incorporated into Article 62 of the Treaty of Berlin of 13 July 1878. The Mandate for Palestine given to the British Government on 24 July 1922 included an Article 13, under which:

“All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, while ensuring the requirements of public order and decorum, is assumed by the Mandatory...” Article 13 further stated: “nothing in this mandate shall be construed as conferring ... authority to

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<sup>27</sup> The Palestinians pretend that all anti-Israel clauses were abolished in a three day meeting of the Palestinian National Council (PNC) in Gaza in April 1996. In fact, the Council took only a bureaucratic decision to establish a committee to discuss abolishment of the clauses that call for the destruction of Israel as they had promised to do at the outset of the Oslo Accords, and no further action has been taken by this ‘committee’ to this day.

<sup>28</sup> See Permanent Missions to the UN, at: [http://www.palestine-un.org/plo/pna\\_three.html](http://www.palestine-un.org/plo/pna_three.html). (11361)

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interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed.”<sup>29</sup>

In fact, the 187-word quote is longer than the ICJ’s entire treatment of nearly three decades of British Mandate, which is summed up in one sentence, and is part of the ICJ rewriting of history:

“In 1947 the United Kingdom announced its intention to complete evacuation of the mandated territory by 1 August 1948, subsequently advancing that date to 15 May 1948.”<sup>30</sup>

The Preamble of the Mandate for Palestine, as well as the other 28 articles of this legal document, including eight articles which specifically refer to the *Jewish* nature of the Mandate and discuss where Jews are legally permitted to settle and where they are not, *appear nowhere* in the Court’s document.<sup>31</sup>

## **Origin of the “Mandate for Palestine” the ICJ overlooked.**

The Mandate for Palestine was conferred on April 24 1920, at the San Remo Conference, and the terms of the Mandate were further delineated on August 10 1920, in the Treaty of Sevres.

The Treaty of Sevres, known also as the Peace Treaty, was settled following World War I at Sevres (France), between the Ottoman Empire (Turkey), and the Principal Allied Powers.

Turkey relinquished its sovereignty over Mesopotamia (Iraq) and Palestine, which became British mandates, and Syria (Lebanon included), which became a French mandate.

The Treaty of Sevres was not ratified by all Turks, and a new treaty was renegotiated and signed on July 24 1923. It became known as the Treaty of Lausanne.

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<sup>29</sup> See Appendix I. ICJ Advisory Opinion, 9 July 2004.

<sup>30</sup> Ibid. Paragraph 71.

<sup>31</sup> See: Appendix A. Article 2 of the “Mandate for Palestine.”

The Treaty of Sevres in Section VII, Articles 94 and 95, states clearly in each case who are the inhabitants referred to in paragraph 4 of Article 22 of the Covenant of the League of Nations.<sup>32</sup>

Article 94 distinctly indicates that Paragraph 4 of Article 22 of the Covenant of the League of Nations applies to the Arab inhabitants living within the areas covered by the Mandates for Syria and Mesopotamia. The Article reads:

“The High Contracting Parties agree that *Syria* and *Mesopotamia* shall, in accordance with the fourth paragraph of Article 22.

Part I (Covenant of the League of Nations), be provisionally recognised as independent States subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone ...” [italics by author].

Article 95 of the Treaty of Sevres, however, makes it clear that paragraph 4 of Article 22 of the Covenant of the League of Nations was not to be applied to the Arab inhabitants living within the area to be delineated by the Mandate for Palestine, but only to the Jews. The Article reads:

“The High Contracting Parties agree to entrust, by application of the provisions of Article 22, the administration of Palestine, within such boundaries as may be determined by the Principal Allied Powers, to a Mandatory to be selected by the said Powers. The Mandatory will be responsible for putting into effect the declaration originally made on November 2, 1917, by the British Government, and adopted by the other Allied Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country ...”

Historically, therefore, Palestine was an ‘anomaly’ within the Mandate system, ‘in a class of its own’ – initially referred to by the British Government as a “special regime.”

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<sup>32</sup> See Appendix F. Article 22 of the Covenant of the League of Nations.

Articles 94 and 95 of the Treaty of Sevres, which the ICJ never discussed, completely undermines the ICJ’s argument that the Mandate for Palestine was a Class “A” Mandate. This erroneous claim renders the Court’s subsequent assertions baseless.

### **The ICJ attempts to overcome historical facts.**

In paragraph 162 of the Advisory Opinion, the Court states:

“Since 1947, the year when General Assembly resolution 181 (II) was adopted and the *Mandate for Palestine was terminated*, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory” [italics by author].

The Court attempts to ‘overcome’ historical legal facts by making the reader believe that adoption of Resolution 181 by the General Assembly in 1947 has present-day legal standing.<sup>33</sup>

The Court also seems to be confused when it states in paragraph 162 of the opinion that “the Mandate for Palestine was terminated” – with no substantiation [E.H., Unless the Court has confused the termination of the British Mandate over the territory of Palestine with the Mandate for Palestine document] as to how this could take place, since the Mandates of the League of Nations have a special status in international law and are considered to be “sacred trusts.” A trust – as in Article 80 of the UN Charter – does not end because the trustee fades away. The Mandate for Palestine, an international accord that was never amended, survived the British withdrawal in 1948 and is a binding legal instrument, valid to this day (See Chapter 9: “Territories – Legality of Jewish Settlement”).

The Court affirmation of the present validity of the Mandate for Palestine is evident in paragraph 49 of the Opinion:

“... It is the Court’s view that the construction of the wall must be deemed to be directly of concern to the United Nations. The responsibility of the United Nations in this matter also has its origin in the Mandate [for Palestine] ...”

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<sup>33</sup> See Chapter 4, Resolution 181, The “Partition Plan”.

Addressing the Arab claim that Palestine was part of the territories promised to the Arabs in 1915 by Sir Henry McMahon, the British Government stated:

“We think it sufficient for the purposes of this Report to state that the British Government have *never accepted the Arab case*. When it was first formally presented by the Arab Delegation in London in 1922, the Secretary of State for the Colonies (Mr. Churchill) replied as follows:

“That letter [Sir H. McMahon’s letter of the 24 October 1915] is quoted as conveying the promise to the Sherif of Mecca to recognize and support the independence of the Arabs within the territories proposed by him. But this promise was given subject to a reservation made in the same letter, which excluded from its scope, among other territories, the portions of Syria lying to the west of the district of Damascus. This reservation has always been regarded by His Majesty’s Government as covering the vilayet of Beirut and the independent Sanjak of Jerusalem. *The whole of Palestine west of the Jordan was thus excluded from Sir H. McMahon’s pledge.*

“It was in the highest degree unfortunate that, in the exigencies of war, the British Government was unable to make their intention clear to the Sherif. *Palestine*, it will have been noticed, *was not expressly mentioned* in Sir Henry McMahon’s letter of the 24th October, 1915. Nor was any later reference made to it. In the further correspondence between Sir Henry McMahon and the Sherif the only areas relevant to the present discussion which were mentioned were the Vilayets of Aleppo and Beirut. The Sherif asserted that these Vilayets were purely Arab; and, when Sir Henry McMahon pointed out that French interests were involved, he replied that, while he did not recede from his full claims in the north, he did not wish to injure the alliance between Britain and France and would not ask ‘for what we now leave to France in Beirut and its coasts’ till after the War. There was no more bargaining over boundaries. It only remained for the British Government to supply the Sherif with the monthly subsidy in gold and the rifles, ammunition and foodstuffs he required for launching and sustaining the revolt”<sup>34</sup> [italics by author].

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<sup>34</sup> The “Palestine Royal Report,” July 1937, Chapter II, p. 20.



# 3

## Jerusalem and the Holy Places

The International Court of Justice erroneously assumes that East Jerusalem is occupied Palestinian territory. The Opinion ignores the fact that UN Resolution 181 which *recommended* turning Jerusalem and its environs into an international city for a limited “period of 10 years” was never consummated; in 1947 all Arab states voted as a bloc against it and kept their promise to defy its implementation by force.

In their ‘concern’ for freedom of movement, the ICJ completely ignores the fact that since September 2000, Palestinians turned the City of Peace into their primary target for suicide bombers, making a barrier to impede movement of terrorists into the heart of the city an imperative.

In 1968 – soon after Israel took control of East Jerusalem in the 1967 Six-Day War – Professor, Judge Sir Elihu Lauterpacht, a renowned expert in International Law, warned against confusing the issue of the Holy Places and the issue of Jerusalem:<sup>1</sup>

“Jerusalem, it seems, is at the physical center of the Arab-Israeli conflict. In fact, two distinct issues exist: the issue of Jerusalem and the issue of the Holy Places.

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<sup>1</sup> Professor, Judge Sir Elihu Lauterpacht, *Jerusalem and the Holy Places*, Pamphlet No. 19 (London, Anglo-Israel Association, 1968). Professor Elihu Lauterpacht is a highly experienced academic and practitioner in the field of public international law. He has been active as an international litigator, advisor and arbitrator. Among the countries for which he has appeared in land and maritime boundary cases are Bahrain, Chile, El Salvador, Israel, Malta and Namibia. He is an ad hoc Judge of the International Court of Justice, and has been an arbitrator in a number of cases in the International Centre for the Settlement of Investment Disputes and in various other international cases. He is an honorary Professor of the University of Cambridge where he taught for thirty five years, and is the founder and first Director of the Research Centre for International Law.

Not only are the two problems separate, they are also quite distinct in nature from one another. So far as the Holy Places are concerned, the question is for the most part one of assuring respect for the existing interests of the three religions and of providing the necessary guarantees of freedom of access, worship, and religious administration. Questions of this nature are only marginally an issue between Israel and her neighbors and their solution should not complicate the peace negotiations. As far as the City of Jerusalem itself is concerned, the question is one of establishing an effective administration of the City which can protect the rights of the various elements of its permanent population – Christian, Arab and Jewish – and ensure the governmental stability and physical security which are essential requirements for the city of the Holy Places.”

### **The ICJ fixation – Internationalization of Jerusalem.**

“Nothing was said in the Mandate [for Palestine] about the internationalization of Jerusalem. Indeed Jerusalem as such is not mentioned, though the Holy Places are. And this in itself is a fact of relevance now. For it shows that in 1922 there was no inclination to identify the question of the Holy Places with that of the internationalization of Jerusalem.”<sup>2</sup>

Professor Julius Stone notes that Resolution 181 that was rejected by all Arab states, “lacked binding force” from the outset, since it required acceptance by all parties concerned:

“While the state of Israel did for her part express willingness to accept it, the other states concerned both rejected it and took up arms unlawfully against it.”<sup>3</sup>

Sir Lauterpacht elaborated in 1968 about the new conditions that had arisen since 1948 with regard to the original thoughts of the internationalization of Jerusalem:

– “The Arab States rejected the Partition Plan and the proposal for the internationalization of Jerusalem.

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<sup>2</sup> Ibid.

<sup>3</sup> Professor Julius Stone (1907-1985), *Israel and Palestine, Assault on the Law of Nations*, The Johns Hopkins University Press, 1981, p. 127. The late Professor Julius Stone was recognized as one of the twentieth century’s leading authorities on the Law of Nations. His work represents a detailed analysis of the central principles of international law governing the issues raised by the Arab-Israel conflict. He was one of a few scholars to gain outstanding recognition in more than one field, as one of the world’s best-known authorities in both Jurisprudence and International Law.

- “The Arab States physically opposed the implementation of the General Assembly Resolution. They sought by force of arms to expel the Jewish inhabitants of Jerusalem and to achieve sole occupation of the City.
- “In the event, Jordan obtained control only of the Eastern part of the City, including the Walled City.
- “While Jordan permitted reasonably free access to Christian Holy Places, it denied the Jews any access to the Jewish Holy Places. This was a fundamental departure from the tradition of freedom of religious worship in the Holy Land, which had evolved over centuries. It was also a clear violation of the undertaking given by Jordan in the Armistice Agreement concluded with Israel on 3rd April, 1949. Article VIII of this Agreement called for the establishment of a Special Committee of Israeli and Jordanian representatives to formulate agreed plans on certain matters which, in any case, shall include the following, on which agreement in principle already exists ... free access to the Holy Places and cultural institutions and use of the Cemetery on the Mount of Olives.
- “The U.N. displayed no concern over the discrimination thus practiced against persons of the Jewish faith.
- “The U.N. accepted as tolerable the unsupervised control of the Old City of Jerusalem by Jordanian forces – notwithstanding the fact that the presence of Jordanian forces west of the Jordan River was entirely lacking in any legal justification.
- “During the period 1948-1952 the General Assembly gradually came to accept that the plan for the territorial internationalization of Jerusalem had been quite overtaken by events. From 1952 to the present time [1968] virtually nothing more has been heard of the idea in the General Assembly.
- “On 5th June, 1967, Jordan deliberately overthrew the Armistice Agreement by attacking the Israeli-held part of Jerusalem. There was no question of this Jordanian action being a reaction to any Israeli attack. It took place notwithstanding explicit Israeli assurances, conveyed to King Hussein through the U.N. Commander, that if Jordan did not attack Israel, Israel would not attack Jordan. Although the charge of aggression is freely made against Israel in relation to the Six-Day War the fact remains that the two attempts made in the General Assembly in June-July 1967 to secure the condemnation of Israel as an aggressor failed. A clear and striking majority of

the members of the U.N. voted against the proposition that Israel was an aggressor.”<sup>4</sup>

Today, more than 57 years later, Israel has reunited Jerusalem and provided unrestricted freedom of religion, with access to the Holy Places in the unified City of Peace assured.

Significant events appear to have escaped the ICJ, which mentioned Jerusalem 54 times in its opinion:

“Moslems have enjoyed, under Israeli control, the very freedom which Jews were denied during Jordanian occupation.”<sup>5</sup>

### **The UN General Assembly and the Security Council have limited influence on the future of Jerusalem.**

Sir Lauterpacht explains:

“(i) The role of the U.N. in relation to the future of Jerusalem and the Holy Places is limited. In particular, the General Assembly has no power of disposition over Jerusalem and no right to lay down regulations for the Holy Places. The Security Council, of course, retains its powers under Chapter VII of the Charter in relation to threats to the peace, breaches of the peace and acts of aggression, but these powers do not extend to the adoption of any general position regarding the future of Jerusalem and the Holy Places.

“(ii) Israel’s governmental measures in relation to Jerusalem – both New and Old – are lawful and valid.”

Originally, internationalization of Jerusalem was part of a much broader proposal [UN Resolution 181] that all the Arab states rejected, both at the UN and ‘on the ground’ – Arab’s rejection by armed invasion of Palestine by the forces of Egypt, Trans-Jordan, Syria, Lebanon, Iraq, and contingents from Saudi Arabia and Yemen ... aimed at destroying Israel.

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<sup>4</sup> Professor, Judge Sir Elihu Lauterpacht, *Jerusalem and the Holy Places*, Pamphlet No. 19 (London, Anglo-Israel Association, 1968).

<sup>5</sup> Ibid.

The outcome of consistent Arab aggression was best described by Judge Stephen Schwebel:

“... as between Israel, acting defensively in 1948 and 1967, on the one hand, and her Arab neighbors, acting aggressively in 1948 and 1967, on the other, Israel has better title in the territory of what was Palestine, including *the whole of Jerusalem* ...”<sup>6</sup> [italics by author].

### **The Myth of ‘Two Jerusalems,’ an Arab ‘East Jerusalem’ and a Jewish ‘West Jerusalem.’**

Jerusalem was *never* an Arab city; Jews have held a majority in Jerusalem since 1870,<sup>7</sup> and ‘east-west’ is a geographic, not a political designation. It is no different than claiming the Eastern Shore of Maryland in the U.S. should be a separate political entity from the rest of that state.

Although uniting the city transformed *all* of Jerusalem into the largest city in Israel and a bustling metropolis, even moderate Palestinian leaders reject the idea of a united city. Their minimal demand for ‘just East Jerusalem’ really means the Jewish holy sites (including the Jewish Quarter and the Western Wall), which Arabs have historically failed to protect, and the transfer to Arabs of neighborhoods that house a significant percentage of Jerusalem’s present-day Jewish population. Most of that city is built on rock-strewn empty land around the city that was in the

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<sup>6</sup> Professor, Judge Stephen M. Schwebel, *What Weight to Conquest?* in *Justice in International Law*, Cambridge University Press, 1994. Judge Schwebel has served on the International Court since 15 January 1981. He was Vice-President of the Court from 1994 to 1997 and has been President from 1997 to 2000. A former Deputy Legal Adviser of the United States Department of State and Burling Professor of International Law at the School of Advanced International Studies of The Johns Hopkins University (Washington). Judge Schwebel is the author of several books and over 150 articles on international law. He is Honorary President of the American Society of International Law.

Opinions quoted in this critiques are not derived from his position as a judge of the ICJ.

<sup>7</sup> For these and more statistics, see “Jerusalem: The City’s Development from a Historical Viewpoint,” at: [http://www.mfa.gov.il/MFA/MFAArchive/1990\\_1999/1998/7/Jerusalem-%20The%20City-s%20Development%20from%20a%20Historica](http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1998/7/Jerusalem-%20The%20City-s%20Development%20from%20a%20Historica). (10748)

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public domain for the past 38 years. With an overall population of 704,000 (June 2005), separating East Jerusalem and West Jerusalem is as viable and acceptable as the notion of splitting Berlin into two cities again, or separating East Harlem from the rest of Manhattan within New York City.

### **Jerusalem's Jewish link: Historic, Religious, Political.**

Jerusalem, wrote historian Martin Gilbert,<sup>8</sup> is not a “‘mere’ capital: It holds the central spiritual and physical place in the history of the Jews as a people.”<sup>9</sup>

For more than 3,000 years, the Jewish people have looked to Jerusalem as their spiritual, political, and historical capital, even when they did not physically rule over the city. Throughout its long history, Jerusalem has served, and still serves, as the political capital of only one nation – the one belonging to the Jews. Its prominence in Jewish history began in 1004 B.C.E., when King David declared the city the capital of the first Jewish kingdom.<sup>10</sup> David's successor and son, King Solomon, built the First Temple there, according to the Bible, as a holy place to worship the Almighty. History, however, would not be kind to the Jewish people. Nearly four hundred ten years after King Solomon completed construction of Jerusalem [in 586 B.C.E.], the Babylonians (early ancestors to today's Iraqis) seized and destroyed the city, forcing the Jews into exile. Fifty years later, the Jews, or Israelites as they were called, were permitted to return after Persia (present-day Iran) conquered Babylon. The Jews' first order of business was to reclaim Jerusalem as their capital and rebuild the Holy Temple, recorded in history as the Second Temple.

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<sup>8</sup> Martin Gilbert is an Honorary Fellow of Merton College Oxford and the biographer of Winston Churchill. He is the author of the “Jerusalem: Illustrated History Atlas” (Valentine Mitchell) and “Jerusalem: Rebirth of the City” (Viking-Penguin).

<sup>9</sup> Martin Gilbert, “Jerusalem: A Tale of One City,” *The New Republic*, Nov. 14 1994. See: <http://web.idirect.com/~cic/jerusalem/martinGilbertArticle.htm>. (11362)

<sup>10</sup> Ibid.

Jerusalem was more than the Jewish kingdom's political capital. It was a spiritual beacon. During the First and Second Temple periods, Jews throughout the kingdom would travel to Jerusalem three times yearly for the Jewish holy days of Sukkot, Passover, and Shavuot, until the Roman Empire destroyed the Second Temple in 70 C.E. and ended Jewish sovereignty over Jerusalem for the next 1,900 years. Despite that fate, Jews never relinquished their bond to Jerusalem or, for that matter, to *Eretz Yisrael* – the Land of Israel.

No matter where Jews lived throughout the world for those two millennia, their thoughts and prayers were directed toward Jerusalem. Even today, whether in Israel, the United States, or anywhere else, Jewish ritual practice, holiday celebration and lifecycle events include recognition of Jerusalem as a core element of the Jewish experience. Consider that:

- Jews in prayer always turn toward Jerusalem.
- Arks (the sacred chests) that hold Torah scrolls in synagogues throughout the world face Jerusalem.
- Jews end Passover Seders each year with the words: “Next year in Jerusalem”; the same words are pronounced at the end of Yom Kippur, the most solemn day of the Jewish year.
- A three-week moratorium on weddings in the summer recalls the breaching of the walls of Jerusalem by the Babylonian army in 586 B.C.E. That period culminates in a special day of mourning – Tisha B’Av (the 9th day of the Hebrew month Av) – commemorating the destruction of both the First and Second Temples.
- Jewish wedding ceremonies are joyous occasions marked by sorrow over the loss of Jerusalem. The groom recites a biblical verse from the Babylonian Exile: “If I forget thee, O Jerusalem, let my right hand forget her cunning,” and breaks a glass in commemoration of the destruction of the Temples.

Even body language, often said to tell volumes about a person, reflects the importance of Jerusalem to Jews as a people and, arguably, the lower priority the city holds for Muslims:

- When Jews pray they *face Jerusalem*; in Jerusalem they pray *facing the Temple Mount*.
- When Muslims pray, they *face Mecca*; in Jerusalem they pray with their *backs to the city*.
- Even at burial, a Muslim face is turned toward Mecca.

Finally, consider the number of times Jerusalem is mentioned in the two religions' holy books:

- The Old Testament mentions Jerusalem 349 times. Zion, another name for Jerusalem, is mentioned 108 times.<sup>11</sup>
- The Quran never mentions Jerusalem – not even once.

Even when others controlled Jerusalem, Jews have maintained a physical presence in the city, despite being persecuted and impoverished. Before the advent of modern Zionism in the 1880s, Jews were moved by a form of religious Zionism to live in the Holy Land, settling particularly in four holy cities: Safed, Tiberias, Hebron, and most importantly, Jerusalem. Consequently, Jews constituted a majority of the city's population for generations. In 1898, "In this City of the Jews, where the Jewish population outnumbers all others three to one ..." Jews constituted 75 percent<sup>12</sup> of the Old City population in what Secretary-General Kofi Annan calls East Jerusalem. In 1914, when the Ottoman

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<sup>11</sup> See Ken Spiro, "Jerusalem: Jewish and Moslem Claims to the Holy City," at [http://www.aish.com/Israel/articles/\\_Jewish\\_and\\_Moslem\\_Claims\\_to\\_the\\_Holy\\_City.asp](http://www.aish.com/Israel/articles/_Jewish_and_Moslem_Claims_to_the_Holy_City.asp). (11341)

<sup>12</sup> "The eighty thousand Jews in Palestine, fully one-half are living within the walls, or in the twenty-three colonies just outside the walls, of Jerusalem. This number – forty thousand Jews in Jerusalem – is not an estimate carelessly made ..." Edwin S. Wallace, Former U.S. Consul "The Jews in Jerusalem" *Cosmopolitan* magazine (1898; original pages of article are in possession of the author).



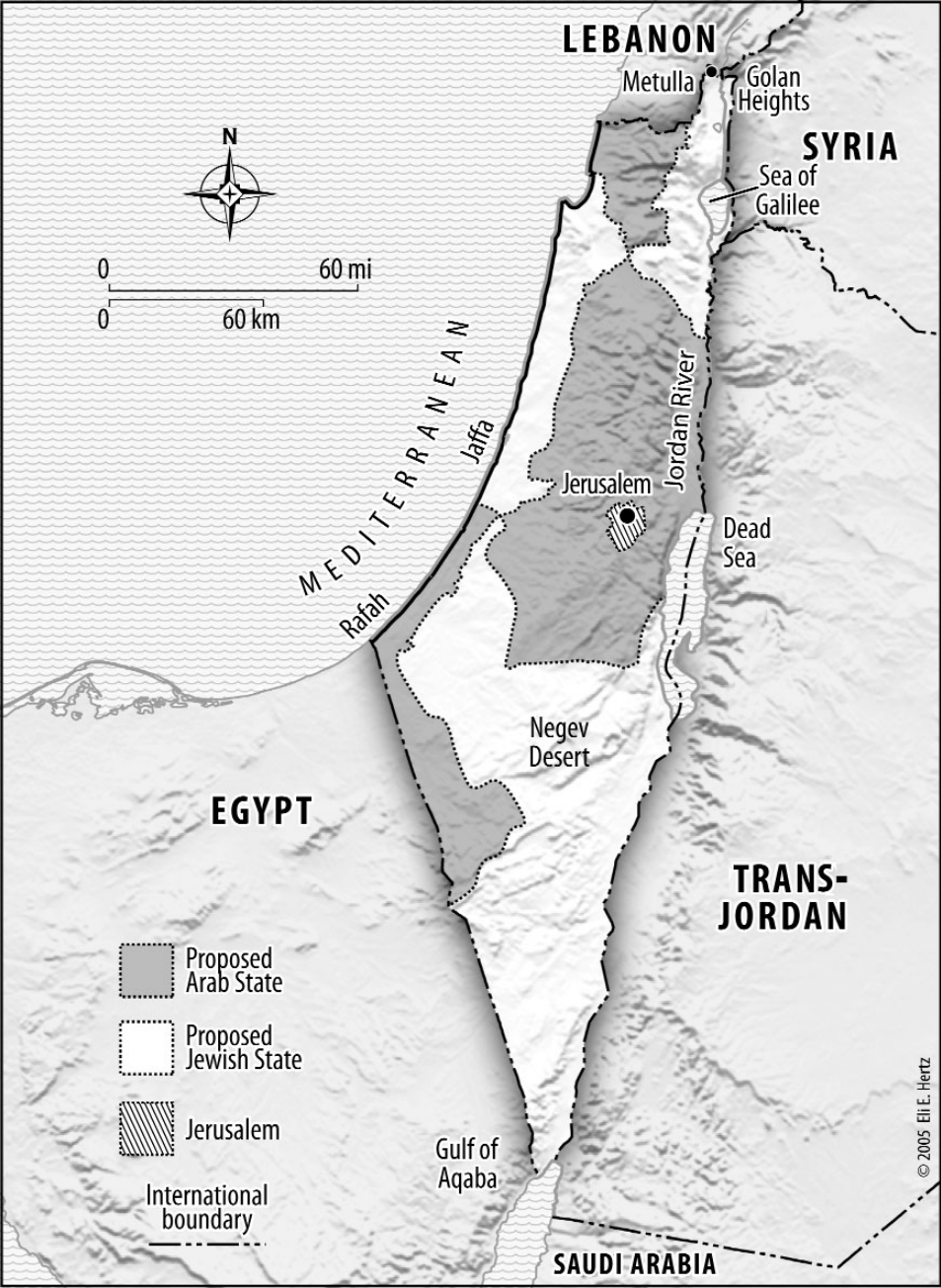
Turks ruled the city, 45,000 Jews made up a majority of the 65,000 residents. And at the time of Israeli statehood in 1948, 100,000 Jews lived in the city, compared to only 65,000 Arabs.<sup>13</sup> Prior to unification, Jordanian-controlled East Jerusalem was a mere 6 square kilometers, compared to 38 square kilometers on the 'Jewish side.' Arab claims to Jerusalem, a Jewish city by all definitions, reflect a "what's-mine-is-mine, what's-yours-is-mine" disingenousness.

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<sup>13</sup> "JERUSALEM – Whose City?" at <http://christianactionforisrael.org/whosecity.html>. (10744)

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**Recommended “Partition Plan,” November 29, 1947**



# 4

## Resolution 181 – the “Partition Plan”

The International Court of Justice insists that as a UN institution it must take the case of the security fence, based on two major documents: The “Mandate for Palestine” and the November 1947 UN General Assembly Resolution 181<sup>1</sup> [the “Partition Plan”], a non-binding *recommendation* that was never legally consummated and one that all Arabs rejected by use of force.<sup>2</sup>

Had the recommendations of UN Resolution 181 been accepted and implemented by both parties, it would have been the foundation for the creation in Palestine of an Arab state and a Jewish state, and as a result would have terminated the Mandate for Palestine.

The Court’s careless ‘legal review’ of the status of the Territories reaches its apex in the way the ICJ relates to Resolution 181. The Court ignores Arab total rejectionism of the “Partition Plan” and views the *recommendation* of Resolution 181 as if it was a valid Security Council *directive*.

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<sup>1</sup> UN General Assembly Resolution 181 (II). Future government of Palestine. November 29 1947. See at: <http://www.mefacts.com/cache/html/un-resolutions/10063.htm>. (10063)

<sup>2</sup> “*Appeals* to all Governments and all peoples to refrain from taking action which might hamper or delay the carrying out of these *recommendations* [to partition] ,” UN Resolution 181, A, (d) [italics by author].

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The ICJ cites Resolution 181 as one of the *legal pillars* supporting the right of Palestinian Arabs to self-determination alongside the “Mandate for Palestine.”

It appears that the ICJ was unaware of the fact that in November 1947, all Arab states voted as a bloc against Resolution 181 and kept their promise to defy its implementation by force.

Aware of Arab past aggression, Resolution 181, in paragraph C, calls on the Security Council to:

“... determine as a threat to the peace, breach of the peace or *act of aggression*, in accordance with Article 39 of the Charter, any attempt to *alter by force* the settlement envisaged by this resolution” [italics by author].

The ones who sought to alter by force the settlement envisioned in Resolution 181 were the Arabs who threatened bloodshed if the UN were to adopt the Resolution:

“The Government of Palestine [E.H., that is, the British mandate government] fear that strife in Palestine will be greatly intensified when the Mandate is terminated, and that the international status of the United Nations Commission will mean little or nothing to the Arabs in Palestine, to whom *the killing of Jews now transcends all other considerations*. Thus, the Commission will be faced with the problem of how to avert certain bloodshed on a very much wider scale than prevails at present. ... The Arabs have made it quite clear and have told the Palestine government that they do not propose to co-operate or to assist the Commission, and that, far from it, they *propose to attack and impede* its work in every possible way. We have no reason to suppose that they do not mean what they say”<sup>3</sup> [italics by author].

Arab intentions and deeds did not fare better after Resolution 181 was adopted:

“Taking into consideration that the Provisional Government of Israel has indicated its acceptance in principle of a prolongation of the truce in

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<sup>3</sup> United Nations Palestine Commission, First Monthly Progress Report to the Security Council. A/AC.21/7, 29 January 1948. See: <http://www.mefacts.com/cache/html/un-resolutions/10923.htm>. (10923)

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Palestine; that the States members of the Arab League have rejected successive appeals of the United Nations Mediator, and of the Security Council in its resolution 53 (1948) of 7 July 1948, for the prolongation of the truce in Palestine; and that there has consequently developed a renewal of hostilities in Palestine.”<sup>4</sup>

Resolution 181 reads:

“Having met in special session at the request of the mandatory Power to constitute and instruct a Special Committee to prepare for the consideration of the question of the future Government of Palestine ... and to prepare proposals for the solution of the problem, and ... *Recommends* to the United Kingdom, as the mandatory Power for Palestine, and to all other Members of the United Nations the adoption and implementation, with regard to the future Government of Palestine, of the Plan of Partition with Economic Union set out below ...” [italics by author].

The ICJ in its preamble states:

“Recalling relevant General Assembly resolutions, including resolution 181 (II) of 29 November 1947, which partitioned mandated Palestine into two States, one Arab and one Jewish, ...”

In fact, Resolution 181 was a *non-binding* resolution that only *recommended* partition. It *never* “partitioned” or “mandated” *anything* as the ICJ tries to inject.

The ICJ continues the discussion on the “Partition Plan” in paragraph 71 of the opinion:

“In 1947 the United Kingdom announced its intention to complete evacuation of the mandated territory by 1 August 1948, subsequently advancing that date to 15 May 1948. In the meantime, the General Assembly had on 29 November 1947 adopted resolution 181 (II) on the future government of Palestine, which ‘Recommends to the United Kingdom ... and to all other Members of the United Nations the adoption and implementation ... of the Plan of Partition’ of the territory, as set forth in the resolution, between two independent States, one Arab, the other Jewish, as

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<sup>4</sup> Security Council Resolution S/RES/ 54 (1948) at <http://www.mefacts.com/cache/html/un-resolutions/10894.htm>. (10894)

well as the creation of a special international régime for the City of Jerusalem. The Arab population of Palestine and the Arab States rejected this plan, contending that it was unbalanced; on 14 May 1948, Israel proclaimed its independence on the strength of the General Assembly resolution; armed conflict then broke out between Israel and a number of Arab States and the Plan of Partition was not implemented.”

The 1947 “Partition Plan” was the last of a series of recommendations that had been drawn up over the years by the Mandator and by international commissions, plans designed to reach an historic compromise between Arabs and Jews in western Palestine. The first was in 1922 when Great Britain obtained the League of Nations’ approval under Article 25 of the Mandate for Palestine to cut away the territory east of the Jordan River – Trans-Jordan, today’s Jordan, for the benefit of the Arabs of Palestine. But this did not satisfy the Arabs who wanted the entire country.

Every scheme since 1922 has been rejected by the Arab side, including decidedly pro-Arab recommendations. This was not because the suggestions were “unbalanced,” as the ICJ *has been told* in Arab affidavits and as stated in paragraph 71 of the Court opinion, but because these plans recognized the Jews as a nation and gave the Jewish citizens of Mandate Palestine political dominance.

The ICJ’s use of the term “unbalanced” in describing the reason for Arab rejectionism of Resolution 181 hardly fits reality. 77 percent of the landmass of the original Mandate for the Jews was *excised* in 1922 to create a fourth Arab state: Trans-Jordan.

In the discussions leading to the formulation of the “Partition Plan,” the representative of the Jewish Agency for Palestine addressed the injustice of the plan to the Jewish people:

“According to David Lloyd George, then Prime Minister, the Balfour Declaration implied that the whole of Palestine, including Transjordan, should ultimately become a Jewish state. Transjordan had, nevertheless, been

severed from Palestine in 1922 and had subsequently been set up as an Arab kingdom. Now a second Arab state was to be carved out of the remainder of Palestine, with the result that the Jewish National Home would represent less than one eighth of the territory originally set aside for it. Such a sacrifice should not be asked of the Jewish people.<sup>5</sup>

“Referring to the Arab states established as independent countries since the First World War, he said that 17,000,000 Arabs now occupied an area of 1,290,000 square miles, including all the principal Arab and Moslem centres, while Palestine, after the loss of Transjordan, was only 10,000 square miles; yet the majority plan proposed to reduce it by one half. UNSCOP proposed to eliminate Western Galilee from the Jewish State; that was an injustice and a grievous handicap to the development of the Jewish State.”<sup>6</sup>

### **The ICJ assumes that Israel’s independence is a result of a partial implementation of the “Partition Plan.”**

The ICJ Bench states in paragraph 71 of its opinion that:

“... on 14 May 1948, Israel proclaimed its independence on the strength of the General Assembly resolution.”

Resolution 181 recognized the Jewish right to statehood, but its validity as a potentially legal and binding document was never consummated. Like the schemes that preceded it, Resolution 181’s validity hinged on acceptance by *both parties* of the General Assembly’s recommendation.

Sir Lauterpacht, a renowned expert on international law and editor of *Oppenheim’s International Law*, clarified that, from a legal standpoint, the 1947 UN Partition Resolution had no legislative character to vest territorial rights in either Jews or Arabs. In a monograph relating to one of the most complex aspects of the territorial issue, the status of

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<sup>5</sup> Yearbook of the United Nations 1947-48. 1949.I.13. December 31 1948. See at: <http://www.mefacts.com/cache/html/un-documents/11270.htm>. (11270)

<sup>6</sup> Ibid.

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Jerusalem,<sup>7</sup> Lauterpacht wrote that to be a binding force, the “Partition Plan” would have had to arise from the principle *pacta sunt servanda*,<sup>8</sup> that is, from agreement of the parties at variance to the proposed plan. In the case of Israel, Lauterpacht explains:

“... the coming into existence of Israel does not depend legally upon the Resolution. The right of a State to exist flows from its factual existence – especially when that existence is prolonged, shows every sign of continuance and is recognised by the generality of nations.”

Reviewing Lauterpacht’s arguments, Professor Stone added that Israel’s “legitimacy” or the “legal foundation” for its birth does not reside with the United Nations’ “Partition Plan,” which as a consequence of Arab actions became a dead issue. Professor Stone concluded:

“... The State of Israel is thus not legally derived from the partition plan, but rests (as do most other states in the world) on assertion of independence by its people and government, on the vindication of that independence by arms against assault by other states, and on the establishment of orderly government within territory under its stable control.”<sup>9</sup>

Such attempts by Palestinians (and now by the ICJ) to ‘roll back the clock’ and resuscitate Resolution 181 almost six decades after its rejection as if nothing had happened, are totally inadmissible. Both Palestinians and their Arab brethren in neighboring countries rendered the plan null and void by their own subsequent aggressive actions.

### **Arabs absolute rejectionism of UN Resolution 181.**

Following passage of Resolution 181 by the General Assembly, Arab countries took the dais to reiterate their absolute rejection of the recommendation and intention to render implementation of Resolution 181 a moot question by the use of force. These examples from the

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<sup>7</sup> Professor, Judge Sir Elihu Lauterpacht, *Jerusalem and the Holy Places*, Pamphlet No. 19 (London, Anglo-Israel Association, 1968).

<sup>8</sup> “Treaties must be honored,” the first principle of international law.

<sup>9</sup> Professor Julius Stone, *Israel and Palestine, Assault on the Law of Nations*, The Johns Hopkins University Press, 1981, p. 127.



transcript of the General Assembly plenary meeting on November 29 1947 speak for themselves:

“Mr. JAMALI (Iraq): ... We believe that the decision which we have now taken ... undermines peace, justice and democracy. In the name of my Government, I wish to state that it feels that this decision is antidemocratic, illegal, impractical and contrary to the Charter. ... Therefore, in the name of my Government, I wish to put on record that Iraq does not recognize the validity of this decision, will reserve freedom of action towards its implementation, and holds those who were influential in passing it against the free conscience of mankind responsible for the consequences.”

“Amir. ARSLAN (Syria): ... Gentlemen, the Charter is dead. But it did not die a natural death; it was murdered, and you all know who is guilty. My country will never recognize such a decision [Partition]. It will never agree to be responsible for it. Let the consequences be on the heads of others, not on ours.”

“H. R. H. Prince Seif El ISLAM ABDULLAH (Yemen): The Yemen delegation has stated previously that the partition plan is contrary to justice and to the Charter of the United Nations. Therefore, the Government of Yemen does not consider itself bound by such a decision ... and will reserve its freedom of action towards the implementation of this decision.”<sup>10</sup>

The “Partition Plan” was met not only by verbal rejection on the Arab side but also by concrete, bellicose steps to block its implementation and destroy the Jewish polity by force of arms, a goal affirmed publicly by the Arabs even before Resolution 181 was brought to a vote.

The ICJ simply ignores the unpleasant fact that the Arabs not only rejected the compromise and took action to prevent establishment of a Jewish state, but also blocked establishment of an Arab state under the “Partition Plan” not only *before* the 1948 Israel War of Independence, but also *after* the war when they themselves controlled the West Bank (1948-1967), rendering the *recommendation* a still birth.

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<sup>10</sup> UN GA “Continuation of the discussion on the Palestinian question.” Hundred and twenty-eighth plenary meeting. A/PV.128, November 29 1947. (11363)

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Professor Stone wrote about this novelty of resurrection in 1981 when he analyzed a similar attempt by pro-Palestinians at the UN to rewrite the history of the conflict (published as ‘Studies’). Stone called it “revival of the dead”:

“To attempt to show, as these studies do, that Resolution 181(II) ‘remains’ in force in 1981 is thus an undertaking even more *miraculous* than would be the *revival of the dead*. It is an attempt to give life to an entity that the Arab states had themselves aborted before it came to maturity and birth. To propose that Resolution 181(II) can be treated as if it has binding force in 1981, [E.H., the year Professor Stone’s book was published] for the benefit of the same Arab states, who by their aggression destroyed it *ab initio*,<sup>11</sup> also violates ‘general principles of law,’ such as those requiring claimants to equity to come ‘with clean hands,’ and forbidding a party who has unlawfully repudiated a transaction from holding the other party to terms that suit the later expediencies of the repudiating party”<sup>12</sup> [italics by author].

In its narrative of events, the International Court of Justice’s opinion does not even mention the fact that Jordan (at the time, Trans-Jordan) crossed the international border (the Jordan River) and illegally occupied part of Mandate Palestine, annexing and labeling it the ‘West Bank’ to make it sound like a natural part of the ‘East Bank’ (Trans-Jordan). Indeed, it was Jordan that controlled the West Bank territory for 19 years between 1948 and 1967.<sup>13</sup>

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<sup>11</sup> In Latin: From the beginning.

<sup>12</sup> Professor Julius Stone, *Israel and Palestine, Assault on the Law of Nations*, The Johns Hopkins University Press, 1981, p. 128.

<sup>13</sup> “The 1948 Arab-Israeli War – Prior to the UN General Assembly’s November 1947 decision to partition Palestine, King Abdullah had proposed sending the Arab Legion to defend the Arabs of Palestine. Reacting to the passing of the partition plan, he announced Jordan’s readiness to deploy the full force of the Arab Legion in Palestine. An Arab League meeting held in Amman two days before the expiration of the British mandate concluded that Arab countries would send troops to Palestine to join forces with Jordan’s army. ... [Jordan] Parliament unanimously approved a motion to unite the two banks of the Jordan River, constitutionally expanding the Hashemite Kingdom of Jordan in order to safeguard what was left of the Arab territory of Palestine from further Zionist expansion.” See the official Hashemite Kingdom of Jordan website at: [http://www.kinghussein.gov.jo/his\\_palestine.html](http://www.kinghussein.gov.jo/his_palestine.html). (10634)

The ICJ describes these scores of events in seven words: “The Plan of Partition was not implemented.”<sup>14</sup>

The ICJ fails to read the *fine print* in the Resolutions it cites. The ICJ embraces the General Assembly’s generous annexation of Jerusalem (discussed later in this critique) as part of ‘Occupied Palestinian Territory’ – constantly referring to “the Occupied Palestinian Territories, including East Jerusalem.” In the same breath, the ICJ cites Resolution 181 that leaves the status of Jerusalem in abeyance, in Part III (D) calling for a temporary ‘special regime’ for the City of Jerusalem:

“... It shall remain in force in the first instance for a *period of ten years*, unless the Trusteeship Council finds it necessary to undertake a re-examination of these provisions at an earlier date. After the expiration of this period the whole scheme shall be subject to re-examination by the Trusteeship Council in the light of the experience acquired with its functioning. The residents of the City shall be then free to express by means of a referendum their wishes as to possible modifications of the regime of the City” [italics by author].

Again, this never took place because the “Partition Plan” became a dead issue. If it is not a dead issue, then logically, after almost 59 years it is time to call for a referendum (as stated in Resolution 181, see above) of all Jerusalemites, Jews and Arabs, to decide the status of the city that has always had a Jewish majority as far back as 1870.

Even the UN recognized that Resolution 181 was a moot issue. Had the ICJ examined UN records, it would have had to address a July 30 1949, working paper of the UN Secretariat, entitled *The Future of Arab Palestine and the Question of Partition*, which noted that:

“The Arabs rejected the United Nations Partition Plan so that any comment of theirs did not specifically concern the status of the Arab section of Palestine under partition but rather rejected the scheme in its entirety.

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<sup>14</sup> See Appendix I. ICJ Advisory Opinion, 9 July 2004, paragraph 71.

“... On 18 September the Progress Report of the Mediator was submitted to the General Assembly. In evaluating the situation of the proposed Arab State, the Mediator stated: ‘As regards the parts of Palestine under Arab control, no central authority exists and no independent Arab State has been organized or attempted. This situation may be explained in part by Arab unwillingness to undertake any step which would suggest even tacit acceptance of partition, and by their insistence on a unitary State in Palestine. The Partition Plan presumed that effective organs of state government could be more or less immediately set up in the Arab part of Palestine. This does not seem possible today in view of the lack of organized authority springing from Arab Palestine itself, and the administrative disintegration following the termination of the Mandate.’”<sup>15</sup>

The Secretariat considered Resolution 181 a dead issue, noting:

“... an Arab State for which the Partition Plan provided has not materialized ...”<sup>16</sup>

In the eyes of the International Court of Justice, even the 1948 Israel War of Independence – *before the occupation* and clearly an Arab war of aggression – gets the same treatment as the 1967 Six-Day War. The ICJ’s rendition of events exonerates the Arabs of any complicity, skipping merrily over uncomfortable facts in the process:

“The Arab population of Palestine and the Arab States rejected the [Partition] plan, contending that it was *unbalanced*; on 14 May 1948, Israel proclaimed its independence on the strength of the General Assembly resolution; armed conflict then broke out between Israel and a number of Arab States and the Plan of Partition was not implemented”<sup>17</sup> [*italics by author*].

Far more significantly, from 1922 forward and through nearly three decades of British Mandatory rule, the Arabs systematically rejected every plan for co-existence that included any form of Jewish political

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<sup>15</sup> United Nations Conciliation Commission for Palestine: The Future of Arab Palestine and the Question of Partition. A/AC.25/W.19, July 30 1949. See: <http://www.mefacts.com/cache/html/un-documents/11070.htm>. (11070)

<sup>16</sup> Ibid.

<sup>17</sup> See Appendix I. ICJ Advisory Opinion, 9 July 2004, paragraph 71.

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empowerment whatsoever. These plans included British attempts to create a joint legislature, insuring the Arabs would have had an overwhelming majority and that would have enabled them to cut off any further Jewish immigration. These same Arabs even refused to establish an Arab Agency for development of the Arab sector, which would parallel the Jewish Agency.<sup>18</sup>

In the fall of 1947, the UN Ad Hoc Committee on Palestinian Question<sup>19</sup> tried, to no avail, to ‘bring the Arabs around.’ Had the ICJ read the minutes of this damning UN document, they would find this rejectionism clearly established. The Special Rapporteur, Thor Thors of Iceland, wrote to the Security Council days before the historic vote on November 25 1947. He cited how the Arab Higher Committee first:

“... rejected the recommendations of the Special Committee on Palestine and advocated the establishment on democratic lines, in the whole of Palestine, of an Arab State which would protect the legitimate rights and interests of all minorities.”<sup>20</sup>

and later:

“... did not accept an invitation to sit with the members of Sub-Committee 1 when the latter discussed the question of boundaries. The Arab Higher Committee was prepared to assist and furnish information only with regard to the question of the termination of the Mandate and the creation of a unitary State.”<sup>21</sup>

Suffice it to say, the use of the terms “rejection” and “contending” in the ICJ’s ‘historical narrative’ hardly befit 1948 realities. “Rejection” was

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<sup>18</sup> Christopher Sykes, *Cross Roads to Israel – Palestine from Balfour to Bevin*, Collins London 1965, p. 81.

<sup>19</sup> General Assembly, A/516, November 25 1947, at <http://www.mefacts.com/cache/html/un-documents/11290.htm>. (11290)

<sup>20</sup> Ibid.

<sup>21</sup> In lieu of the two independent States, the city of Jerusalem under an international regime, and the economic union proposed.

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expressed in nearly six months of guerrilla warfare by local Arabs (today's Palestinians) against the Jews of Palestine (today's Israelis), targeting primarily civilians. In the midst of this period (January 29 1948), the First Monthly Progress Report of the UN-appointed Palestine Commission was submitted to the Security Council. How does the UN describe what actually transpired? Actualization of Resolution 181 was placed in the hands of a "commission ... with direct responsibility for implementing the measures recommended by the General Assembly."<sup>22</sup>

Implementation of Resolution 181's recommendations hinged not only on the five Member States appointed to represent the UN (Bolivia, Czechoslovakia, Denmark, Panama, Philippines) and Great Britain, but first and foremost on the participation of the *two sides* who were invited to appoint representatives. The Commission then reported:

"... The invitation extended by the [181] resolution was promptly accepted by the Government of the United Kingdom and by the Jewish Agency for Palestine, both of which designated representatives to assist the commission. ... As regards [to] the Arab Higher Committee, the following telegraphic response was received by the Secretary-General on 19 January:

ARAB HIGHER COMMITTEE IS DETERMINED PRESIST [PERSIST] IN REJECTION PARTITION AND IN REFUSAL RECOGNIZE UN[O] RESOLUTION THIS RESPECT AND ANYTHING DERIVING THEREFROM [THERE FROM]. FOR THESE REASONS IT IS UNABLE [TO] ACCEPT [THE] INVITATION."<sup>23</sup>

## ICJ – "Armed conflict then broke out."

The "armed conflict [that] then broke out,"<sup>24</sup> in the words of the International Court of Justice, was Israel's 1948 War of Independence. It was actually the *second* stage of the Arab war of aggression, launched

<sup>22</sup> United Nations Palestine Commission. First Monthly Progress Report To The Security Council. A/AC.21/7. 29 January 1948. See at: <http://www.mefacts.com/cache/html/un-resolutions/10923.htm>. (10923)

<sup>23</sup> Ibid.

<sup>24</sup> See Appendix I. ICJ Advisory Opinion, 9 July 2004, paragraph 71.

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the day after Israel’s acceptance of Resolution 181 on November 29 1947. It was a pre-planned and coordinated invasion by the armed forces of Egypt, Trans-Jordan, Syria, Lebanon, Iraq, and contingents from Saudi Arabia and Yemen forces across the international borders of Mandate Palestine, boasting they would “throw the Jews into the sea.”

On May 18 1948 in response to an urgent cablegram to the Iraqi delegate to the UN, the reply affirmed that there were Iraqi troops in Palestine in areas where Jews are the majority, declaring that:

“... Elements of our armed forces entered Palestine without discrimination either to the character of areas or to the creed of the inhabitants [invaded Jewish areas] ... Units of Iraqi forces are now operating west of the Jordan. ... Their military objectives ... are the suppression of lawless Zionist terrorism which was dangerously spreading all over the country, and restoration of peace and order. Such objectives will result in enabling the people of Palestine to set up a ‘united state’ in which both Arabs and Jews will enjoy equal Democratic rights. ... Upon the termination of the Mandate on the 15th May, 1948, no legal authority was constituted to take its place. In the same time the terrorism and the aggression of a minority assumed vast proportions and resulted in atrocities and massacre leading up to a complete state of anarchy. ... The Arab League, as a regional organization interested in keeping the peace in that region could not stand by without action. ... Concerning what is called areas (towns, cities, districts) of Palestine where Jews are in the majority, it must again be stated that the division of the country into such units for the present purpose is misleading and can be entertained on the basis of partition which we reject.”<sup>25</sup>

On May 22 1948, in response to a similar cablegram to the Lebanese foreign minister from the Security Council inquiring whether Lebanon had invaded, the foreign minister wrote the Security Council:

“[Lebanese forces] are operating in northern Palestine. Their military objectives are to help pacify Palestine in cooperation with the forces of other States of the Arab League, as stated in the memorandum of the

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<sup>25</sup> United Nations Security Council Document S/769 May 22 1948. See: <http://domino.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/65eb4dccbb362b5585256e4c006f6a02?OpenDocument> (11365)

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Secretary-General of the Arab League on May 1 (document S/745). ... The League of Arab States is responsible for the exercise of political functions in any and all parts of Palestine. ... The League of Arab States is not now negotiating with the Jews on a political settlement in Palestine and will not enter into such negotiations so long as the Jews persist in their intention and their efforts to establish a Jewish state in Palestine.”<sup>26</sup>

A similar query to the foreign minister of Trans-Jordan was ignored. The following questions were not answered:

“Are armed element of your armed forces or irregular forces sponsored by your government now operating (1) in Palestine (2) in areas (towns, cities, districts) of Palestine where the Jews are in the majority?”<sup>27</sup>

Instead the Trans-Jordanian foreign minister complained in a short cablegram that:

“the government of the United States of America [who had penned the questions for the Security Council] has not yet recognized the government of the Hashemite Kingdom of Transjordan ... yet [it] recognized the so-called Jewish government within a few hours.”

The Arabs rejected repeated calls by the Security Council for a cease-fire and only agreed to a four-week truce after being warned by the Security Council on May 29 1948:

“... if the present resolution is rejected by either party or by both, or if, having been accepted, it is subsequently repudiated or violated, the situation in Palestine will be reconsidered with a view to action under Chapter VII of the Charter.”<sup>28</sup>

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<sup>26</sup> United Nations Security Council Document S/770, May 22 1948, at: <http://domino.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/98be7a17e488f06985256db200676705!OpenDocument>. (11364)

<sup>27</sup> Security Council Document S/760, May 20 2003 (the date is incorrect in the original), <http://domino.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/aa99ba96c0a95d5985256db2006928bd!OpenDocument>. (11366)

<sup>28</sup> Security Council Document S/801, May 29 1948, at: <http://domino.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/34235b8f785c7b4485256e76006e58da!OpenDocument>. (11367)



The documents cited above are only a few examples of the evidence available to the ICJ, all of which appear to have been ignored.

### **Israel overcomes Arab aggression at a terrible cost.**

The first cease-fire in the 18-month war finally took effect on June 11 1948.

While Israel prevailed, one percent of the pre-war Jewish population (6,000 persons) was killed. In American terms, that is equivalent to 2.8 million American civilians and soldiers being killed over an 18-month period.<sup>29</sup> The facts that there was a clear aggressor and a clear target in the “armed conflict” in 1948 appears in a host of UN documents that are as immaterial in the International Court of Justice’s eyes as the fate of over a thousand Israelis, again, mostly civilians, deliberately murdered in cold blood by Palestinian suicide bombers and other Palestinian terrorists since 2000.

What became of Resolution 181? On May 17 1948 – after the invasion began – the Palestine Commission designed to implement Resolution 181 adjourned *sine die* [indefinitely], after the General Assembly:

“appointed a United Nations Mediator in Palestine, which relieves the United Nations Palestine Commission from the further exercise of its responsibilities.”

At the time, some thought the “Partition Plan” could be revived, but by the end of the war, Resolution 181 had become a moot issue as realities on the ground made establishment of an armistice-line (the Green Line), a temporary ceasefire line expected to be followed by peace treaties, the most constructive path to solving the conflict.

The Palestinians, for their part, continued to reject Resolution 181, viewing the Jewish state as “occupied territory,” a label that exists to this

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<sup>29</sup> Between November 30 1947 – July 20 1949.

day in PLO and Palestinian Authority maps, insignia and even statistical data. Rejection of any form of Jewish polity anywhere in western Palestine was underscored in the PLO's 1964 Charter.

## **The Arab Palestinians and the “clean hand” principle.**

Only a few years ago voices emerged in Arab circles suggesting that the “Partition Plan” be the basis of a “just and lasting peace,” rather than demanding a return to the Green Line. The ICJ is the first highly regarded institution to *fall for the bait*, claiming that Palestinian rights to self-determination emanate from the very document repudiated by the Arabs for almost sixty years. In 1976, for example, the Arab League was still berating the Family of Nations at the UN that: “In its resolution 181(II) of 29 November 1947, the General Assembly imposed the partition on Palestine against the expressed wishes of the majority of its population.”<sup>30</sup>

The International Court of Justice, by accepting testimony from the Palestinians as interested parties and declaring that it is the ICJ's solemn responsibility to stand up for Palestinian rights, performed another flip-flop by declaring that in such instances (i.e., the “clean hands” test) the Palestinians are exempt.

In paragraphs 63 and 64 of the opinion, the ICJ says:

“Israel has contended that Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the Court a remedy for a situation resulting from its own wrongdoing. In this context, Israel has invoked the *maxim nullus commodum capere potest de sua injuria propria*, which it considers to be as relevant in advisory proceedings as it is in contentious cases. Therefore, Israel concludes, good faith and the principle of ‘clean hands’ provide a compelling

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<sup>30</sup> At a meeting of the Committee on the Exercise of the Inalienable Rights of the Palestinians People, General Assembly Document A/AC.183/L.22, April 26 1976, at: [\(11374\)](http://domino.un.org/UNISPAL.NSF/0/842f480902f25fef85256e2f006a82d2?OpenDocument)

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reason that should lead the Court to refuse the General Assembly’s request. The Court does not consider this argument [the ‘clean hands’ argument raised by Israel] to be pertinent. As was emphasized earlier, it was the General Assembly which requested the advisory opinion, and the opinion is to be given to the General Assembly, and not to a specific State or entity.”

Professor Stone explains the “clean hands” concept:

“... there are also certain other legal grounds, rooted in basic notions of justice and equity, on which the Arab states (and the Palestinians whom they represented in these matters) should not, in any case, be permitted, after so lawless a resort to violence against the plan, to turn around decades later, and claim legal entitlements under it.

“More than one of ‘the general principles of law’ acknowledged in Article 38(1)(c) of the Statute of the International Court of Justice seem to forbid it. Such claimants do not come with ‘clean hands’ to seek equity; their hands indeed are mired by their lawlessly violent bid to destroy the very resolution [181] and plan from which they now seek equity. They may also be thought by their representations concerning these documents, to have led others to act to their own detriment, and thus to be debarred by their own conduct from espousing, in pursuit of present expedencies, positions they formerly so strongly denounced. They may also be thought to be in breach of the general principle of good faith in two other respects.

“Their position resembles that of a party to a transaction who has unlawfully repudiated the transaction, and comes to court years later claiming that selected provisions of it should be meticulously enforced against the wronged party. It also resembles that of a party who has by unlawful violence wilfully destroyed the subject-matter that is ‘the fundamental basis’ on which consent rested, and now clamors to have the original terms enforced against the other party. These are grounds that reinforce the pithy view of U.S. Legal Adviser Herbert Hansell that the 1947 partition was never effectuated.

“... the Partition Resolution and Plan, since they were prevented by Arab rejection and armed aggression from entering into legal operation, could not thereafter carry any legal effects binding on Israel.”<sup>31</sup>

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<sup>31</sup> Professor Julius Stone, *Israel and Palestine, Assault on the Law of Nations*, The Johns Hopkins University Press, 1981, p. 65.

When armistice lines were finally drawn in the spring and summer of 1949 under the auspices of the UN, they reflected ‘facts on the ground.’ Resolution 181 had been tossed into the waste bin of history, along with all other plans of partition.

# 5

## Self-Defence

### Article 51 – The Right to Self-Defence

Article 51 of the UN Charter clearly recognizes “the inherent right of individual or collective self-defence” *by anyone*. That is, the language of Article 51 does not identify or stipulate the kind of aggressor or aggressors against whom this right of self-defence can be exercised ... and certainly does not limit the right to self-defence to attacks by States!

ICJ’s attempt to qualify the use of self-defence under Article 51 as aggression committed by a ‘state’ *only*, is clearly an attempt to evade international law.

The ICJ Bench ignored repeated acts of terrorism from ‘Palestine’ as emanating from non-State entities and therefore inadmissible to the issue of the security fence.

The ICJ’s opinion engages in some highly questionable interpretations not only of its own mandate, but also of the UN Charter’s article on the right to self-defence, or in the case of Israel, the lack of the right to self-defence. The worst of all statements concerns a *fallacious interpretation* of Article 51 of the UN Charter.

The ICJ writes in paragraph 139 of the opinion:

“Under the terms of Article 51 of the Charter of the United Nations:

‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.’

“Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by *one State against another State*. However, Israel does not claim that the attacks against it are imputable to a foreign State. ... Consequently, the Court concludes that *Article 51 of the Charter has no relevance in this case*” [italics by author].

In addition to, and apart from, the provisions of Article 51, the ICJ also ignores the fact that Palestinian warfare is “... strictly regulated by the customs and provisions of the law of armed conflict, referred to here as international humanitarian law (IHL).”

“The authoritative commentary of the ICRC to the Fourth Geneva Convention justifies applying the provision to *non-state actors*, saying [t]here can be no drawbacks in this, since the Article in its reduced form, contrary to what might be thought, *does not in any way limit the right* [E.H., to self-defence] *of a State to put down rebellion*, nor does it increase in the slightest the authority of the rebel [in this case the Palestinian Authority] party ...”<sup>1</sup> [italics by author].

The ICJ ignores the Palestinian Authority (PA) violations of their assumed responsibility, such as the Oslo Accords, that required the Palestinians to abide by internationally recognized human rights standards. The Israeli Palestinian interim agreement of September 28 1995 stated:

“Israel and the Council [Palestinian Interim Self-Government Authority, i.e., the elected Council,] hereinafter ‘the Council’ or ‘the Palestinian Council’ shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally-accepted norms and principles of human rights and the rule of law.”<sup>2</sup>

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<sup>1</sup> See Legal Standards in *Erased In A Moment: Suicide Bombing Attacks Against Israeli Civilians*, HRW, October 2002 at: <http://www.hrw.org/reports/2002/isrl-pa/index.htm#TopOfPage>. (11262)

See also ICRC “...the right of a State to put down rebellion.” In “Article 3 - Conflicts not of an International Character” at: <http://www.icrc.org/ihl.nsf/0/1919123e0d121fefc12563cd0041fc08?OpenDocument>. (11368)

<sup>2</sup> Under “Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip,” Article XIX, Human Rights and the Rule of Law. September 28 1995. See: <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT#art13>. (10944)

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Israel's right to self-defence under Article 51 can not be more apparent according to both international humanitarian law and the 'Oslo Accord.'

Nothing can be more ludicrous than the ICJ conclusion that because "Israel does not claim that the attacks [by Palestinian terrorists] against it are imputable to a foreign State," it *lost* its right to act in self-defence.

It is worth noting that the UN and its organs have compromised even the Geneva Convention's protocols, by selective politicization to bash Israel.<sup>3</sup> The High Contracting Parties never met to discuss Cambodia's killing fields or the 800,000 Rwandans murdered in the course of three months in 1994.<sup>4</sup> *Israel is the only country in the Geneva Convention's 54-year history to be the object of a country-specific denunciation.*

### **The ICJ lacks the authority to amend or 'interpret' Article 51.**

There is no foundation for 'adding restrictions,' narrowly interpreting Article 51's meaning, or simply making changes to the UN Charter. The ICJ fails to reference Articles 108 and 109 of the UN Charter that set the precedent rules for amending the Charter:

"Amendments to the present Charter shall come into force for all Members [E.H., and not a customized version for Israel] of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council."

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<sup>3</sup> For the text of the February 9 1999 resolution "Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory," see: <http://www.mefacts.com/cache/html/un-resolutions/11124.htm>. (11124)

<sup>4</sup> See Associated Press report "More Than One Million Rwandans Killed in 1990's," *The New York Times*, February 16 2002 at <http://www.mtholyoke.edu/acad/intrel/bush/rwandadeaths.htm>. (10731)

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It is rather strange that the ICJ, of all bodies, takes liberties to change what Article 51 clearly states. This ICJ also failed to review its own past writings on the subject of *attempting to interpret* UN Charter Articles. Elsewhere in the opinion, the ICJ quotes its 1950 ruling on South West Africa (Namibia) regarding Article 80 of the same UN Charter, saying that Articles of the UN Charter were carefully penned and should be strictly read in a direct manner ‘as is’:

“The Court considered that if Article ... had been intended to create an obligation ... such intention would have been *expressed in a direct manner*”<sup>5</sup> [italics by author].

The ICJ Bench zig-zags from strict construction to loose construction, coupled with biased *interpretation*, to deny Israel the fundamental right to defend its citizens from terrorism.

Writing on the subject of the *legal effect of Resolutions and Codes of Conduct of the United Nations*, Schwebel, the former president of the International Court of Justice, notes:

“what the terms and the *travaux* (notes for the official record) of the Charter do not support can scarcely be implemented.”<sup>6</sup>

Ironically, in December 2004, the UN High-level Panel on Threats, Challenges and Change, published the much anticipated report entitled “A more secure world: Our shared responsibility.” Paragraph 192 of this report states:

**“We do not favour the rewriting or reinterpretation of Article 51”** [Bold in the original].

The same is true of the International Court of Justice, an organ of the United Nations, which lacks the mandate to ‘amend’ Article 51.

<sup>5</sup> See International status of South-West Africa. Advisory Opinion of 11 July 1950 at: <http://www.icj-cij.org/icjwww/idecisions/isummaries/isswasummary500711.htm>. (10954)

<sup>6</sup> Professor, Judge Stephen M. Schwebel, *The Legal Effect of Resolutions and Codes of Conduct of the United Nations in Justice in International Law*, Cambridge University Press, 1994. Opinions quoted in this critiques are not derived from his position as a judge of the ICJ.

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## When Use of Force is Lawful

UN Charter Article 51 is not the only UN sanction of self-defence to be disregarded by the ICJ.<sup>7</sup> The Court also chooses to ignore a number of highly relevant United Nations Resolutions, passed by the General Assembly and the Security Council, addressing the legitimate and lawful use of force in self-defence by Member States.

For instance, the rationale behind General Assembly Resolution 3314 – “Definition of Aggression” – is highly relevant to the case at hand. It states:

“*Convinced* that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim.”<sup>8</sup>

The ICJ speaks repeatedly of the “inadmissibility of the acquisition of territory by war.” What does this phrase mean in the framework of international law? The ICJ’s use of this important principle is selective, misplaced, misleading and totally out of context.

The Bench chooses to quote Article 2, paragraph 4, of the UN Charter, which says:

“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.”

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<sup>7</sup> Article 51 reads: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.” See: <http://www.un.org/aboutun/charter/chapter7.htm>. (10370)

<sup>8</sup> See Appendix E. UN General Assembly Resolution 3314 (XXIX). <http://middleeastfacts.org/content/book/18-aggression-nm-010504.doc>. (10495)

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But the Bench chooses to ignore Article 5, paragraph 3, of UN GA Resolution 3314 which states:

“No territorial acquisition or special advantage *resulting from aggression* is or shall be recognized as lawful” [italics by author].

That is, the inadmissibility of the acquisition of territory by war cannot and should not be viewed as a blanket statement. Rather, it hinges on acquisition being the result of aggression. Arab countries acted aggressively against Israel in 1948 and 1967. Israel was not the aggressor in either the 1948 War of Independence or in the 1967 Six-Day War.

In the same manner, the ICJ quotes *selectively* from the 1970 General Assembly Resolution 2625 (“Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States”).<sup>9</sup> In paragraph 87 of the ICJ opinion, the Bench notes that Resolution 2625:

“... emphasized that ‘No territorial acquisition resulting from the threat or use of force shall be recognized as legal.’”

It hides from the reader that the same Resolution subsequently clarifies that:

“The territory of a State shall not be the object of military occupation *resulting from* the use of force in contravention of the provisions of the Charter” [italics by author].

The same Resolution continues:

“Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning *cases in which the use of force is lawful*” [italics by author].

Schwebel explains that the principle of “acquisition of territory by war is inadmissible” must be read together with other principles:

“... namely, that no legal right shall spring from a wrong, and the Charter principle that the Members of the United Nations shall refrain in their

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<sup>9</sup> See Appendix D. “Declaration on principles of international law concerning friendly relations and cooperation among states in accordance with the charter of the united nations” at: <http://www.un.org/documents/ga/res/25/ares25.htm>. (11488)

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international relations from the threat or use of force against the territorial integrity or political independence of any State.”<sup>10</sup>

Simply stated, illegal Arab aggression against the territorial integrity and political independence of Israel, cannot be rewarded.

Had the Charter forbidden use of force in any and all circumstances, it would not need to use the words “resulting from.” The Resolution would have simply read: “The territory of a State shall not be the object of military occupation by another State.” Period.

It is relevant at this juncture to recall again Lauterpacht’s explanation on this important issue, a point also cited by Schwebel in his writing:

“... territorial change cannot properly take place as a result of the ‘unlawful’ use of force. But to omit the word ‘unlawful’ is to change the substantive content of the rule and to turn an important safeguard of legal principle into an aggressor’s charter. For if force can never be used to effect lawful territory change, then, if territory has once changed hands as a result of the unlawful use of force, the illegitimacy of the position thus established is sterilized by the prohibition upon the use of force to restore the lawful sovereign. This cannot be regarded as reasonable or correct.”<sup>11</sup>

That is, there are situations involving *lawful* use of force and there are *lawful* occupations in the course of repelling aggression. Article 51 addresses the right to self-defence and the lawful use of force when one faces an aggressor.

The Security Council is the only UN body authorized to label a Member State (or non-State entity) an aggressor. In the Preamble of Resolution 3314 (“Definition of Aggression”) it says:

“Recalling that the Security Council, in accordance with Article 39 of the Charter of the United Nations, shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make

<sup>10</sup> Professor, Judge Schwebel in *What Weight to Conquest?* in “Justice in International Law,” Cambridge University Press, 1994.

<sup>11</sup> Professor, Judge Sir Elihu Lauterpacht, *Jerusalem and the Holy Places*, Pamphlet No. 19 (London, Anglo-Israel Association, 1968).

recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”<sup>12</sup>

## **Palestinian terrorism is an act of aggression.**

The United Nations defines aggressor as an entity that was first to start hostility by using armed force. In this regard the Security Council has never labeled Israel an aggressor in its entire history.

General Assembly Resolution 3314, adopted unanimously in 1974, makes it abundantly clear that no group, including non-State entities and individuals, can expect to be shielded behind the ICJ’s narrow and warped interpretation of Article 51 (the right to self-defence), which suggests that only aggression by “one State against another State” qualify for self-defence.

Article 3(a) of UN Resolution 3314 clarifies that the definition of a State when defining aggressors must be loosely construed:

“... without prejudice to questions of recognition or to whether a State is a member of the United Nations.”<sup>13</sup>

This clause clearly covers aggression emanating from the Palestinian Authority, an internationally recognized autonomous, national political entity established by international treaty – the Oslo Accords.<sup>14</sup> Moreover, Article 3(g) cites specifically that this includes:

“... the sending by or on behalf of a State of armed hands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”

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<sup>12</sup> See discussion in this critique, Chapter 8: “Attempting to Brand Israel the Aggressor.”

<sup>13</sup> UN General Assembly Resolution 3314 (XXIX) at: <http://middleeastfacts.org/content/book/18-aggression-nm-010504.doc> (10495)

<sup>14</sup> See: Israel-PLO Agreement: Oslo, 1993 [9/13/1993] Ref #11318. (11318) and Oslo II Interim Agreement - Washington, D.C., September 28 1995 [9/28/1995] Ref #10944. (10944)

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Furthermore, in Article 4, Resolution 3314 notes that “... the acts enumerated above are not exhaustive” and declares they can be further enumerated by the Security Council. Palestinian terrorist organizations, with headquarters and support in places such as Gaza, Jenin, Lebanon, Iran and Syria, using areas under the civil and security responsibility of the Palestinian Authority as organizational and staging areas to commit terrorist acts, clearly fall within the confines of this Resolution.

**Self-defence should be used against “all perpetrators” of terrorism “whomever” they are.**

UN General Assembly and Security Council Resolutions,<sup>15</sup> including the *International Convention for the Suppression of Terrorist Bombings*,<sup>16</sup> call for specific actions to be taken by *all States* and underscore repeatedly that terrorism must be fought by *all parties*, by *all means*, at *all times*, by *whomever* and against *all perpetrators*. None of these requirements are cited by the ICJ, neither in its discussion of Article 51 and the right of Israel to self-defence, nor in any other similar context within the ICJ’s opinion.

**The ICJ suggests: Israelis have to face deadly acts of violence, and lack the right for self-defence.**

In paragraph 141 of the ICJ Opinion, the Court concludes that,

“The fact remains that Israel *has* to face numerous indiscriminate and deadly acts of violence against its civilian population” [italics the author].

The Court’s use of the word ‘*has*’ rather than ‘*faces*’ [deadly acts], has the ring of a ‘court order.’ The Court doesn’t condemn the attacks; instead it ‘sentences’ Israel to a form of cruel and unusual punishment.

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<sup>15</sup> See Appendix B.

<sup>16</sup> Adopted without a vote, December 15 1997. See: <http://www.un.org/ga/documents/gares52/res52164.htm>. (10899)

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The Court recognizes Israel's predicaments, while being careful not to use the "T" word (terrorism) or bring itself to classify Palestinian's acts as "*crimes against humanity*,"<sup>17</sup> for to do so would imply that Israel's plight comes under the umbrella of Resolutions and International Conventions safeguarding universal human rights.

The Court that in paragraph 141 suggests that Israel "has the right, and indeed the duty, to respond in order to protect the life of its citizens" is the same Court that in paragraph 142 leaves Israel powerless; denies it the right for self-defence and rules against building a non-lethal security barrier that saves lives, in favor of Palestinian inconvenience and Palestinian terrorism.

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<sup>17</sup> See "Element of Crimes" at the Rome Statute of the International Criminal Court, at [http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/elements\(e\).pdf](http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/elements(e).pdf) (11456)

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# 6

## Terrorism

The International Court of Justice fails to identify Palestinian terrorism, the root cause of the construction of the security barrier, and what one may and may not do to combat it.

UN-sponsored International Conventions, Security Council Resolutions and Directives, including the Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/13, are all ignored by the ICJ.<sup>1</sup>

The ICJ cites UN Document A/ES-10/248 – the report of the Secretary General on the security fence – as a key document and source of information for its opinion. Yet, the ICJ overlooks entirely the points in the Secretary-General's Report<sup>2</sup> that admits the causal relationship between

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<sup>1</sup> Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13, October 21 2003, paragraph C, 1. (11317)

<sup>2</sup> UN Document A/ES-10/248, November 24 2003, "Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13," November 24 2003, at: <http://domino.un.org/unispal.nsf/0/a5a017029c05606b85256dec00626057?OpenDocument>. (10575)

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terrorism and the security barrier. In Section C (Route of the Barrier) (4) of his report, the Secretary-General cites:

“... After a sharp rise in Palestinian terror attacks in the spring of 2002, the [Israeli] Cabinet approved Government Decision 64/B on 14 April 2002, which called for construction of 80 kilometers of the Barrier in the three areas of the West Bank.”

Not only does the report label the Palestinian actions as *terror*, but it also clearly establishes, in its own words, the cause for building a security barrier. The ICJ completely ignores this fact; at no point is it addressed in the ICJ’s opinion.

In December 1997, the United Nations adopted Resolution 52/164 – the *International Convention for the Suppression of Terrorist Bombings*<sup>3</sup> – a contribution to international law that establishes rules of jurisdiction in the prosecution of terrorists.

The UN legislation clearly defines terrorism and ‘who is a terrorist,’ declaring, for the first time, that:

“... the States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, *wherever* and by *whomever* committed” [italics by author].

This text is clear: regarding *any* act of terrorism, the ends do not justify the means.

Article 2 of the Convention defines a terrorist as:

“*Any* person [who] unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of

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<sup>3</sup> UN General Assembly, International Convention for the Suppression of Terrorist Bombings, Adopted without a vote, 15 December 1997. See: <http://www.un.org/ga/documents/gares52/res52164.htm>. (10899)

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public use, a State or government facility, a public transportation system or an infrastructure facility ... with the intent to cause death or serious bodily injury ... or with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.”

It underscores in 2 a-c that this includes:

“... accomplices, organizers and directors and other persons who in any other way contribute to the commission of such acts.”

There is no *escape clause* in this piece of international law that exempts “struggles for self-determination” from anti-terrorism resolutions. In fact, the *International Convention for the Suppression of Terrorist Bombings* clarifies in Article 11 that:

“None of the offences set forth in article 2 shall be regarded ... as a political offence or as an offence connected with a political offence or as an offence inspired by political motives.”

The ICJ skirts this issue, choosing to rule favorably on the “applicability of human rights instruments outside national territory ... in the Occupied Palestinian Territory” – quoting time and again other conventions and covenants. These agreements include the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child* and the *International Covenant on Civil and Political Rights*. All are used as evidence (without a single reference to particulars or law), to condemn Israel’s abrogation of humanitarian law in building the Barrier against “... numerous indiscriminate and deadly acts of violence,”<sup>4</sup> but the ICJ doesn’t so much as mention the *International Convention for the Suppression of Terrorist Bombing*. In fact, the term ‘suicide bombers’ does not appear even once, nor is the “T” word used in the wording of the Opinion.<sup>5</sup>

<sup>4</sup> See Appendix I. ICJ Advisory Opinion, 9 July 2004, paragraphs 141-142.

<sup>5</sup> “Terrorism” appears only five times in the document, cited in brief quotes from the Israeli brief. In the actual opinion, in the name of the ICJ, the word “terrorism” doesn’t appear even once.

If General Assembly Resolution 3314<sup>6</sup> and the *International Convention for the Suppression of Terrorist Bombings* do not make their denunciation of terrorism explicitly clear, resolutions by the Security Council – Resolution 1269<sup>7</sup> adopted in the wake of the first attack on the World Trade Center in 1999 and other resolutions adopted in the wake of the September 11 2001 terrorist attack on the United States by a non-State terrorist organization – do.

In Point 4 of Security Council Resolution 1269, passed in October 1999 (after the first attack on the World Trade Center), the Security Council calls upon every UN member and non-member:

“... to take, *inter alia*, in the context of such cooperation and coordination, appropriate steps to:

“cooperate with each other, particularly through bilateral and multilateral agreements and arrangements, to prevent and suppress terrorist acts, protect their nationals and other persons against terrorist attacks and bring to justice the perpetrators of such acts.”

In essence, the Security Council expects every Member State to carry out this and other steps enumerated in the resolution.

Resolutions 1368,<sup>8</sup> 1373<sup>9</sup> (September 2001) and Resolution 1377<sup>10</sup> (November 2001) leave no room to question Israel’s right to defend itself against systematic and sustained Palestinian terrorist attacks launched since September 2000 – an onslaught per capita, equivalent to 17 September 11th attacks.<sup>11</sup>

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<sup>6</sup> UN General Assembly Resolution 3314 (XXIX). See: <http://middleeastfacts.org/content/book/18-aggression-nm-010504.doc>. (10495)

<sup>7</sup> UN Security Council, Resolution 1269 Adopted by the Security Council at its 4053rd meeting on October 19 1999. See: <http://www.un.int/usa/sres1269.htm>. (11375)

<sup>8</sup> UN Security Council Resolution 1368 (2001). See: <http://www.mefacts.com/cache/pdf/un-resolutions/10574.pdf>. (10574)

<sup>9</sup> UN Security Council 1373 (2001) September 28 2001. (10838)

<sup>10</sup> UN Security Council Resolution 1377 (2001) November 12 2001. (10837)

<sup>11</sup> Between September 1993 (the signing of the Oslo Accords) and February 2003 (prior to completion of the first leg of the fence) more than 1,004 Israelis lost their lives to Palestinian terrorists.

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With regard to terrorism, Resolution 1368 clarifies and 1373 reconfirms in a broader form that the Security Council:

“*Reaffirms* the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in Resolution 1368 (2001),

“*Reaffirming* the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts.”

The UN term “by all means” clearly includes a passive, non-lethal physical barrier to impede the movement of such perpetrators, in addition to more *forceful responses*.

Resolution 1377, passed two months later:

“*Declares* that acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century,

“*Reaffirms* its unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their *motivation*, in all their *forms* and *manifestations, wherever* and by *whomever* committed” [italics by author].

Terrorist attacks that blow up and destroy public buses, religious celebrations such as a Passover *seder* and bat mitzvah, young people at cafes and discos, families at supermarkets and restaurants, and that murder youth at boarding schools, school outings, and families in their homes and on the road, clearly fall within the confines of this definition.

The nature of Palestinian terrorism is public knowledge. Yet, the International Court of Justice claims in paragraphs 55-57:

“According to Israel, if the Court decided to give the requested opinion, it would be forced to speculate about essential facts and make assumptions about arguments of law. More specifically, Israel has argued that the Court could not rule on the legal consequences of the construction of the wall without enquiring, first, into the nature and scope of the security threat to which the wall is intended to respond and the effectiveness of that response ... ”

Nevertheless, in paragraph 57 of the opinion, the ICJ claims it has ample information:

“... the Court has at its disposal the report of the Secretary-General,<sup>12</sup> as well as a voluminous dossier submitted by him to the Court. ... The Court notes in particular that Israel’s Written Statement, although limited to issues of jurisdiction and judicial propriety, contained observations on other matters, including Israel’s concerns in terms of security, and was accompanied by corresponding annexes; many other documents issued by the Israeli Government on those matters are in the public domain.”

After all has been said and done,<sup>13</sup> how is it that *nowhere* in the opinion does the ICJ weigh Israel’s security threat or even mention terrorism as a factor in the case? The ICJ did not even have to *depend* on Israeli sources. There is, for instance, a well-documented 170-page Human Rights Watch (HRW) report on suicide bombings against Israelis since September 2000 – *Erased in a Moment: Suicide Bombing Attacks Against Israel Civilians* – available ‘in the public domain’ at the click of a computer mouse. The report, prepared by an international human rights monitoring organization, concluded: “The scale and systematic nature of these [E.H., terror] attacks in 2001 and 2002 meet the definition of a *crime against humanity*.”

Moreover, the Human Rights Watch report, which examines in a special section the justifications given by terrorists for their actions under the right to self-determination, places responsibility for terrorist acts directly at the Palestinian Authority’s door.

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<sup>12</sup> The report includes the following statements: “The Government of Israel has since 1996 considered plans to halt infiltration into Israel from the central and northern West Bank, with the first Cabinet approval of such a plan in July 2001. After a sharp rise in Palestinian terror attacks in the spring of 2002 ...” and “I acknowledge and recognize Israel’s right and duty to protect its people against terrorist attacks.” See: Report of the Secretary-General prepared pursuant to GA Res. ES-10/13. (10940)

<sup>13</sup> In short, the PA is competent to rule, but if it fails, Israel is to blame for not providing the relevant material ... which the Court in any case rules is immaterial.

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Security Council Resolution 1368, passed the day after the September 11th attack, clearly specified who was accountable for such a terrorist act and called for:

“... bring[ing] to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that *those responsible for aiding, supporting or harbouring* the perpetrators, organizers and sponsors of these acts *will be held accountable*” [italics by author].

Security Council Resolution 1456 – passed in January 2003 – further clarified:

“... any acts of terrorism are criminal and unjustifiable, regardless of their motivation, *whenever and by whomsoever committed* and are to be unequivocally condemned, especially when they *indiscriminately target or injure civilians*”<sup>14</sup> [italics by author].

Again, the International Court of Justice sees no relevance in the definition of terrorism and culpability set forth in Resolution 1456, despite the fact that Israel has been the target of aggression with 80 percent of the Israelis killed being non-combatants, with women and girls accounting for 31 percent of the fatal casualties,<sup>15</sup> including 51 American citizens and a score of foreign laborers.<sup>16</sup>

The ICJ quotes from a variety of international conventions devoted to wartime situations, including the Hague and Geneva Conventions. Is it reasonable that the ICJ is unaware of the Rome Statute in force since 2002 that is clearly posted on the UN International Law website?<sup>17</sup>

<sup>14</sup> UN Security Council Resolution 1456 (2003), [1/20/2003]. (10843)

<sup>15</sup> For a summary of the study see Don Radlauer, “The al-Aqsa Intifada – An Engineered Tragedy,” January 7 2003 at: <http://www.ict.org.il/articles/articleDet.cfm?articleid=440>. For the full study, see <http://www.ict.org.il/articles/articleDet.cfm?articleid=439>.

<sup>16</sup> “Shin Bet report: 1,017 Israelis killed in intifada,” *Haaretz*, September 27 2004. This report also cites 70% of the fatalities (1,017 persons) and 82% of the wounded (5,598 persons) were civilians during four years of violence (September 2000-September 2004).

<sup>17</sup> See <http://www.un.org/law/icc/>. (11130)

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What does the Rome Statute say? In Section IV (“Legal Standards”) in the Human Rights Watch investigation of suicide bombings, the Rome Statute and the *Draft Code Against the Peace and Security of Mankind* drawn up by the International Law Commission and often quoted as a guide or yardstick in legal proceedings, are discussed at length.<sup>18</sup> The HRW notes:

“The notion of ‘crimes against humanity’ refers to acts that, by their scale or nature, outrage the conscience of humankind. Crimes against humanity were first codified in the charter of the Nuremberg Tribunal of 1945. Since then, the concept has been incorporated into a number of international treaties, including the Rome Statute of the International Criminal Court (ICC). Although definitions of crimes against humanity differ slightly from treaty to treaty, all definitions provide that the deliberate, widespread, or systematic killing of civilians by an organization or government is a crime against humanity. Unlike war crimes, crimes against humanity may be committed in times of peace or in periods of unrest that do not rise to the level of an armed conflict.”<sup>19</sup>

The most recent definition of crimes against humanity is contained in the Rome Statute of the ICC, which entered into force on July 1 2002.

“The statute, in Article 7, defines crimes against humanity as the ‘participation in and knowledge of a widespread or systematic attack against a civilian population,’ and ‘the multiple commission of [such] acts ... against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.’ The statute’s introduction defines ‘policy to commit such attack’ to mean that the state or organization actively promoted or encouraged such attacks against a civilian population. The elements of the ‘crime against humanity of murder’ require that (1) ‘the perpetrator killed one or more persons,’ (2) ‘[t]he conduct was committed as part of a widespread or systematic attack directed against a civilian population,’ and (3) ‘[t]he perpetrator knew that the conduct was part of, or intended the

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<sup>18</sup> See Section IV, at: [http://www.hrw.org/reports/2002/isrl-pa/ISRAELPA1002-04.htm#P564\\_114276](http://www.hrw.org/reports/2002/isrl-pa/ISRAELPA1002-04.htm#P564_114276). (11455) See also “Element of Crimes” at the Rome Statute of the International Criminal Court, at: [http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/elements\(e\).pdf](http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/elements(e).pdf). (11456)

<sup>19</sup> See Human Rights Watch at [http://www.hrw.org/reports/2002/isrl-pa/ISRAELPA1002-04.htm#P589\\_123822#P589\\_123822](http://www.hrw.org/reports/2002/isrl-pa/ISRAELPA1002-04.htm#P589_123822#P589_123822). (11455)

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conduct to be part of, a widespread or systematic attack against a civilian population.”<sup>20</sup>

It is noteworthy that the Rome Statute addresses both the character of the act (deliberate “widespread or systematic” killing), *and* the nature of the perpetrator (a “State” or “organization”), and leaves no loopholes for non-State entities to escape culpability. Yet, the Rome Statute – an integral part of international law – is patently ignored by the International Court of Justice.<sup>21</sup>

### **The ICJ ignores relevant bilateral treaties, including the Oslo Accords.**

In paragraph 77 of the ICJ opinion, ten years of Palestinian autonomy marked by broken promises to recognize Israel by abolishing anti-Israel clauses in the Palestinian National Covenant and to replace denunciation of terrorism with negotiation, is reduced by the ICJ to one sentence:

“... a number of agreements have been signed since 1993 between Israel and the Palestine Liberation Organization imposing various obligations on each party.”

The ICJ then takes liberties with the content of the Oslo Accords, claiming erroneously:

“Those agreements *inter alia* required Israel to transfer to Palestinian authorities certain powers and responsibilities exercised in the Occupied Palestinian Territory by its military authorities and civil administration.”

In fact, this is a doctored interpretation: had the members of the ICJ read the Accords, the Bench would have found that Israel only recognized the PLO as the representative of the Palestinian people in the exchange of letters between both sides:

“In response to your [Arafat] letter of September 9 1993, I [Yitzhak Rabin, Prime Minister of Israel] wish to inform you that, in light of the PLO

<sup>20</sup> Ibid.

<sup>21</sup> See Article 7 (1) (a) Crime against humanity of extermination at: [http://www.rk19-bielefeld-mitte.de/info/Recht/United\\_Nations/Strafgerichtshof/Elements\\_of\\_Crime/Article\\_7.htm#1](http://www.rk19-bielefeld-mitte.de/info/Recht/United_Nations/Strafgerichtshof/Elements_of_Crime/Article_7.htm#1). (11456)

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*commitments* included in your letter, the Government of Israel has decided to *recognize the PLO as the representative of the Palestinian people* and commence negotiations with the PLO within the Middle East peace process.”<sup>22</sup>

Israel never recognized the claim that the autonomy to be granted Palestinians pertained to ‘Occupied Palestinian Territories.’ In fact, at no point in the Accords is the West Bank or Gaza labelled ‘occupied territory.’ The ICJ simply fabricated this and lamely concludes:

“Such transfers have taken place, but, as a result of subsequent events, they remained partial and limited.”

This abridged sentence sanitizes the history of the Oslo peace process, and doesn’t so much as hint at what “subsequent events” disrupted the peace process – events that have taken the lives of 1366 Israeli victims of terrorism, mostly civilians.<sup>23</sup> Instead, the ICJ claims the only regime is Israeli!

“... Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory.”

In short, a corrupt logic holds that Israel is solely in charge in a said area, but it is forbidden to take any effective actions in that given area.

The ICJ blithely argues with no reference to international law:

“The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.”

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<sup>22</sup> PLO-Israel Letters of Mutual Recognition. Exchange of Letters between PLO Chairman Yasser Arafat & Israeli Prime Minister Yitzhak Rabin. September 9 1993. See: [http://www.palestine-un.org/peace/p\\_b.html](http://www.palestine-un.org/peace/p_b.html). (10420)

<sup>23</sup> As of December 3 2004, and since September 1993, 1,366 Jews have been murdered by Palestinian’s terror. For a an updated listing by name see: <http://www.masada2000.org/oslo.html>.



The ICJ's denial of Israel's right to act under Resolution 1373 is particularly grave. Resolution 1373<sup>24</sup> was adopted by the Security Council under Chapter VII of the UN Charter ("Threats to Peace, Breaches of the Peace and Acts of Aggression") that invests the Security Council with the power to issue stringent resolutions *requiring all* nations to comply with the terms set forth in Resolution 1373, citing

"the need to combat *by all means*, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts" [italics by author].

The ICJ has no authority and no power over the Security Council to alter the resolution or exclude Israel, a Member State of the UN, from its rights and obligations under Resolution 1373.

The ICJ's position pretends that a decade of Palestinian autonomy never existed and Palestinians have no margin of control whatsoever over their lives. The threats from suicide bombers and other terrorist acts are magically transformed into an 'internal problem,' so that the Security Council Resolutions passed after September 11th, which allow countries to compromise the sovereignty of other polities to combat terrorism, become inapplicable. Elsewhere in the opinion the ICJ denies Israel the right to take anti-terrorism measures anywhere beyond the Green Line because the same territory 'belongs' to an entity called 'Palestine.'

Even the British judge on the Bench, Rosalyn Higgins, felt compelled to note in a separate opinion that:

"Palestine cannot be sufficiently an international entity to be invited to these proceedings, and to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attack on others to be applicable."<sup>25</sup>

<sup>24</sup> UN Security Council Resolution 1373 (2001). S/RES/1373 (2001). Adopted by the Security Council at its 4385th meeting, on 28 September 2001. See: <http://middleeastfacts.org/content/UN-Documents/PDF/SC-res-1373-sep-28-2001.pdf>. (10838)

<sup>25</sup> See Judge Higgins at: <http://www.icj-cij.org/icjwww/idocket/imwp/imwframe.htm>.

Yet, this and numerous other reservations did not prevent Higgins from voting in favor of adopting the opinion as written.

As far as the ICJ is concerned, Palestinian society lacks any semblance of social organization or self-rule, either on a local or national level, that can be held accountable for terrorism. Yet, at the same time, this same Court holds that Palestinians are such a sustainable entity as to deserve *immediate self-determination*.

The ICJ patently ignores the other clauses in Oslo II<sup>26</sup> which gives the Palestinian Authority full responsibility for Gaza, Jericho and seven major Palestinian cities on the West Bank, including internal security and public order, a responsibility it abrogated by using control of the civil machinery in 450 towns throughout the West Bank to incite the population, including children. It also included turning densely populated areas under full Palestinian control, such as Ramallah and Jenin, into bomb-making factories and staging areas for suicide bombers.

Human Rights Watch – a non-governmental organization (NGO) – is far more thorough in its report on suicide bombings. It doesn't gloss over Palestinian commitments (and complicity) or hide behind the Palestinian Authority's non-state status. It has the courage to say:

“Although it is not a sovereign state, the Palestinian Authority has explicit security and legal obligations set out in the Oslo Accords, an umbrella term for the series of agreements negotiated between the government of Israel and the PLO from 1993 to 1996. The PA obligations to maintain security and public order were set out in articles XII to XV of the 1995 Interim Agreement on the West Bank and Gaza Strip. These responsibilities were elaborated further in Annex I of the interim agreement, which specifies that the PA will bring to justice those accused of perpetrating attacks against

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<sup>26</sup> The Israeli-Palestinian Interim Agreement on the West Bank And the Gaza Strip, Washington, D.C. September 28 1995. Full text see: <http://www.mefacts.com/cache/html/oslo/10944.htm>. (10944)

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Israeli civilians. According to article II (3)(c) of the annex, the PA will ‘apprehend, investigate and prosecute perpetrators and all other persons directly or indirectly involved in acts of terrorism, violence and incitement.’”<sup>27</sup>

These clauses in a landmark international accord, as well as other yardsticks examined by Human Rights Watch in their study and found to be relevant, are of no interest to the International Court of Justice.

The ICJ bases its ‘conclusion’ on General Assembly Resolution 58/163 that “reaffirms the right of the Palestinian people ... to their independent State of Palestine.”<sup>28</sup> The General Assembly, of course, has no authorization to ‘hand out’ politics any more than the ICJ has the right to give this bogus right a legal ‘stamp of approval’ because neither body has actual legislative or executive powers.

Under the Law of Nations, rights go hand-in-hand with responsibilities. Entitlement is irrevocably tied to accountability. The entire opinion penned by the International Court of Justice speaks time and again of Palestinian rights, but *not once* about Palestinian responsibilities. If Palestinians are unable to behave in a manner in keeping with the most fundamental principles of the law of nations – attacking their neighbors as opposed to peaceful negotiation of differences – then surely Israel has the right to defend such an onslaught of its national security. But, alas, the entire issue of terrorism is considered immaterial to the security barrier question, which the ICJ brands a political ploy that merely grabs Palestinian land and abridges Palestinian rights.

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<sup>27</sup> HUMAN RIGHTS WATCH. *Erased In A Moment: Suicide Bombing Attacks Against Israeli Civilians*, October 2002. Obligations of the Palestinian Authority and Armed Palestinian Groups, at: <http://www.hrw.org/reports/2002/isrl-pa/ISRAELPA1002-4.htm#TopOfPage>. (11262)

<sup>28</sup> UN General Assembly - 58/163. A/RES/58/163. 77th plenary meeting. December 22 2003. The right of the Palestinian people to self-determination. See: <http://domino.un.org/UNISPAL.NSF/0/e5eaf52d1c576d0785256e6d0055b152?OpenDocument>. (11319)

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## **Report of the UN High-level Panel on Threats, Challenges and Change.**

On December 2 2004, the UN Secretary-General released a report entitled *A more secure world: Our shared responsibility*.<sup>29</sup>

This report, more than one year in the making, acknowledges the global threats of terrorism, and clearly contradicts the ICJ's Advisory Opinion on some of the core issues regarding terrorism and self-defence, stating that the:

“biggest security threats we face now, and in the decades ahead, go far beyond States waging aggressive war. They extend to ... terrorism. ... The threats are *from non-State actors* [E.H., such as the Palestinians] as well as States [E.H., such as Syria, Saudi Arabia, Iran], and to human security as well as State security” [italics by author].

The report continues to challenge the Court assertion that Resolution 1373 is not applicable to Israel [E.H., as the court did without reference to law, or other supportive source] by stating:

“Security Council resolution 1373 (2001) imposed uniform, mandatory counter-terrorist obligations on *all States* ...” [italics by author].

It proceeds to explain that the response to the use of force by a non-State has been inadequate:

“159. The norms governing the use of force by non-State actors have not kept pace with those pertaining to States. ... Legally, virtually all forms of terrorism are prohibited by one of 12 international counter-terrorism conventions, international customary law, the Geneva Conventions or the Rome Statutes. Legal scholars know this. ... The United Nations must achieve the same degree of normative strength concerning non-State use of force as it has concerning State use of force.” And that “... there is *nothing* in the fact of occupation that justifies the targeting and killing of civilians [italics by author].

“161. ... Attacks that specifically target innocent civilians and non-combatants must be condemned clearly and unequivocally by all.”

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<sup>29</sup> UN General Assembly Fifty-Ninth Session, 2 December 2004. (11550)

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# 7

## **ICJ Attempts to Brand Israel the Aggressor**

In 1974, the United Nations General Assembly adopted a definition of “aggression” in the context of establishing international peace when it approved Resolution 3314.<sup>1</sup> The resolution reaffirms the principles of the UN Charter and the Declaration on Principles of International Law, which states that “... war of aggression constitutes a crime against the peace, for which there is responsibility under international law.”

Using provocative words such as “belligerents,” “belligerency,” and “hostile,” the ICJ’s opinion attempts to convey the impression that Israel is an “aggressor” who deserves no rights.<sup>2</sup>

When applying Resolution 3314 to major battles between Israel and the Arab states in 1948, 1956, 1967, 1973 and the continuing fight of self-defence against Palestinian Arab terrorism, the UN’s 1974 definition of aggression clearly and unequivocally would label the Arab states and the

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<sup>1</sup> See Appendix E. UN Resolution 3314 – Defining Aggression.

<sup>2</sup> See Appendix I. ICJ Advisory Opinion, 9 July 2004.

Palestinian Arabs as the aggressors in both their direct and indirect acts of hostility against Israel.<sup>3</sup>

The following demonstrates just who is the aggressor in the Arab-Israeli conflict under international laws:

1. Article 1 defines “aggression” as the use of armed force against the sovereignty, territorial integrity or political independence of a State. An “Explanatory note:” follows to explain that “In this Definition the term ‘State’”:

“(a) is used without prejudice to questions of recognition or to whether a State is a member of the United Nations;” which means to say that acts of aggression applies [apply] also to “people,” State [refers] not [only to] members of the UN, or other non-recognized States. This note is given to understand that *aggression* can apply to *any* aggressor, whether an acknowledged state or an organization.

2. Article 2, 25 years after the fact, establishes that the Arab states that attacked the newly declared State of Israel in 1948 (known as Israel’s War of Independence) were all aggressors.

Furthermore, during the 1967 Six-Day War, Jordan, who joined Egypt and initiated ‘the first use of armed forces’ against Israel, was clearly an aggressor.<sup>4</sup>

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<sup>3</sup> Professor, Judge Stephen M. Schwebel, *What Weight to Conquest?* in *Justice in International Law*, Cambridge University Press, 1994. “As between Israel, acting defensively in 1948 and 1967, on the one hand, and her Arab neighbors, acting aggressively in 1948 and 1967, on the other, Israel has better title in the territory of what was Palestine, including the whole of Jerusalem.”

<sup>4</sup> “In response to the Israeli attack [on Egypt], Jordanian forces launched an offensive into Israel, but were soon driven back as the Israeli forces counterattacked into the West Bank and Arab East Jerusalem.” From the official website of Jordan at: <http://www.mefacts.com/cache/html/jordan/10364.htm>. (10364)

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3. Article 3 (c) – In both 1956 and 1967, Egypt blockaded the Strait of Tiran, preventing access to Israel's southern port of Eilat, a hostile action that led to the Sinai Campaign in 1956<sup>5</sup> and to the 1967 Six-Day War. As defined by the UN's 1974 resolution, Egypt indisputably committed an act of aggression.

Article 3 (f) – Lebanon's acquiescence in allowing Syrian armed forces to use Lebanon as a platform to wage war against Israel by supporting Hezbollah's terrorist attacks, clearly puts Lebanon in the category of aggressor.

Article 3 (g) – Under this Article, Lebanon, Syria and Iran are clearly aggressors. By allowing Hezbollah to freely launch attacks from its territory, Lebanon permits armed aggression against Israel. Syria and Iran are aggressors as they are clearly Hezbollah's greatest supporters in the region.

Article 6 – Applies when use of force is exercised under the UN Charter's definition of self-defence and in cases in which the use of force is *lawful*.<sup>6</sup>

### **Israel's enemies unsuccessful in branding Israel the aggressor.**

All UN Draft Resolutions attempting to brand Israel as aggressor or illegal occupier as a result of the 1967 Six-Day War, were all defeated by either the UN General Assembly or the Security Council:

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<sup>5</sup> The "Time 100" historical review of the Sinai Campaign, describes the principle by which Israel will agree to withdrawal from the Sinai Peninsula: "France's Premier Guy MoDd and Foreign Minister Christian Pineau arrived in Washington ... Pineau submitted to Dulles a draft resolution whereby 1) Israel would withdraw unconditionally, and 2) Israel's rights would be reserved under the Charter's self-defence clause if Egypt should go back to raids and blockages against her." See: [http://www.time.com/time/time100/leaders/profile/ben-gurion\\_related5.html](http://www.time.com/time/time100/leaders/profile/ben-gurion_related5.html). (11541)

<sup>6</sup> "Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the *use of force is lawful*." [italics by author]. See Appendix D. UN Resolution 2625.

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A/L.519,<sup>7</sup> 19 June 1967, submitted by: the Union of Soviet Socialist Republics, “Israel, in gross violation of the Charter of the United Nations and the universally accepted principles of international law, has committed a premeditated and previously prepared aggression against the United Arab Republic, Syria and Jordan.”

A/L.521,<sup>8</sup> 26 June 1967, submitted by: Albania “Resolutely condemns the Government of Israel for its armed aggression against the United Arab Republic, the Syrian Arab Republic and Jordan, and for the continuance of the aggression by keeping under its occupation parts of the territory of these countries.”

A/L.522/REV.3\*,<sup>9</sup> 3 July 1967, submitted by: Afghanistan, Burundi, Cambodia, Ceylon, Congo (Brazzaville), Cyprus, Guinea, India, Indonesia, Malaysia, Mali, Pakistan, Senegal, Somalia, United Republic of Tanzania, Yugoslavia and Zambia. “Calls upon Israel to withdraw immediately all its forces to the positions they held prior to 5 June 1967.”

A/L.523/Rev.1,<sup>10</sup> 4 July 1967, submitted by: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Trinidad and Tobago and Venezuela. “Israel to withdraw all its forces from all the territories occupied by it as a result of the recent conflict.”

In short, Israel did not violate the provisions of the UN Charter, is not an aggressor, and is not required to withdraw from all territories.

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<sup>7</sup> Union of Soviet Socialist Republics: draft resolution, A/L.519, June 19 1967, DOCUMENT A/L.519 at: <http://domino.un.org/unispal.nsf/0/2795fff6b58b212c052566cd006e0900?OpenDocument>. (10919)

<sup>8</sup> Draft Resolution A/L. 521, by Albania at the Emergency Session of the General Assembly- June 26 1967, see: <http://www.mefacts.com/cache/html/un-resolutions/10921.htm>. (10921)

<sup>9</sup> Document A/L.522/REV.3\*, July 3 1967, Afghanistan, Burundi, Cambodia, Ceylon, Congo (Brazzaville), Cyprus, Guinea, India, Indonesia, Malaysia, Mali, Pakistan, Senegal, Somalia, United Republic of Tanzania, Yugoslavia and Zambia: Revised draft resolution. (10918)

<sup>10</sup> A/L.523/Rev.1, July 4 1967, Fifth emergency special session Agenda item 5. Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Trinidad and Tobago and Venezuela: revised draft resolution. See: <http://domino.un.org/UNISPAL.NSF/0/510ef41fac855100052566cd00750ca4?OpenDocument>. (10920)

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# 8

## UN Security Council Resolutions 242 and 338

United Nations Security Council Resolution 242 was adopted unanimously by the UN Security Council in the aftermath of the 1967 Six-Day War. The resolution calls for a solution to the Arab-Israeli conflict based in principle on states having the right to “just and lasting peace” within “secure and recognized boundaries.”<sup>1</sup>

Resolution 242 and 338 never branded Israel as an “unlawful occupier” or an “aggressor” and never called on Israel to withdraw from *all* the “territories.” The wording of the resolutions clearly reflect the contention that none of the territories were occupied land taken by force in an *unjust war*.

In contrast, the International Court of Justice repeatedly reminds readers of the “... illegality of territorial acquisition resulting from the threat or use of force,” all out of context. The Court misleads readers by ignoring Arab aggression and concealing “the provisions of the Charter concerning cases in which the use of force is lawful,”<sup>2</sup> as was the case of the 1967 Six-Day War.

The minutes of the six month ‘debate’ over the wording of Resolution 242, as noted in the close of Chapter 7, show that draft resolution proposals that speak of “occupied territories,” “aggression” and which called on Israel to “withdraw immediately all its forces to the positions they held prior to 5 June 1967,” were all defeated.

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<sup>1</sup> See Appendix C. UN Resolutions 242, 338, 1515.

<sup>2</sup> See Appendix D. UN Resolution 2625.

Professor Eugene V. Rostow, a drafter of UN Security Council Resolution 242 and an international law expert, went on record in 1991 to make this clear:

“Resolution 242, which as Undersecretary of State of Political Affairs between 1966 and 1969, I helped to produce, calls on the parties to make peace and *allows Israel to administer the territories it occupied in 1967* until ‘a just and lasting peace in the Middle East’ is achieved. ... Speaker after speaker made it explicit that Israel was not to be forced back to the ‘fragile’ and ‘vulnerable’ Armistice Demarcation Lines, but should retire once peace was made to what Resolution 242 called ‘secure and recognized’ boundaries, agreed upon by the parties”<sup>3</sup> [italics by author].

Former British Ambassador to the UN Lord Caradon, the principal author of the Resolution 242 draft, indicated the same in 1974:

“It would have been wrong to demand that Israel return to its positions of 4 June 1967. ... That’s why we didn’t demand that the Israelis return to them and I think we were right not to.”<sup>4</sup>

Arthur J. Goldberg,<sup>5</sup> the U.S. Ambassador to the UN in 1967 and a key drafter of Resolution 242, stated:

“The notable omissions in language used to refer to withdrawal are the words *the, all,* and the *June 5, 1967, lines.* I refer to the English text of the resolution. The French and Soviet texts differ from the English in this respect, but the English text was voted on by the Security Council, and thus it is determinative. In other words, there is lacking a declaration requiring Israel to withdraw from the (or all the) territories occupied by it on and after June 5, 1967. Instead, the resolution stipulates *withdrawal from occupied*

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<sup>3</sup> Eugene V. Rostow, *The Future of Palestine*, Institute for National Strategic Studies, November 1993. Professor Rostow was Sterling Professor of Law and Public Affairs Emeritus at Yale University and served as the Dean of Yale Law School (1955-66); Distinguished Research Professor of Law and Diplomacy, National Defense University; Adjunct Fellow, American Enterprise Institute. In 1967 as U.S. Under-Secretary of State for Political Affairs he became a key drafter of the UN Resolution 242.

<sup>4</sup> Lord Caradon (Sir Hugh Foot) was the UK representative to the UN in 1967. His final draft becomes the foundation for UN Resolution 242. See Beirut Daily Star, June 12 1974, as quoted by Leonard J. Davis in *Myths and Facts* (Washington: Near East Report, 1989), p. 48, cited in Dan Diker, “Does the International News Media Overlook Israel’s Legal Rights in the Palestinian-Israeli Conflict,” JCPA, at: <http://www.jcpa.org/jl/vp495.htm>.

<sup>5</sup> Arthur J. Goldberg was a professor of law at the John Marshall Law School in Chicago, and was appointed in 1962 to the U.S. Supreme Court. In 1965 he was named U.S. representative to the United Nations. Judge Goldberg was a key drafter of UN Resolution 242.

*territories without defining the extent of withdrawal.* And it can be inferred from the incorporation of the words *secure and recognized boundaries* that the territorial adjustments to be made by the parties in their peace settlements could encompass less than a complete withdrawal of Israeli forces from occupied territories”<sup>6</sup> [italics by author].

Political figures and international jurists have discussed the existence of “permissible” or “legal occupations.” In a seminal article on this question, Schwebel, the former president of the International Court of Justice, wrote:

“... a state [E.H., Israel] acting in lawful exercise of its right of self-defense may seize and occupy foreign territory as long as such seizure and occupation are necessary to its self-defense; (c) where the prior holder of territory had seized that territory unlawfully, the state which subsequently takes that territory in the lawful exercise of self-defense has, against that prior holder, *better title*.  
“... as between Israel, acting defensively in 1948 and 1967, on the one hand, and her Arab neighbors, acting aggressively, in 1948 and 1967, on the other, Israel has the better title in the territory of what was Palestine, including the *whole of Jerusalem*, than do Jordan and Egypt”<sup>7</sup> [italics by author].

Professor Stone, a leading authority on the law of nations, has concurred, further clarifying:

“Territorial Rights Under International Law. ... By their [Arab countries] armed attacks against the State of Israel in 1948, 1967, and 1973, and by various acts of belligerency throughout this period, these Arab states flouted their basic obligations as United Nations members to refrain from threat or use of force against Israel’s territorial integrity and political independence. These acts were in flagrant violation *inter alia* of Article 2(4) and paragraphs (1), (2), and (3) of the same article.”<sup>8</sup>

<sup>6</sup> Goldberg, “U.N. Resolution 242: Origin, Meaning, and Significance.” National Committee on American Foreign Policy. See article at: <http://www.mefacts.com/cache/html/arab-countries/10159.htm>. (10159)

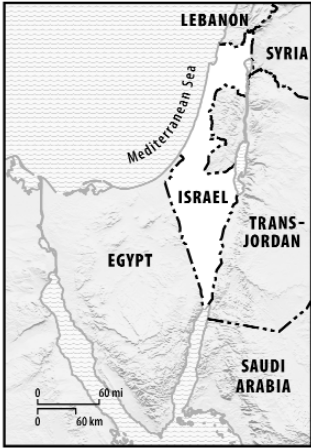
<sup>7</sup> Professor, Judge Stephen M. Schwebel, *What Weight to Conquest?* in *Justice in International Law*, Cambridge University Press, 1994. Opinions quoted in this critiques are not derived from his position as a judge of the ICJ.

<sup>8</sup> Professor Julius Stone, *Israel and Palestine, Assault on the Law of Nations*, The Johns Hopkins University Press, 1981.

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## Border Changes As Arabs Initiate Wars of Aggression

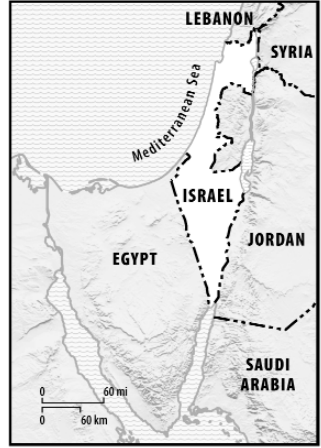
In 1947 Jews accepted the UN “Partition Plan” that recommended a sovereign independent Jewish State. All Arab countries rejected the “Partition Plan,” and tried to wipe Israel off the face of the earth. Time and again Israel has returned land it gained in these Arab wars of aggression, in the hope that this will deliver peace and stability. It did not.



1949  
Israel territory after Israel War of Independence.



1956  
Sinai Campaign: Israel gains control over the Sinai Peninsula territory.



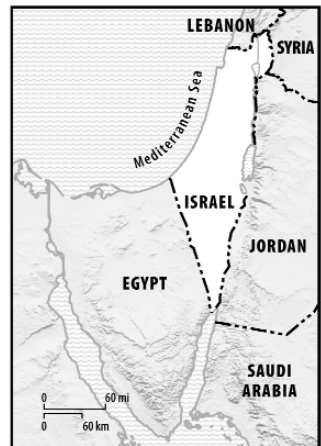
1957  
Israel agrees to withdraw its troops from the Sinai Peninsula and the Gaza Strip, handing over these territories back to Egypt.



1967  
Israel boundaries following the Six-Day War. Egypt, Jordan and Syria in a war of aggression, lost the territories of the Sinai Peninsula, the West Bank and the Golan Heights. For the first time Israel is in control of Jewish Mandated Palestine.



1973  
Israel boundaries following the Yom-Kippur War. In a clear act of aggression Egypt and Syria attacked the State of Israel, but were driven away.



1979-present  
On March 26, 1979, Israel and Egypt signed a peace treaty on the White House lawn. Israel returned the Sinai Peninsula territory to Egypt.

## 9 Territories – Legality of Jewish Settlements

In advising that Jewish settlements are illegal, the ICJ went beyond its own mandate from the General Assembly without being asked to do so.

In paragraph 120 of the Court’s opinion, the ICJ declares:

“The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.”

The ICJ based its conclusion on the inappropriate use of an article of the Fourth Geneva Convention which stipulates:

“The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”

This was coupled with a host of anti-Israeli UN General Assembly resolutions passed in the 1990s that describe the West Bank and Gaza as “Palestinian Occupied Territories” and declare Israeli settlements – including hundreds of thousands of Jewish Jerusalemites living in numerous new neighborhoods built since 1967 – to be illegal settlers.

For example, in paragraph 19 of the opinion, the ICJ notes that in 1997 the Security Council *rejected* two one-sided draft resolutions that sought to brand Israeli settlements as *illegal* (draft S/1997/199<sup>1</sup> and draft S/1997/241<sup>2</sup>). The ICJ then proceeds to solemnly describe how “the Arab Group” maneuvered to by-pass the Security Council and to subsequently pass General Assembly Resolution ES-10/2 that “expressed its [General Assembly] conviction” and:

“... condemned the ‘illegal Israeli actions’ in occupied East Jerusalem and the rest of the Occupied Palestinian Territory, in particular the construction of settlements in that territory.”

The ICJ leads the reader to believe that expressing “conviction” in regard to the so-called “illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory” is sufficient to make the document a source of law.

The General Assembly request of the ICJ’s advisory opinion reads:

*“Recalling in particular relevant United Nations resolutions affirming that Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, are illegal and an obstacle to peace and to economic and social development as well as those demanding the complete cessation of settlement activities.”*<sup>3</sup>

Again, the ICJ treats its reference to “United Nations Resolutions” as if it was a source of law, all without checking its accuracy or legal standing.

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<sup>1</sup> Rejected – UN Security Council draft resolution S/1997/199, March 7 1997. See: <http://domino.un.org/UNISPAL.NSF/0/f97c162f6a30647205256531005b4e15?OpenDocument>. (11379)

<sup>2</sup> Draft SC Resolution (res no. S/S/1997/241) Vetoed by the U.S. March 21 1997. See: <http://domino.un.org/UNISPAL.NSF/0/88f7fb474668764705256531005b7239?OpenDocument>. (11380)

<sup>3</sup> United Nations, General Assembly Resolution, A/RES/ES-10/14, “Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory” 12 December 2003. See: <http://middleeastfacts.org/content/UN-Documents/A-RES-ES-10-14.htm>. (10938)

**The UN Charter does not grant the General Assembly or the International Court of Justice the authority to assign or affect ‘ownership’ of the Territories.**

As incredulous as it may be, the ICJ chose to ignore the actual powers vested in the UN General Assembly. A host of anti-Israel resolutions passed annually by the Assembly are not legally binding documents by any measure. One need only to read Article 10 of the UN Charter:

“The General Assembly may *discuss* any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, *may make recommendations* to the Members of the United Nations or to the Security Council or to both on any such questions or matters” [italics by author].

Schwebel, the former president of the International Court of Justice, has written that:

“... the General Assembly of the United Nations can only, in principle, issue ‘recommendations’ which are not of a binding character, according to Article 10 of the Charter of the United Nations.”<sup>4</sup>

Schwebel also cites the (1950) opinion of Judge, Sir Hersch Lauterpacht, a former member judge of the International Court of Justice, who declared that:

“... the General Assembly has no legal power to legislate or bind its members by way of recommendation.”

Yet, another former ICJ judge, Sir Gerald Fitzmaurice, has been just as resolute in rejecting what he labeled the “illusion” that a General Assembly resolution can have “legislative effect.”<sup>5</sup>

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<sup>4</sup> Professor, Judge Stephen M. Schwebel, *The Legal Effect of Resolutions and Codes of Conduct of the United Nations in Justice in International Law*, Cambridge University Press, 1994. Opinions quoted in this critiques are not derived from his position as a judge of the ICJ.

<sup>5</sup> Cited in *Israel and Palestine, Assault on the law of nations*, Professor Julius Stone, The Johns Hopkins University Press, 1981. p. 29.

Academics and renowned international law experts also agree. Professor Stone illuminates this subject by pointing out:

“In his book *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, Professor Gaetano Arangio-Ruiz<sup>6</sup> is led to conclude that the General Assembly lacks legal authority either to enact or to ‘declare’ or ‘determine’ or ‘interpret’ international law so as legally to bind states by such acts, whether these states be members of the United Nations or not, and whether these states voted for or against or abstained from the relevant vote or did not take part in it.”<sup>7, 8</sup>

Certain General Assembly resolutions may be recognized as “declaratory,” but no more. Among Schwebel conclusions:

“... certain resolutions of the General Assembly – viewed as expressions of the assembled States of the world community ... which treat questions of international law which are not the subject of principles found in the United Nations Charter may be recognized to be declaratory, though not creative, of international law, provided that they are:

(i) adopted with the support of all assembled States, or, at any rate, of all the groups of States represented in the General Assembly, including major States that are not members of a group, such as the United States of America and China.”

## **The Territories and the war of words.**

One can easily trace the General Assembly’s attempts to *legislate* changes in the status of the Territories. How the definition of the status of the Territories was doctored is well documented on the website of the Palestinian delegation to the United Nations that posts landmark pro-Palestinian decisions. Examination reveals how over the years UN

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<sup>6</sup> Professor Gaetano Arangio-Ruiz “The United Nations declaration on friendly relations and the system of the sources of international law” Publisher: Alphen aan den Rijn, The Netherlands; Germantown, Md.: Sijthoff & Noordhoff, 1979. ISBN: 902860149X.

<sup>7</sup> Ibid, p. 40. Professor Julius Stone – another eminent scholar of international law – labeled Ruiz’s work “perhaps the most comprehensive and up-to-date treatise on this matter”.

<sup>8</sup> See the Hague Academy of International Law, at: <http://www.ppl.nl/bibliographies/all/showresults.php?bibliography=recueil&keyword1ppn=076252078&keyword=General%20Assembly>.



General Assembly resolutions and the wording of resolutions by sub-committees moves from “territories” to “occupied territories” to “Occupied Territories” and “Arab territories” to “occupied Palestinian territories” to “Occupied Palestinian Territory” and “occupied Palestinian territory, including Jerusalem”:

- Resolution 3236 (XXIX)<sup>9</sup> passed in November 1974 speaks of “the question of Palestine”;
- Resolution 38/58<sup>10</sup> in December 1983 speaks of “Arab territories” and “occupied territories”;
- Resolution 43/176<sup>11</sup> passed in December 1988 expresses sentiments suggesting Palestinian entitlement – speaking of “the Palestinian people[s] right to exercise their sovereignty over their territory occupied since 1967”;
- Resolution 51/133<sup>12</sup> passed in December 1996 adds Jerusalem in particular – speaking of “occupied Palestinian territory, including Jerusalem, and the occupied Syrian Golan”;
- Resolution 52/250<sup>13</sup> passed in July 1998 fully “assigns title” – speaking of “Occupied Palestinian Territory,” a designation that is frequently used in subsequent resolutions.

None of these terms have a legal foundation any more than declaring “the world is flat” makes it so. Yet, the International Court of Justice cites these terms as if they were *legal* documents, all in violation of the Court’s Statute.

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<sup>9</sup> See: <http://domino.un.org/UNISPAL.NSF/0/025974039acfb171852560de00548bbe?OpenDocument>. (11382)

<sup>10</sup> See: <http://domino.un.org/UNISPAL.NSF/0/2fdd47753d2ae353852560d8006ca36b?OpenDocument>. (11383)

<sup>11</sup> See: <http://domino.un.org/UNISPAL.NSF/0/8ff8af940beaf475852560d60046f73f?OpenDocument>. (11384)

<sup>12</sup> See: <http://domino.un.org/UNISPAL.NSF/0/4080cb55ac61c2658025646c002a89a3?OpenDocument>. (11385)

<sup>13</sup> See: <http://daccessdds.un.org/doc/UNDOC/GEN/N98/773/11/PDF/N9877311.pdf?OpenElement>. (11386)

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It should be noted that the coining of the term “Occupied Palestinian Territory” by the General Assembly, and all the more so its ‘adoption’ by the International Court of Justice, is contrary to, and *totally incompatible* with, Article 12 of the UN Charter which states:

“While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly *shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests*” [italics by author].

### **International law allows for “just wars” and “lawful occupation.”**

Resolutions 242 and 338 (discussed in Chapter 8) are the cornerstones for how a “just and lasting peace” should be achieved. The term ‘Occupied Palestinian Territory’ does not appear in either, not even the term ‘occupied territory.’ Resolution 242 affirms that:

“... fulfillment of the 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: Withdrawal of Israeli armed forces from territories occupied in the recent conflict; Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.”

The ICJ ignores that there is such a quality as a “lawful occupation.” In essence the ICJ seeks to *overturn* Security Council Resolutions 242 and 338, and to de-legitimize Israel’s right to claim any territory over the Green Line, even for self-defence.

In paragraph 74 of the opinion, the ICJ prefers a highly questionable, *abridged* rendition of these two core documents in a way that makes it appear as if Israel was an aggressor:

“On 22 November 1967, the Security Council unanimously adopted resolution 242 (1967), which emphasized [E.H., Principle I] the inadmissibility of acquisition of territory by war and [E.H., Principle II]

called for the ‘Withdrawal of Israel armed forces from territories occupied in the recent conflict,’ and [E.H., Principle III] ‘Termination of all claims or states of belligerency.’”

## **ICJ selective writing falsifies historical documents.**

The ICJ misleads the readers by simply *removing* from the second principle [Principle II above] the need, as stated in Resolution 242, for “secure and recognized boundaries” that will not invite aggression. In any case, the ICJ cannot override Security Council resolutions nor can it *edit* or *fix* them. Such doctored use of “the inadmissibility of the acquisition of territory by force” is disingenuous.

It is impossible to believe that the ICJ was unfamiliar with the basic rules governing the workings of the UN that are most relevant in understanding the meaning of the Security Council’s power and the two types of resolutions it may adopt:

Resolutions adopted under Chapter VI of the UN Charter – Recommending “Pacific Resolution of Dispute”:

Resolutions the Security Council adopts under Chapter VI are intended to be followed and implemented via negotiated settlements between concerned parties. One of the UN resolutions adopted under Chapter VI of the UN Charter is Resolution 242, adopted after the 1967 Six-Day War. It calls on Israel and its Arab neighbours to accept the resolution through negotiation, arbitration and conciliation. Under Chapter VI of the UN Charter, the recommendations of UN Resolution 242 cannot *be imposed* on the parties concerned, as Arab leaders often argue. In fact, the title of Chapter VI also offers a clue to its nature, for it deals with “Pacific Resolution of Disputes.”

Resolutions adopted under Chapter VII of the UN Charter – Dealing with the “Threats to Peace ...”:

In contrast, resolutions adopted by the Security Council under Chapter VII invest the Security Council with power to issue stringent resolutions that *require* nations to comply with the terms and directives set forth in the resolution. This leaves no room to negotiate a settlement with the affected parties. Thus, Chapter VII deals with “Threats to Peace, Breaches of the Peace and Acts of Aggression.”

When Iraq invaded Kuwait in 1990, the Security Council adopted resolutions under Chapter VII that only required the aggressor, Iraq, to comply.<sup>14</sup>

Had Israel been an aggressor – where the territories were “occupied territories” taken by force in an *unjust* war – Resolution 242 would have been adopted under Chapter VII of the UN Charter, *requiring Israel to comply* ... and not under Chapter VI.

In paragraph 26 of its opinion, the ICJ notes that Chapter VII empowers the Security Council to “require enforcement by coercive action,” thus *implying* that this Chapter is somehow relevant to these proceedings. Chapter VI isn’t even mentioned in the ICJ’s opinion – not in general and not with regard to Resolutions 242 or 338, although the Bench cites “242 (1967)” no less than seven times, providing ample opportunity to clarify that 242 adopted under Chapter VI of the UN Charter is intended to be followed and implemented via negotiated settlements between the concerned parties, and *not by this Court*.

### **Ignoring just wars and legal occupation.**

It is important to note here that the ICJ refuses to even acknowledge the existence of scholarly literature that addresses the issue of seizure of territory in *just wars* written by internationally respected, former members of the ICJ. The ICJ simply turns a blind eye to the fact that some wars are *just wars* and *not all* occupations are *illegal* – as in the Israeli case, so clearly reflected by the unanimous adoption of UN Security Council Resolution 242 under Chapter VI.

As noted earlier, Lauterpacht pointed out in his writing that:

“... territorial change cannot properly take place as a result of the ‘unlawful’ use of force. But to omit the word ‘unlawful’ is to change the substantive

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<sup>14</sup> UN Security Council Resolution 678, S/RES/0678 (1990), November 29 1990. See: <http://www.mefacts.com/cache/html/icj/11446.htm>. (11446)

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content of the rule and to turn an important safeguard of legal principle into an aggressor's charter. For if force can never be used to effect lawful territory change, then, if territory has once changed hands as a result of the unlawful use of force, the illegitimacy of the position thus established is sterilized by the prohibition upon the use of force to restore the lawful sovereign. This cannot be regarded as reasonable or correct."<sup>15</sup>

This argument, which is widely recognised, goes unnoticed or is consciously and purposely ignored by the Court.

The ICJ's sweeping 'adoption' of the General Assembly's resolutions – as if they were legally binding or a source of international law – and the ICJ's unauthorized 'illegal transfer' of unallocated disputed territories to one of the sides in the conflict, is all the more ironic in light of the ICJ's main contention: that Israel's actions are primarily political and not security motivated, and that these actions constitute a *fait accompli*, declaring in paragraph 121 of the opinion:

"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."

This begs the question: Are the ICJ's own actions in arbitrarily handing over ownership and *title* to all territories beyond the Green Line to the Palestinians – including East Jerusalem – not tantamount to unlawful *de facto* annexation?

Professor Stone cites in his writings that in 1975 the ICJ has been:

"insistent, not least as regards [to] questions of *territorial title*, that the rules and concepts of international law have to be interpreted 'by reference to the law in force' and 'the State practice' at the relevant period [italics by author].

"Judge de Castro in his Separate Opinion (*ibid.*, 127, at 168 ff.) declared the principle *tempus regit factum* as a recognized principle of international law.

<sup>15</sup> Professor, Judge Sir Elihu Lauterpacht, *Jerusalem and the Holy Places*, Pamphlet No. 19 (London, Anglo-Israel Association, 1968).

He continued (p. 169): ‘Consequently, the creation of ties with or titles to a territory must be determined according to the law in force at the time. ... The rule *tempus regit factum* must also be applied to ascertain the legal force of new facts and their impact on the existing situation.’ He went on to illustrate this influence of ‘new facts and new law’ by reference to the impact on the suppression of the colonial status of Western Sahara by the principles concerning non-self-governing territories emanating from the United-Nations Charter and the later application to them of the principle of Self-determination (pp. 169-71). This limiting rider has reference to the appearance of new principles of international law, overriding the different principles on which earlier titles are based. But, of course, it can have no application to vested titles based, as was the very territorial allocation between the Jewish and Arab peoples, on the principle of self-determination itself.”<sup>16</sup>

If the so-called West Bank and Gaza were indeed occupied territory – belonging to someone else and unjustly seized by force – there could be no grounds for negotiating new borders, as UN Security Council Resolution 242 implies.

## **The ICJ charges that Jewish settlements in the West Bank are populated by settlers ‘deported by force.’**

Once the ICJ has ‘established evidence’ that the West Bank and Gaza are unlawfully occupied territories, it then applies this *status* to the Fourth Geneva Conference<sup>17</sup> *de jure*, stating in paragraph 120 of the opinion that:

“As regards these settlements, the Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: ‘The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.’

“In this respect, the information *provided to the Court* shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited” [italics by author].

<sup>16</sup> Majority Opinion in the Western Sahara case, I.C.J. Reports, 1975, p. 12, esp. at 38-39) as cited by Professor Julius Stone, *Israel and Palestine, Assault on the Law of Nations*. The Johns Hopkins University Press, 1981, p. 127.

<sup>17</sup> Geneva Convention relative to the Protection of Civilian Persons in Time of War. See: <http://www.unhchr.ch/html/menu3/b/92.htm>. (10356)

One can hardly believe this baseless ICJ assertion that Israel used “deportation” and “forced transfer” of its own population into “occupied territories.”

The Court attempts to broaden the definition of Article 49 to possibly ‘fit’ some wrong doing on the part of the State of Israel, all with no reference to law, adding:

“That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.”

In the above conclusion, the ICJ fails to disclose the content of the “information provided” (information the Court based its decision on), and the *anonymous* ‘authorities’ that provided such. Anyone interested in the subject at hand is aware of the difficulties the Israeli Government faces in its decision to relocate some Israeli settlements *out* of the “Territories,” a *fact* that seems to be contrary to the “information provided” to the ICJ.

Professor Stone touches on the applicability of Article 49 of the Geneva Convention. Writing on the subject in 1980:

“... that because of the *ex iniuria* principle, Jordan never had nor now has any legal title in the West Bank, nor does any other state even claim such title. Article 49 seems thus simply not applicable. (Even if it were, it may be added that the facts of recent voluntary settlements seem not to be caught by the intent of Article 49 which is rather directed at the forced transfer of the belligerent’s inhabitants to the occupied territory, or the displacement of the local inhabitants, for other than security reasons.) The Fourth Geneva Convention applies only, according to Article 2, to occupation of territory belonging to ‘another High Contracting Party’; and Jordan cannot show any such title to the West Bank, nor Egypt to Gaza.”

Support to Stone’s assertion can be found in Lauterpacht’s writing in 1968:

“Thus Jordan’s occupation of the Old City—and indeed of the whole of the area west of the Jordan river—entirely lacked legal justification; and being defective

in this way could not form any basis for Jordan validly to fill the sovereignty vacuum in the Old City [and whole of the area west of the Jordan river].”<sup>18</sup>

Rostow concludes that the Convention is not applicable to Israel’s legal position and notes:

“The opposition to Jewish settlements in the West Bank also relied on a legal argument – that such settlements violated the Fourth Geneva Convention forbidding the occupying power from transferring its own citizens into the occupied territories. How that Convention could apply to Jews who already had a legal right, protected by Article 80 of the United Nations Charter, to live in the West Bank, East Jerusalem, and the Gaza Strip, was never explained.”<sup>19</sup>

It seems that the International Court of Justice “never explained” it either.

**By default, ICJ support of the “Mandate for Palestine” suggests it is actually supporting Jewish settlement in Palestine. Is the ICJ confused?**

The ICJ concluded that under the Fourth Geneva Conference, Jewish settlements in the “Territories” are illegal, which brings up the need to reconcile two of the ICJ’s conflicting positions:

The first, as noted above, is the ICJ opinion regarding the *illegal Jewish settlements* in the “Territories.”

The second, refers to the ICJ ‘adoption’ of the “Mandate for Palestine” – a document which under Article 6 testifies to the legality of Jewish settlements in Palestine that:

“*encourage*, in co-operation with the Jewish agency referred to in Article 4, [building] *close settlement by Jews* on the land, including State lands and waste lands not required for public purposes”<sup>20</sup> [italics by author].

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<sup>18</sup> Professor, Judge Sir Elihu Lauterpacht, *Jerusalem and the Holy Places*, Pamphlet No. 19 (London, Anglo-Israel Association, 1968).

<sup>19</sup> Professor Eugene V. Rostow, see: [http://www.law.yale.edu/outside/pdf/Public\\_Affairs/ylr50-2/Rostow.pdf](http://www.law.yale.edu/outside/pdf/Public_Affairs/ylr50-2/Rostow.pdf).

<sup>20</sup> See Appendix A. “Mandate for Palestine.”



The ICJ ignores that under both international convention<sup>21</sup> and Article 80 of the UN Charter, all of western Palestine is legally open to settlement by Jews, and at best, the West Bank and Gaza are unallocated territory left over from the British Mandate to which there are two claimants.

Paragraph 88 of the Court's opinion stated that:

“... the ultimate objective of the sacred trust” referred to in Article 22, paragraph 1, of the Covenant of the League of Nations “was the self-determination ... of the peoples concerned.”

The ICJ seems confused. It attempts to links the “sacred trust” to the wrong “people concerned”!

## **UN Charter and Article 80.**

International law, the UN Charter, and specifically Article 80 of the UN Charter implicitly recognize the “Mandate for Palestine” of the League of Nations. This Mandate granted Jews the *irrevocable* right to settle in the area of Palestine, anywhere between the Jordan River and the Mediterranean Sea. Rostow explains:

“This right is protected by Article 80 of the United Nations Charter. The Mandates of the League of Nations have a special status in international law, considered to be trusts, indeed ‘sacred trusts.’

“Under international law, neither Jordan nor the Palestinian Arab ‘people’ of the West Bank and the Gaza Strip have a substantial claim to the sovereign possession of the occupied territories.”<sup>22</sup>

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<sup>21</sup> Ibid.

<sup>22</sup> Eugene V. Rostow, *The Future of Palestine* from the paper delivered at the American Leadership Conference on Israel and the Middle East in Arlington, Virginia. October 10 1993. See: <http://middleeastfacts.org/content/book/The%20Future%20of%20Palestine.htm>. (10509)

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It is interesting to learn how Article 80 made its way into the UN Charter. Professor Rostow recalls:

“I am indebted to my learned friend Dr. Paul Riebenfeld, who has for many years been my mentor on the history of Zionism, for reminding me of some of the circumstances which led to the adoption of Article 80 of the Charter. Strong Jewish delegations representing differing political tendencies within Jewry attended the San Francisco Conference in 1945. Rabbi Stephen S. Wise, Peter Bergson, Eliahu Elath, Professors Ben-Zion Netanayu and A. S. Yehuda, and Harry Selden were among the Jewish representatives. Their mission was to protect the Jewish right of settlement in Palestine under the mandate against erosion in a world of ambitious states. Article 80 was the result of their efforts.”

### **The ICJ ignores the history of Jewish life in the area called Palestine.**

The ICJ also ignores that Jews who had settled in these areas during almost 30 years of “Mandate” government and, in fact, for thousands of years in areas such as Hebron and the Old City of Jerusalem (in so-called “East Jerusalem”), in Kfar Darom in Gaza or the Etzion Bloc near Hebron, were either killed or driven out by the Arabs during the 1948 War. All areas of western Palestine that remained under Arab control were rendered racially cleansed of Jews – by Jordanian and Egyptian invaders, an act that in today’s parlance would be labeled “ethnic cleansing.” Even the 2,000 Jewish inhabitants of the Jewish Quarter of the Old City [of Jerusalem], who lived adjacent to the holiest site to Judaism, the Western Wall in the shadow of the Temple Mount, were an intolerable presence to Arabs.

While the ICJ opinion mentions Jerusalem 54 times, all references are in relation to Palestinian rights of free access to holy sites. The ICJ ignores the fact that not one Jew was allowed to reside or even visit the West Bank and the Old City of Jerusalem for 19 years of illegal Jordanian rule. Between 1949 and 1967, Jordanian military personnel

overran and razed Jewish settlements to the ground, trashed some 58 synagogues, and used headstones from the Mount of Olives cemetery to build roads.<sup>23</sup> After the 1967 Six-Day War, Jews *reestablished* their legal right to settle anywhere in western Palestine – an entitlement unaltered in international law since 1920 and valid to this day.

Invoking the Fourth Geneva Convention to make any Jewish presence in the West Bank, including the Old City of Jerusalem, ‘illegal’ is hardly applicable – neither from an historical, nor from a legal standpoint.

### **Where Jews are and are not permitted to settle.**

The ICJ chooses to ignore the content of the “Mandate for Palestine” and accompanying legally binding international accords that set the boundaries of the Jewish mandate and delineate where Jews are and are not permitted to settle.

The Court opinion cites in paragraph 70 – almost parenthetically – that:

“The territorial boundaries of the Mandate for Palestine were laid down by various instruments, in particular on the eastern border by a British memorandum of 16 September 1922 and an Anglo-Transjordanian Treaty of 20 February 1928.”

The reader is left in the dark as to what these “instruments” say or to what the text refers. No wonder. The ICJ does not quote the content of these two key international treaties and ignores the relevant clauses of the Mandate itself vis-à-vis the status of western Palestine, because citing these treaties and clauses would collapse the foundations of the commonly-held assumption that Israeli settlements are ‘illegal’. It is important to set the record straight. The “eastern border” the ICJ chose not to discuss was the Jordan River.

At first, the six page “Mandate” document did not set the borders –

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<sup>23</sup> Jeff Jacoby, “When Jerusalem was divided,” see: <http://www.mefacts.com/cache/html/territories/11304.htm>. (11304)

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leaving this for the Mandator to stipulate in a binding appendix to the document in the form of a memorandum, but Article 6 of the Mandate says clearly:

“The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, *close settlement by Jews on the land, including State lands and waste lands not required for public purposes*” [italics by author].

Article 25 of the “Mandate for Palestine” entitled the Mandatory to change the terms of the Mandate in the part of the Mandate *east* of the Jordan River. That is, it gave the Mandatory an ‘escape clause’ that was not applicable to western Palestine:

“In the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined, the Mandatory shall be entitled, with the consent of the Council of the League of Nations, to postpone or withhold application of such provision of this Mandate as he may consider inapplicable to the existing local conditions, ...”<sup>24</sup>

Great Britain activated this option in the above-mentioned memorandum of September 16 1922, which the Mandatory sent to the League of Nations and which the League subsequently approved – making it a legally binding integral part of the Mandate.

Thus the “Mandate for Palestine” brought to fruition a fourth Arab state *east* of the Jordan River, realized in 1946 when the Hashemite Kingdom of Trans-Jordan was granted independence from Great Britain. All the clauses concerning a Jewish homeland would not apply to this part (Trans-Jordan) of the original Mandate, stating clearly:

“The following provisions of the Mandate for Palestine are not applicable to the territory known as Trans-Jordan, which comprises all territory lying to the east of a line drawn from ... up the centre of the Wady Araba, Dead Sea and River Jordan. ... His Majesty’s Government accept[s] full responsibility as Mandatory for Trans-Jordan.”

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<sup>24</sup> See: Appendix A. “Mandate for Palestine.”

The creation of an Arab state in eastern Palestine (today Jordan) on 77 percent of the land mass of the original Mandate for Jews, in no way changed the status of Jews west of the Jordan River and their right to settle anywhere in western Palestine, between the Jordan River and the Mediterranean Sea.

These documents are the last legally binding documents regarding the status of what is commonly called “the West Bank and Gaza.”

The memorandum (regarding Article 25) is also the last modification of the Mandate on record<sup>25</sup> by the League of Nations or by its legal successor – the United Nations – in accordance with Article 27 of the Mandate that states unequivocally:

“The consent of the Council of the League of Nations is required for any modification of the terms of this mandate.”

But to note or to quote these documents would ‘spoil’ the ICJ’s charge that Israeli settlements are “illegal” and that Israel is an unlawful “occupying power” of land that ‘belongs’ to Palestinian Arabs.

The ICJ even uses its own opinions in a selective manner. Under the mistaken assumption that Palestinian self-determination was set in stone by the international community in 1922 by the Mandate for Palestine, the Bench quotes a previous opinion on Namibia that addresses the fate of League of Nations’ mandates, stating in paragraph 70 of the opinion:

“...two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of ... peoples [not yet able to govern themselves] form[ed] ‘a sacred trust of civilization.’”<sup>26</sup>

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<sup>25</sup> Ibid.

<sup>26</sup> The latter – a quote from Article 73 of the UN Charter.

The term “sacred trust” quoted by the ICJ is borrowed from the United Nations Charter Article 73<sup>27</sup> which recognizes the UN’s commitments of its predecessor – the League of Nations – and promises to carry through to fruition the mandate system the League of Nations created, enshrined in Article 22 of the League of Nations Charter. Thus, the Bench quotes from its own 1950 opinion when it believes it supports the Palestinian cause, but the Bench also fails to mention that in the same case under the ICJ Advisory Opinion of 21 June 1971, the ICJ says:

“...The International Court of Justice has consistently recognized that *the Mandate survived the demise of the League [of Nations]*” [italics by author].

In other words, neither the ICJ nor the General Assembly can arbitrarily change the status of *Jewish settlement* as set forth in the “Mandate for Palestine,” an international accord that was never amended.

All of western Palestine, from the Jordan River to the Mediterranean Sea, including the West Bank and Gaza, remains open to Jewish settlement under international law until a legally binding document – in Israel’s case, a peace treaty between Arabs and Jews that was called for in Security Resolution 242 and 338 – changes this.

Rostow’s position concurred with the ICJ’s opinion as to the “sacredness” of such trusts:

“A trust” – as in Article 80 of the UN Charter (which the Court avoids to mention) – “does not end because the trustee dies ... the Jewish right of settlement in the whole of western Palestine – the area West of the Jordan – survived the British withdrawal in 1948. ... They are parts of the mandate territory, now legally occupied by Israel with the consent of the Security Council.”<sup>28</sup>

<sup>27</sup> Charter of the United Nations at: [http://middleeastfacts.org/content/UN-Documents/UN\\_Charter\\_One\\_Document.htm](http://middleeastfacts.org/content/UN-Documents/UN_Charter_One_Document.htm). (11032)

<sup>28</sup> Professor Eugene V. Rostow was Sterling Professor of Law and Public Affairs Emeritus at Yale University and served as the Dean of Yale Law School (1955-66); In 1967 as U.S. Under-Secretary of State for Political Affairs he become a key drafter of UN Resolution 242. <http://www.mefacts.com/cache/html/bio/10956.htm>. (10956)

## **The Oslo Accords and the Gaza-Jericho agreements recognize Israel legal presence in the “Territories.”**

Even the Oslo Accords do not forbid either Israeli (i.e., Jewish) or Arab settlement activity. Likewise, the ICJ does not consider it relevant that the propriety of a *security fence around Gaza* was written into the Gaza-Jericho agreement, between Israel and the PLO, signed in Cairo, May 4 1994, and that Israel retained the right to provide for security, including the security of Israeli settlers.

“The Parties agree that, as long as this Agreement is in force, the *security fence erected by Israel around the Gaza Strip* shall remain in place and that the line demarcated by the fence, as shown on attached map No. 1, shall be authoritative only for the purpose of this Agreement”<sup>29</sup> [italics by author].

## **The ICJ’s narrative of how the Territories came into the possession of Israel is void of any context and sanitized of any trace of past and present Arab aggression.**

The backdrop to the 1967 Six-Day War – the expulsion by Egypt of UN peace-keepers from the Sinai Peninsula, Egypt’s illegal blockade of an international waterway, the massing of Egyptian troops on Israel’s borders, and Jordan attacking the Israeli-held part of Jerusalem – mysteriously disappears from the ICJ’s narrative. The ICJ jumps from the signing of the 1948 armistice agreements that established the Green Line as a temporary border, to the aftermath of the 1967 Six-Day War in *one* step. Paragraph 72 of the opinion recounts how:

“By resolution 62 (1948) of 16 November 1948, the Security Council decided that ‘an armistice shall be established in all sectors of Palestine’ and called upon the parties directly involved in the conflict to seek agreement to this end. ... The Demarcation Line was subject to such rectification as might be agreed upon by the parties.”<sup>30</sup>

<sup>29</sup> Gaza-Jericho agreement. See: <http://www.mefacts.com/cache/html/arab-peace-agreements/11371.htm> (11371)

<sup>30</sup> UN Security Council Resolution of November 16 1948. See: <http://domino.un.org/UNISPAL.NSF/0/1a2b613a2fc85a9d852560c2005d4223?OpenDocument>. (11381)

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Paragraph 73 of the Court’s opinion immediately follows, saying:

“In the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under British Mandate (including those known as the West Bank, lying to the east of the Green Line).”

Readers might think that Israel just woke up one morning and out of the blue attacked its neighbors and occupied part of their territory without provocation. In fact, both the events and UN resolutions of the period substantiate and recognize that Israel’s presence in the West Bank and Gaza is a legal occupation, and a result of Arab aggression.

### **The Principal Allied Powers and the League of Nations recognized Jewish historical rights to the land of Palestine.**

Mandate for Palestine document, 1920:

“Whereas recognition *has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country ...*”

Report on the economic and commercial situation of Palestine, 1921:

“... Jews throughout the world would be able to see one country in which their race had a political and a spiritual home, in which, perhaps, the Jewish genius might repeat the services it had rendered to mankind from the *same soil long ago*” [italics by author].

Report of The High Commissioner of Palestine, 1920-1925:

“Jewish National Home in Palestine ... should be formally recognised to rest upon [Jewish] *ancient historic connection* ... fervid imaginations saw a rapid occupation of the country by great numbers of Jews, hurrying from the lands in which they were oppressed, the consequent creation, within a few years, of a Jewish State, the sudden *fulfillment* in almost apocalyptic fashion of the most far reaching of the *ancient prophecies*. ... Among the eight millions of Jews in Eastern Europe ... Palestine makes to them a most powerful appeal; they wish particularly to contribute to the productiveness of Palestine and above all to help to *recreate* in Palestine a people of Jewish agriculturists” [italics by author].

Palestine Royal Commission report, July 1937:

“... [The Jewish people] should know that *it is in Palestine as of right and not on sufferance* ... and that it should be formally recognized to *rest upon ancient historic connection*” [italics by author].



# 10 **The Supreme Court of the State of Israel**

The ICJ does not follow the directive in its mandate that requires it to use the most qualified and valued writing of law of other nations – in this case Israel. The Bench ignores the rulings of the Supreme Court of the State of Israel [acting in the cases cited, as the High Court of Justice – HCJ] that could directly contribute to its own investigation of legality *and* proportionality.

The ICJ's Statute<sup>1</sup> requires it "to decide in accordance with international law" and to apply "... the most highly qualified publicists of the various nations." In this case, the relevant writings of the Supreme Court of the State of Israel should have been applied "as subsidiary means for the determination of the rules of law."

The ICJ's evaluation of the validity of supporting evidence appears to be carefully tailored to support forgone conclusions, including the ICJ's own rules that the Bench seems to ignore. Article 38, rule 1(d) of the Court Statute requires that the Court:

"Shall apply: ... Judicial decisions and the teachings of the most highly qualified publicists of the various nations [to] determine rules of law."

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<sup>1</sup> Statute of The International Court of Justice at: <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>. (10485)

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The Bench even ignores the writings of former members of its own Bench, including a past president of the Court, as well as a host of other eminent jurists and academic scholars of international law.

In his writing on *Government Legal Advising in the Field of Foreign Affairs* about what influences and makes international laws, the former president of the International Court of Justice, Judge Schwebel, writes:

“International law is largely the creation of Governments. In that creative process, those who render legal advice to Governments play a critical part (in present case the Supreme Court of the State of Israel). The forces which shape international law, like the forces which shape international affairs, are many and complex. But what is singular and clear is that those who advise Governments on what international law is and should be exert a particular, perhaps at times a paramount, influence on the formation of international law.”<sup>2</sup>

United States Supreme Court Justice Stephen G. Breyer has said that:

“the United States could learn from compromises Israeli courts have struck to *balance* terrorism and human rights concerns”<sup>3</sup> [italics by author].

At first glance, it would seem that the ICJ recognizes this fact. Closer examination reveals that when convenient, this same Court relies on the Israel Supreme Court to reach a conclusion that *fits* its thinking, but it sees nothing improper in ignoring the decisions most relevant to this case by the Israeli Supreme Court when its findings differ from the ICJ’s. Thus, the ICJ supports the applicability of the Hague and Geneva Conventions by citing in paragraph 100 of the ICJ opinion, a May 30 2004 ruling by the Supreme Court of the State of Israel sitting as a High

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<sup>2</sup> Professor, Judge Stephen M. Schwebel, *Government Legal Advising in the Field of Foreign Affairs in Justice in International Law*, Cambridge University Press, 1994. Opinions quoted in this critiques are not derived from his position as a judge of the ICJ.

<sup>3</sup> “Justice: Israeli courts could teach U.S. something about compromise,” Associated Press, September 13 2003. See: <http://www.mefacts.com/cache/html/human-rights/10308.htm>. (10308)

Court of Justice.<sup>4</sup> The ICJ noted that Israel's highest court of justice ruled that:

“... the military operations of the [Israeli Defense Forces] in Rafah, to the extent they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907 ... and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949.”<sup>5</sup>

Yet, when it comes to a far more fundamental question – the purpose of the security fence and whether it is justified in light of the injury it causes Palestinians<sup>6</sup> – the expertise and experience of the Supreme Court of the State of Israel are no longer deemed valid. In paragraph 140 of the ICJ opinion, the Bench declares:

“... In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.”

What is the highly qualified material before the ICJ? Or, to be more precise, is there highly relevant material that the ICJ arbitrarily judged to be immaterial?

If the Israeli Supreme Court can contribute to the case, why is there no mention whatsoever of a ruling handed down by the Supreme Court of the State of Israel, sitting as the High Court of Justice, in the case of *Beit Sourik Village Council v. 1. The Government of Israel*, (HCJ 2056/04) dated June 30 2004<sup>7</sup> that also recognizes the applicability of the Hague and Geneva Conventions, and is also *directly* connected to the security barrier issue?

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<sup>4</sup> In Hebrew “Bagatz.”

<sup>5</sup> HCJ 4764/04, May 30 2004, “Physicians for Human Rights v. Commander of the IDF Forces in the Gaza Strip,” at: <http://www.mefacts.com/cache/pdf/icj/11387.pdf>. (11387)

<sup>6</sup> The wording of the Advisory Opinion does not ask what its ramifications for Israelis are...

<sup>7</sup> HCJ 2056/04, June 30 2004, “Beit Sourik Village Council v. 1. The Government of Israel,” at: <http://www.mefacts.com/cache/html/israel/10926.htm>. (10926)

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The case is not hard to find in the online archive of the Israeli Court. In addition, the decision received worldwide exposure, reported internationally in most major media outlets.<sup>8</sup> Moreover, the Israeli Court's Judge Aaron Barak notes in the *opening* paragraph of the second case, the June 30 2004 ruling: "The question before us is whether the orders and the Fence are legal."

Examination of the Israeli Court's ruling reveals why the ICJ *preferred* to quote a ruling that deals with alleged lack of access to medical treatment for civilians in Rafiah (Rafah) in the Gaza Strip in the midst of Israel Defense Forces (IDF) military operations, rather than a ruling that addresses the legality of the *security barrier*, which is on the West Bank, directly relevant to the case.

The Israeli Supreme Court devoted *seven* court sessions to hearing the appeal of *one* Palestinian village that felt it had been wronged by seizure of some of its land to construct the security barrier. The June 30 2004 judgment is 22,000 words long. The Israeli Court describes at length both the all-pervasive and insidious character of Palestinian terrorism and the injury to Palestinian civilians caused by the security barrier. It concludes in paragraph 28:

"We examined petitioners' arguments and have come to the conclusion, based upon the facts before us, that the *Fence is motivated by security concerns*. As we have seen in the government decisions concerning the construction of the Fence, the government has emphasized, numerous times, that '*the Fence, like the additional obstacles, is a security measure*'. Its construction does not express a political border, or any other border.' (Decision of June 23 2002).

"The obstacle that will be erected pursuant to this decision, like other segments of the obstacle in the Seam Area, is a security measure for the prevention of terror attacks and does not mark a national border or any other border" (Government of Israel, decision of October 1 2003) [italics by author].

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<sup>8</sup> See for example *The New York Times*, "Israeli Court Orders Changes to Barrier in West Bank," June 30 2004, at: <http://www.mefacts.com/cache/html/icj/11388.htm>. (11388)

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The Israeli Supreme Court's ruling doesn't even rate a rebuttal in the ICJ's opinion. It simply does not exist, or it is judged to be immaterial to the case.

It is clear there is *another* reason why the ICJ chose not to highlight this case. On the surface, from the ICJ's point of view, the judgment by the Israeli Court is just as good. The Israeli judgment says clearly in paragraph 23:

"The authority of the military commander flows from the provisions of public international law regarding belligerent occupation. These rules are established principally in the Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 [hereinafter – the Hague Regulations]. These regulations reflect customary international law. The military commander's authority is also anchored in IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 [hereinafter – the Fourth Geneva Convention]."<sup>9</sup>

But the judgment goes beyond this. The Israeli ruling also *explains* how the Israeli Court views adjudication of appeals for protection under the Hague and Geneva Conventions. In a very lengthy and thoughtful discussion of the challenges facing *any* court, the president of the Israeli Supreme Court says in paragraph 36:

"The problem of balancing security and liberty is not specific to the discretion of a military commander of an area under belligerent occupation. It is a general problem in the law, both domestic and international. Its solution is universal. It is found deep in the general principles of law, which include reasonableness and good faith. ... One of these foundational principles, which balance the legitimate objective with the means for achieving it, is the principle of proportionality. According to this principle, the liberty of the individual can be limited (in this case, the liberty of the local inhabitants under belligerent occupation), on the condition that the restriction is proportionate. This approach applies to all types of law."

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<sup>9</sup> Israel Supreme Court, ruling HCJ 2056/04, June 30 2004, *Beit Sourik Village Council v. 1.The Government of Israel*, at: <http://www.mefacts.com/cache/html/israel/10926.htm>. (10926)

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In paragraph 44, the Israeli Supreme Court adds:

“The key question regarding the route of the Fence is: Is the route of the Separation Fence proportionate? The proportionality of the Separation Fence must be decided by the three following questions ... First, does the route pass the ‘appropriate means’ test? ... The question is whether there is a rational connection between the route of the Fence and the goal of the construction of the Separation Fence. Second, does it pass the test of the ‘least injurious’ means? The question is whether, among the various routes which would achieve the objective of the Separation Fence, is the chosen one the least injurious. Third, does it pass the test of proportionality in the narrow sense? The question is whether the Separation Fence route, as set out by the military commander, injures the local inhabitants to the extent that there is no proper proportion between this injury and the security benefit of the Fence.”

In a subsequent case, known as *Alfei Menashe*, HCJ 7957/04, September 15 2005, the Supreme Court of Israel held that according to international law regarding belligerent occupation, erecting a separation fence that minimizes the impediment of the local population in order to protect the lives and safety of Israeli settlers in Judea and Samaria (West Bank) is legal.<sup>10</sup>

### **The International Court of Justice distorts the Israeli court’s intention.**

For the ICJ to simply quote the Israeli court as ‘accepting the applicability of the Hague and Geneva Conventions dealing with behavior towards civilians in wartime’ while failing to explain what the Israeli court actually means by this, hardly does justice to the Israeli Supreme Court. In fact, such conduct by the ICJ warps the true position of the Israeli court, which demonstrates just how *difficult* it really is to weigh the merits of such a case where the ‘right to life’ of potential victims of Palestinian terrorism must be balanced against non-lethal injury to Palestinian non-combatants. Such input would be welcome in

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<sup>10</sup> For a summary of the Judgment in English, see: [http://elyon1.court.gov.il/heb/dover/html/hodaot\\_hanhalat.htm#msg4863](http://elyon1.court.gov.il/heb/dover/html/hodaot_hanhalat.htm#msg4863). (11547) For complete text in Hebrew, see 11542.

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any fair and judicious Court, but not to the ICJ, which lacks any military and security experience and never experienced life under constant terrorism, and was not interested in struggling with this issue.

In paragraph 100 of the ICJ opinion, the Bench mischaracterized the Supreme Court of Israel's limited acceptance of the applicability of Geneva Convention, warping the Israel court's intention and misleading the reader with selective use. The Supreme Court of the State of Israel did not rule that the West Bank and Gaza are Occupied Palestinian Territories and never suggested that the Geneva Convention applies to the legal status of Israeli settlers. Israel signed the Fourth Geneva Convention on August 12 1949, and ratified it on July 6 1951. Since then, including after the 1967 war, Israel has not denounced the Convention, as permitted by the convention's Article 158.

As articulated in 1971 by then Attorney General of Israel, Meir Shamgar (who in 1983 became President of the Supreme Court), Israel *voluntarily* abides by the humanitarian provisions of the Geneva Convention in the West Bank and Gaza Strip, despite pointing out that Israel and other world renowned experts of international law believe that the Convention does not apply to these territories *de jure*.





# 11

## **Arab Consistent Behavior and Precedent for Fencing**

The ICJ ignores the remarkably consistent Arab behavior in mandated Palestine that is documented in the Mandator's reports to the League of Nations – a role that parallels a UN Special Rapporteur today. Such primary documents contain precedents for security fences and testify to their non-political nature.

The International Court of Justice shows an avid interest in the “Mandate for Palestine” and uses the Mandate document to openly champion a Palestinian state, but the ICJ also chooses to ignore evidence of the ‘un-readiness’ of Palestinian Arabs for independence – a political maturity that it quotes in the opinion is a prerequisite for political independence under Article 22 of the League of Nations. Far more crucial to the case, such documents note the necessity of security barriers in the past and demonstrate that in the context of the Arab-Israeli conflict, indeed, security barriers are temporary in nature. This statement undermines the Bench's opinion that Israel's security fence is political and illegal.

The Bench finds it convenient to ignore that the mandate system speaks of readiness for independence in terms of signs of local responsible

governance. Article 22 of the League of Nation's Charter speaks of reaching "a stage of development" that is provisional "until such time as they are able to stand alone." This yardstick was applied to Lebanon, Iraq, and Syria. By contrast, this ICJ considers Palestinian statehood to be a 'given' – irrespective of Palestinian political behavior.

Ironically, the same political behavior (the use of terrorism as a political instrument) that the ICJ chooses to ignore as irrelevant, is chronicled in official reports to the Council of the League of Nations filed by the British Government during its nearly three-decade rule over Palestine's Arab and Jewish inhabitants.<sup>1</sup> Such reports from the British Government to the Council of the League of Nations were *required* of the Mandator in the terms of the "Mandate for Palestine" in Article 24 it requires that:

"The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council as to the measures taken during the year to carry out the provisions of the mandate. Copies of all laws and regulations promulgated or issued during the year shall be communicated with the report."<sup>2</sup>

Logically, such documents and other special reports to the League by the Mandator should be of equal weight, in terms of standing and credibility, with the reports by the UN Special Rapporteur today, such as the one upon which the ICJ opinion says it relies. These reports, as well as the findings of international commissions such as the Anglo-American Committee of Enquiry,<sup>3</sup> could have provided a valuable perspective for the ICJ and placed the current terrorism dilemma in its appropriate historical context.

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<sup>1</sup> Report by His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland to the Council of the League of Nations on the Administration of Palestine, and by the "Palestine Royal Commission" 1936-1937.

<sup>2</sup> See: Appendix A. "Mandate for Palestine."

<sup>3</sup> Report of the Anglo-American Committee of Enquiry Regarding the Problem of European Jewry and Palestine. Lausanne, April 20 1946.

## Is the fence a security measure?

Most importantly, the reports are highly relevant in determining whether the fence is a security measure or a political ploy. The ICJ could have learned something about the need for a *security fence* from the Mandate Report of 1930 (p. 169) which noted, after Arabs razed the Jewish farming village of Beer-Tuvia to the ground and attacked ancient Jewish communities in Hebron, Safed and elsewhere in 1929:

“For the greater security of exposed Jewish *settlements*, the [Jewish] Agency, in co-operation with the [British] Administration, has allotted £P.36,500 to roads, telephones, central buildings and *fencing*” [italics by author].

Seventeen years later, in 1946, the Anglo-American Committee of Enquiry described again the need for security fences in the face of renewed Arab violence against Jews in 1936-39:

“The sudden rise of [Jewish] immigration after the Nazi seizure of power had as its direct result the three and a half years of Arab revolt, during which the Jew had to train himself for *self-defence*, and to accustom himself to the life of a pioneer in an armed stockade. ... The high barbed wire and the watchtowers, manned by the settlement police day and night, strike the eye of the visitor as he approaches every collective [Jewish] colony. ... The Jews in Palestine are convinced that Arab violence paid. Throughout the Arab rising, the Jews in the National Home, despite every *provocation*, *obeyed the orders of their leaders and exercised a remarkable self-discipline*. They shot, *but only in self-defence*; they rarely took reprisals on the Arab population”<sup>4</sup> [italics by author].

Not one but two historical precedents (1929 and 1936-39) support the Israeli claim that its fencing is not necessarily political or permanent, but is instead a measure prompted by legitimate security needs. Indeed, the stockade walls and watchtowers that surrounded isolated civilian Jewish settlements in the latter part of the 1930s and protected them from attacks were dismantled when the 1936-39 Arab Revolt subsided. This

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<sup>4</sup> Ibid.

challenges the Court's conclusion that the fence is political "*de facto annexation*" and unilaterally changes the status of parts of the West Bank, all without any reference to law.

The Report by His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland to the Council of the League of Nations on the Administration of Palestine and the Palestine Royal Commission 1936-1937 testifies to the fact that there is no linkage between terrorism and "occupation" and the use of violence that required building security fences is not new. Unfortunately, these are salient features on the landscape that repeat themselves due to the violence deeply embedded in Palestinian political culture. The only difference is that the 'shoe is on the other foot' in terms of 'who is fenced in,' the potential victims or the perpetrators.

The above Mandator's report definitively cites its corroborative evidence:

"There were similar assaults [by the Arabs] on the persons and property of the Jews, conducted with the same reckless ferocity. Women and children were not spared. ... In 1936 this was still clearer. Jewish lives were taken and Jewish property destroyed. ... The word 'disturbances' gives a misleading impression of what happened. It was an open rebellion of the Palestinian Arabs, assisted by fellow Arabs from other countries, against British Mandatory rule. Throughout the strike the Arab press indulged in unrestrained invective against the [British] Government. The [British] Government imprisons and demolishes [houses] and imposes extortionate fines in the interests of imperialism."<sup>5</sup>

The British report to the League of Nations had no problem using the 'T' word or acknowledging the sustaining character of political violence in Palestinian Arab culture – internal and external, noting:

"The ugliest element in the picture remains to be noted. Arab nationalism in Palestine has not escaped infection with the foul disease which has so often defiled the cause of nationalism in other lands. Acts of 'terrorism' in various

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<sup>5</sup> British National Archive, Palestine Royal Commission report, July 1937, Chapter IV, p. 104.

parts of the country have long been only too familiar reading in the newspapers. As in Ireland in the worst days after the War or in Bengal, intimidation at the point of a revolver has become a not infrequent feature of Arab politics. Attacks by Arabs on Jews, unhappily, are no new thing. The novelty in the present situation is attacks by Arabs on Arabs. For an Arab to be suspected of a lukewarm adherence to the nationalist cause is to invite a visit from a body of ‘gunmen.’”<sup>6</sup>

The British report to the League of Nations noted Palestinian Arabs’ “refusal to negotiate.”

“The Arab leaders had refused to co-operate with us [E.H., British] in our search for a means of settling the [E.H., Arab-Jewish] dispute.”<sup>7</sup>

The British report to the League of Nations noted the hate that fueled Palestinian Arab political culture:

“... Palestine Arab nationalism is inextricably interwoven with antagonism to the Jews. ... That is why *it is difficult to be an Arab patriot and not to hate the Jews*” [italics by author].

“...We [E.H., the British] find ourselves reluctantly convinced that no prospect of a lasting settlement can be founded on moderate Arab nationalism. At every successive crisis in the past that hope has been entertained. In each case it has proved illusory”<sup>8</sup> [italics by author].

The British report to the League of Nations noted the destructive role of Palestinian Arab leadership:

“If anything is said in public or done in daylight against the known desires of the Arab Higher Committee, it is the work not of a more moderate, but a *more full-blooded nationalism* than theirs [AHC]”<sup>9</sup> [italics by author].

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<sup>6</sup> Ibid. Chapter V, Paragraph 45, p. 135.

<sup>7</sup> Ibid. Chapter V, “The Present Situation”, Paragraph 1, p. 113.

<sup>8</sup> Ibid. Chapter V, “3. Arab Nationalism”, Paragraph 37, p. 131.

<sup>9</sup> Ibid. Chapter V, Paragraph 39, p. 132.



# 12

## Self-Determination

Does the democratic and free world need a rogue state that:

“... puts a high priority on subverting other states and sponsoring non-conventional types of violence against them. It does not react predictably to deterrence or other tools of diplomacy and statecraft.”<sup>1</sup>

The ICJ opinion cites the right to self-determination as a fundamental right almost two dozen times, always in the Palestinian context, never in the Jewish framework.

The Bench even takes the liberty to *interpret* what Israel’s recognition of “Palestinian rights” in a legally-binding accord (Camp David) meant, all with no reliance on law. The ICJ says in paragraph 118 of the Opinion:

“The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 also refers a number of times to the Palestinian people and its ‘legitimate rights’ ... The Court considers that those rights include the right to self-determination, as the General Assembly has more-over recognized on a number of occasions (see, for example, resolution 58/163 of 22 December 2003).”

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<sup>1</sup> Barry Rubin, “US Foreign Policy and Rogue States,” MERIA, September 1999, at: <http://www.biu.ac.il/SOC/besa/meria/journal/1999/issue3/jv3n3a7.html>.(11389)

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Again, the ICJ turns General Assembly *recognition* – this time a December 2003 Resolution recognizing “The right of Palestinian people to self-determination”<sup>2</sup> – into the basis for a legal opinion, ignoring the powers vested (or not vested, as the case may be) in the General Assembly under the UN Charter.

It is instructive to compare such ‘instant recognition’ to the way the Jewish people’s right to self-determination, totally ignored by the ICJ, was anchored in a series of genuine international accords.

The British objectives in ‘mentoring a national home for the Jewish people’ under the Mandate for Palestine were not based solely on the 1917 Balfour Declaration. While international support for the establishment of a Jewish homeland in Palestine was set in motion by this landmark British policy statement, international intent rested on a solid consensus, expressed in a series of accords and declarations that reflected the ‘will’ of the international community, hardly the product or whim of a colonial empire with its own agenda.

The Mandate itself notes this intent when it cites that the Mandate is based on the agreement of *the Principal Allied Powers* and declares:

“Whereas recognition has therefore been given to the historical connection of the Jewish people with Palestine and *to the grounds for* reconstituting their national home in that country” [italics by author].

A June 1922 letter from the British Secretary of State for the Colonies, Winston Churchill, reiterated that:

“...the [Balfour] Declaration of 1917 [was] re-affirmed by the Conference of the Principle Allied Powers at San Remo and again in the Treaty of Sevres ... the Jewish people ... is in Palestine as a right and not on sufferance. That is the reason why it necessary that the existence of a Jewish National Home in Palestine should be internationally guaranteed, and that it should be formally recognized to rest upon ancient historical connection.”

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<sup>2</sup> UN General Assembly – 58/163. A/RES/58/163. 77th plenary meeting. December 22 2003. The right of the Palestinian people to self-determination. See: <http://www.mefacts.com/cache/html/un-resolutions/11319.htm>. (11319)

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In the first Report of The High Commissioner on the Administration of Palestine 1920-1925 to the Secretary of State for the Colonies, published in April 1925, the most senior official of the Mandate for Palestine, the High Commissioner for Palestine, underscored how “international guarantee[s]” for the existence of a Jewish National Home in Palestine were achieved:

“The Declaration was endorsed at the time by several of the Allied Governments; it was reaffirmed by the Conference of the Principal Allied Powers at San Remo in 1920; it was subsequently endorsed by unanimous resolutions of both Houses of the Congress of the United States; it was embodied in the Mandate for Palestine approved by the League of Nations in 1922; it was declared, in a formal statement of policy issued by the Colonial Secretary in the same year, ‘not to be susceptible of change’; and it has been the guiding principle in their direction of the affairs of Palestine of four successive British Governments. The policy was fixed and internationally guaranteed.”

One may also note the Report of The High Commissioner on the Administration of Palestine to the Right Honourable L. S. Amery, M.P., Secretary of State for the Colonies’ Government Offices in April 22 1925, describing Jewish peoplehood:

“During the last two or three generations the Jews have recreated in Palestine a community, now numbering 80,000, of whom about one-fourth are farmers or workers upon the land. This community has its own political organs, an elected assembly for the direction of its domestic concerns, elected councils in the towns, and an organisation for the control of its schools. It has its elected Chief Rabbinate and Rabbinical Council for the direction of its religious affairs. Its business is conducted in Hebrew as a vernacular language, and a Hebrew press serves its needs. It has its distinctive intellectual life and displays considerable economic activity. This community, then, with its town and country population, its political, religious and social organisations, its own language, its own customs, its own life, has in fact ‘national’ characteristics.

“When it is asked what is meant by the development of the Jewish National Home in Palestine, it may be answered that it is not the imposition of a Jewish nationality upon the inhabitants of Palestine as a whole, but the further development of the existing Jewish community, with the assistance of Jews in other parts of the world, in order that it may become a centre in which the Jewish people as a whole may take, on grounds of religion and

race, an interest and a pride. But in order that this community should have the best prospect of free development and provide a full opportunity for the Jewish people to display its capacities, it is essential that it should know that it is in Palestine as of right and not on sufferance. That is the reason why it is necessary that the existence of a Jewish National Home in Palestine should be internationally guaranteed, and that it should be formally recognised to rest upon ancient historic connection.”

Eleven successive British governments, Labor and Conservative, from David Lloyd George (1916-1922) through Clement Attlee (1945-1952) viewed themselves as duty-bound to fulfill the Mandate for Palestine placed in the hands of Great Britain by the League of Nations.<sup>3</sup>

This is a far cry from the *instant approval* noted in the UN’s General Assembly upon which the ICJ bases its findings, totally ignoring that at no point in the Mandate for Palestine is there any granting of *political* rights to non-Jewish entities (i.e., Arabs), only *civil* and *religious* rights (discussed in Chapter 2), because political rights to self-determination as a polity for Arabs were guaranteed in three other parallel mandates for Arab peoples, initially in Lebanon, Syria, and Iraq. The area east of the Jordan River was later cut away from the area of historical Palestine to create an additional Arab state, Trans-Jordan, known today as Jordan.

There is one more point that should be mentioned at this juncture: the ICJ’s highly irregular perception of peoplehood, eligibility and readiness for self-determination. In paragraph 118 the ICJ says:

“As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a ‘Palestinian people’ is no longer in issue. ... The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 (Oslo II Accords) also refers a number of times to the Palestinian people and its ‘legitimate rights.’”

Making its judgment, the ICJ concludes:

“The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions.”

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<sup>3</sup> See <http://www.direct.gov.uk/Homepage/fs/en>.

Historically, before the Arabs fabricated the ‘Palestinian people’ as an exclusively Arab phenomenon, no such group existed. This is substantiated in countless official British Mandate vintage documents that speak of ‘the Jews’ and ‘the Arabs’ of Palestine – not ‘Jews and Palestinians.’ Even the United Nations’ 1947 “Partition Plan” recommended the establishment of “Arab and Jewish states,” not a ‘Palestinian’ and Jewish states.

In fact, the first Article of the PLO Charter makes it clear that ‘Palestinian people’ are ordinary Arabs:

“**Article 1:** Palestine is the homeland of the Arab Palestinian people; it is an *indivisible part of the Arab homeland*, and the *Palestinian people are an integral part of the Arab nation*”<sup>4</sup> [italic by author].

Professor Rostow, examining the claim for Palestinian’s self-determination on the bases of law, concludes:

“... the mandate implicitly denies Arab claims to national political rights in the area in favor of the Jews; the mandated territory was in effect reserved to the Jewish people for their self-determination and political development, in acknowledgment of the historic connection of the Jewish people to the land. Lord Curzon, who was then the British Foreign Minister, made this reading of the mandate explicit. There remains simply the theory that the Arab inhabitants of the West Bank and the Gaza Strip have an inherent ‘natural law’ claim to the area.

“Neither customary international law nor the United Nations Charter acknowledges that every group of people claiming to be a nation has the right to a state of its own.”<sup>5</sup>

<sup>4</sup> See Appendix G. The PLO Charter.

<sup>5</sup> Eugene V. Rostow, *The Future of Palestine*, Institute for National Strategic Studies, November 1993. See also his writing: “Are Israel’s Settlements Legal?” *The New Republic*, October 21 1991.



# 13

## **The International Court of Justice's Mandate**

Article 38 of the ICJ's own Statute instructs the Bench what input is to be applied in adjudicating cases in its Docket.<sup>1</sup> Article 38 clarifies:

- "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - "a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - "b. international custom, as evidence of a general practice accepted as law;
  - "c. the general principles of law recognized by civilized nations;
  - "d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

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<sup>1</sup> Statute of the International Court of Justice. See <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>. (10485)

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Throughout this critique of the ICJ's performance of its duties, the Bench has been found time after time to be biased in its application of the above-mentioned foundations of international law.

**1(a) *International Conventions:*** The Bench applies international conventions that are applicable and inapplicable, while ignoring others that are highly relevant, demonstrating a total disregard of the UN's own legal machinery by treating General Assembly resolutions as if they were legally valid and/or legally binding documents.

It is not even clear whether international conventions are admissible as evidence in an Advisory Opinion. The wording of Article 38 views as admissible only "international conventions, whether general or particular ... expressly recognized by the contesting states." This seems to indicate that in terms of *fair use*, the ICJ is mandated to use only general conventions such as the Hague and Geneva Conventions and the human rights conventions cited by the ICJ (as well as equally relevant ones the ICJ chose not to cite) *only* in cases where the ICJ *is sitting in the capacity of an arbitrator between two sides where both sides* have accepted its jurisdiction. Therefore, use of general conventions might *not apply* when the ICJ has been asked for an advisory opinion – all the more so because Israel, the only "state" in the case, clarified in its brief to the ICJ that it did not accept the court's jurisdiction.

**1(b) *International Custom:*** The Bench often perverts the general principles of law – the core elements which include reasonableness, good faith and the principle of proportionality, components that are highly relevant to the case at hand, which pits Palestinian rights against Israeli rights.

Furthermore, the rules of war enshrined in the Hague (1907) and Geneva Conventions (1949) did not envision terrorism as a major form

of warfare.<sup>2</sup> Until a comprehensive use of convention or protocol on terrorism is established and takes force, countries like America that respect the rule of law have taken the lead to fill the void by defining a new category for such terrorists – ‘illegal combatants.’ This category, the United States argues, recognizes that one cannot abridge all the rules of warfare by targeting civilians and then expect to enjoy the privileges of POWs under the same conventions. The ICJ prefers to adhere rigidly to outdated definitions that hardly reflect current realities about terrorism.

### **Security barriers in other disputed territories.**

Moreover, Israel is not the only country in the world with a security barrier in disputed territory. If the ICJ has been requested to examine the legality and the ramifications of the Israeli barrier and if realities in South West Africa (Namibia) are considered by the ICJ to be relevant to the case at hand, then logically the legality and ramifications of a barrier just up the coast in Western Sahara and also built inside disputed territory would be relevant to the case. Israel is not only *singled out* in the General Assembly request, but also by the ICJ, which exhibits no interest in even noting the existence of precedents or using them as a yardstick of proportionality.

The two most outstanding cases are Morocco (in the disputed territory of the Western Sahara) and India (in the disputed territory of Kashmir). In 1982, Morocco began building a 1,500 kilometer-long defensive wall to protect its settlers and military personnel against Polisario guerrillas – members of the Saharawi tribes who claimed title to the Western Sahara and demanded self-determination. Morocco claims the Western Sahara is an integral part of pre-colonial Morocco. The barrier consists of a series of berms (3 meter high sand walls) deep inside the disputed

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<sup>2</sup> Amnon Straschnov, “Israel’s Commitment to Domestic and International Law in Times of War,” JCPA, October 10 2004, at: <http://www.jcpa.org/brief/brief4-5.htm>. (11390)

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territory – each between 300 – 670 kilometers in length, seeded with an estimated 200,000 to one million<sup>3</sup> anti-personnel and anti-vehicle mines planted in a 100 meter-wide strip on the ‘enemy’ side of Morocco’s security barrier.<sup>4</sup>

In the late 1980s, India began building a security fence to protect itself from Sikh separatists supported by Pakistan; the barrier runs the full length of India’s Rajasthan and Punjab states. In 2003, in the wake of cross-border attacks into the Indian sector of the disputed territory of Kashmir by Islamic terrorists, India began extending the existing 8-foot high mud wall with a 3-tier maze of barbed-wire<sup>5</sup> into the disputed territory, along a route that runs deep inside Kashmir. The planned 1,800 mile security fence, like Israel’s, is non-lethal – comprised of steel posts set into concrete blocks and strung up with concertina wire.

**1(c) *General Principles of Law of Civilized Nations*:** It is hard to justify the ICJ’s failing to even discuss crimes against humanity, such as systematic targeting of civilians by suicide bombers, or the Court’s failure to consider the human rights conventions it quotes as being equally applicable to Jews and Arabs.

The instructions to the ICJ that it apply the “general principles of law of civilized nations” raises a far more fundamental question, a matter of propriety. Common decency should have led this ICJ Bench to at least bar those with blood on their hands from participating in such a procedure.

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<sup>3</sup> Estimates vary between 200,000 and one million mines. See “Landmines – A Threat Still Linger,” at: <http://wsahara.net/landmines.html>. (11391)

<sup>4</sup> “Desert Dreams, Saharan Nightmares: Morocco, Polisario and the Struggle for Western Sahara” at: <http://www.wibemedia.com/sahara.html> (11392) for general information and use of mining as a part of the barrier see: <http://www.icbl.org> (11393) and [http://www.icbl.org/lm/2002/western\\_sahara/](http://www.icbl.org/lm/2002/western_sahara/). (11394)

<sup>5</sup> Rama Lakshmi, “India’s Border Fence Extended to Kashmir,” *The Washington Post*, July 30 2003 at: <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A64700-2003Jul29&notFound=true>. (11464)

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Legal scholar Professor Stone, writing about Palestinian attempts to *resurrect* the “Partition Plan” (discussed in Chapter 4), wrote:

“... there are also certain other legal grounds, rooted in basic notions of justice and equity, on which the Arab states (and the Palestinians whom they represented in these matters) should not, in any case, be permitted, after so lawless a resort to violence against the plan, to turn around decades later, and claim legal entitlements under it. More than one of ‘the general principles of law’ acknowledged in Article 38(1)(c) of the Statute of the International Court of Justice seem to forbid it. Such claimants do not come with ‘clean hands’ to seek equity; their hands indeed are mired by their lawlessly violent bid to destroy the very resolution and plan from which they now seek equity ...”<sup>6</sup>

If this is so, it is hard to ignore the relevance of “clean hands” in the eligibility of Palestine to seek redress from the ICJ, or at least for bodies such as the PLO, Fateh, the Arab League and the Conference of Islamic States who champion and sanction violence, to aid the ICJ by “furnishing it with information.” If this doesn’t violate “basic notions of justice and equity,” then barring Israeli victims from testifying surely does.

The ICJ did not consider it fitting and proper to invite the Organization of Casualties of Terror Acts in Israel (Almagor) to present evidence under the ‘catch-all’ Article 66 Clause 2 of its Charter invoked to listen to the Arab League. The request on the part of Israeli terror victims’ families to participate in oral hearings was rejected by the ICJ on the grounds that the families do not represent a country and therefore should not take part in the hearings.<sup>7</sup>

**1(d) *Judicial decisions:*** “Judicial decisions and the teachings of the most highly qualified publicists of the various nations,” ... [to] determine rules of law.

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<sup>6</sup> Professor Julius Stone, *Israel and Palestine, Assault on the Law of Nations*, The Johns Hopkins University Press, 1981, p. 127.

<sup>7</sup> “ICJ rejects terror victim’s families participation,” *The Jerusalem Post*, February 21 2004 at: <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/Printer&cid=1077351468319>. (11486)

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The Bench not only ignores the relevant rulings of the Supreme Court of the State of Israel that could contribute to its own investigation of legality *and* proportionality, but also ignores the writings of the former president of the Court, Judge Schwebel, who wrote specifically to this issue:

“International law is largely the creation of Governments. In that creative process, those who render legal advice to Governments play a critical part (in present case the Supreme Court of the State of Israel). The forces which shape international law, like the forces which shape international affairs, are many and complex. But what is singular and clear is that those who advise Governments on what international law is and should be exert a particular, perhaps at times a paramount, influence on the formation of international law.”<sup>8</sup>

### **The ICJ cannot consider declarations and resolutions of the UN General Assembly as customary international law.**

To understand what the ICJ cannot do, it is instructive to review the language used during the debate of the defeated draft resolution that attempted to allow the ICJ to consider *declarations* and *resolutions* of the UN General Assembly as if they were customary international law:

“Complete imbalance” is what Professor Stone describes as “arising from the entry of scores of new states into the United Nations who promote resolutions in the General Assembly reflecting political, economic, or sociological aspirations rather than a responsible assessment of the relevant legal issues and considerations. It would greatly enhance the dangers inherent in this imbalance in the United Nations if the above illusion were thoughtlessly indulged.”

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<sup>8</sup> Professor, Judge Stephen M. Schwebel, *Government Legal Advising in the Field of Foreign Affairs in Justice in International Law*, Cambridge University Press, 1994. Opinions quoted in this critiques are not derived from his position as a judge of the ICJ.

Professor Stone continues to describe the 1974 rejected attempt to *over-empower* the ICJ:

“At the 1492d meeting of the General Assembly’s Sixth Committee, on November 5, 1974. ... The Committee had before it a draft resolution on the role of the International Court of Justice, the preamble of which referred vaguely in its eighth paragraph to the possibility that the court might take into consideration declarations and resolutions of the General Assembly. A wide spectrum of states, including Third World, Soviet bloc, and Western states, rejected even this indecisive reference. It was, some said, an attempt at ‘indirect amendment’ of Article 38 of the Statute of the International Court, a ‘subversion of the international structure of the United Nations.’”<sup>9</sup>

**The International Court of Justice lacks the authority to issue a directive to Member States, a function reserved solely to the Security Council.**

In paragraph 163 (3)D, the Opinion states:

“All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties

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<sup>9</sup> (Mr. Sette Camara [Brazil] United Nations General Assembly [U.N.G.A.] A/C6/SR1492, p. 166, with whom U.S. representative Rosenstock agreed on this point). It contradicted the U.N. Charter and the court Statute, so that on a separate vote the Soviet Union would not have supported it (Mr. Fedarov, Union of Soviet Socialist Republics, *ibid.*, p. 167). It was capable of meaning that “General Assembly resolutions could themselves develop international law” (Mr. Steel, for United Kingdom, *ibid.*, p. 167). It was “inappropriate in the light of Article 38” of the Court’s Statute (Mr. Guney, Turkey, *ibid.*, p. 168). It was subject to “serious doubts” (Mrs. Ulyanova, Ukraine, *ibid.*, p. 168). It was an attempt to “issue directives regarding the sources of law,” departing from his delegation’s view that resolutions and declarations of the General Assembly are “essentially recommendations and not legally binding” (Mr. Yokota, Japan, *ibid.*, p. 168). Mr. Rasoloko, Byelorussia, declared roundly (*ibid.*, p. 169) that “declarations and resolutions of the General Assembly could not be sources of international law”; and Mr. Prieto, Chile (*ibid.*, p. 169) added that they could not be so considered “particularly in view of their increasing political content which was often at variance with international law.” The eighth paragraph, it was also objected, attributed to the General Assembly “powers which were not within its competence” (Mr. Foldeak, Hungary, *ibid.*, p. 169). Also, the preambular paragraph in question had already been amended at the instance of Mexico in a sense explained as in no way altering or introducing any new source of international law to those enumerated in Article 38 of the Statute of the International Court of Justice (A/C6/L 989).

to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention;”

Such a directive goes beyond the authority of the Court on three counts. First, no directive was requested of the Court by the UN General Assembly. The Court decided on its own to ‘rule’ on the legality of Jewish settlements in Section 120 (see Chapter 9). Secondly, the Court’s powers under its own mandate do not include the right to issue directives to enforce its advisory opinion. Just as General Assembly’s resolutions are only recommendations, the Court’s Advisory Opinion is also void of any legislative or coercive power and is no more than counsel or advice. Thirdly, adoption and enforcement of the ICJ’s advice is solely the prerogative of the Security Council, the only UN organ with the power under the UN Charter to ‘direct’ or ‘obligate’ Member States on how to act.

Here again, the Court’s behaviour seems to be a sheer ‘power grab’ reflecting the Bench’s own aspirations to assume prerogatives reserved solely for the Security Council, in order to bring the ICJ’s own powers into parity with those of the Security Council.

# 14

## Epilogue

The International Court of Justice ignored not only its own Statute but also the writings of eminent jurists and academic scholars of international law, members of its *own* Bench, including a past president of the ICJ, all of whom are uniquely qualified and experienced on the subject at hand. Among them: Professor and Judge Stephen M. Schwebel, past president of the ICJ; Sir Gerald Fitzmaurice, former ICJ judge; Judge Sir Hersch Lauterpacht, a former member judge of the International Court; Judge Sir Elihu Lauterpacht, judge ad hoc of the International Court of Justice; former British Ambassador to the UN, Lord Caradon, principal author of draft Resolution 242; Professor Julius Stone, one of the twentieth century's leading authorities on the Law of Nations; Professor Eugene V. Rostow, dean of the Yale Law School, U.S. Under-Secretary of State for Political Affairs, and a key draftee of UN Resolution 242; Professor and Jurist Arthur J. Goldberg, member of the U.S. Supreme Court, and U.S. Ambassador to the UN in 1967 and a key draftee of Resolution 242; and Professor George P. Fletcher, faculty member of the Columbia University School of Law, who wrote recently that Kofi Annan's use of the phrase "'illegal occupation' is a perilous threat to the diplomatic search for peace."<sup>1</sup>

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<sup>1</sup> Professor George Fletcher, an expert in international law at Columbia University School of Law and author of "Romantics at War: Glory and Guilt in the Age of Terrorism." See "Annan's Careless Language," *The New York Times*, March 21 2002. (10327)

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In contradiction to international law, scholarly judgment, and common sense, the International Court of Justice handed down an ‘Advisory Opinion’ that is:

So sloppy that it wants the reader to believe that the League of Nations document – the 1922 “Mandate for Palestine” that laid down the *Jewish* legal right to settle anywhere in the area between the Jordan River and the Mediterranean Sea, an entitlement unaltered in international law and valid to this day – was the founding document for Palestinian self-determination. It seems that the members of the Court didn’t even bother to read the six-page legally-binding Mandate for Palestine document.

So biased that it found terrorist activities to be irrelevant to its judicial investigation. The ICJ that cites the Secretary-General’s Report as a key document and a major source of information for its opinion, skips the part of the same UN Report that labeled the Palestinian actions “*terror*,” clearly stating the cause for building a security barrier.

So incompetent that it demonstrates a total disregard of the UN’s own legal machinery by arbitrarily treating numerous General Assembly Resolutions and Declarations as a source of law, contradicting the UN Charter and the Court’s Statute.<sup>2</sup>

So devious that it erases all Arab aggression during the British Mandate period (1922-1948), the 1948, 1956, 1967 and 1973 wars, and Israel’s continuing fight of self-defence against Palestinian terrorism.

So manipulative that it denied Israel’s rights to battle terrorism as directed by Security Council Resolution 1373 that was adopted under Chapter VII of the UN Charter and required *all* nations to comply with the terms set forth in Resolutions 1373, 1368, and 1269. The ICJ does not have the authority or the power over the Security Council to alter the resolution or wrongly and illegally exclude Israel, a Member State of the UN, from its rights and obligations under such Security Council Resolutions.

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<sup>2</sup> “... at the 1492d meeting of the General Assembly’s Sixth Committee, on November 5 1974.” See footnote 9 on page 147.

## ICJ – Challenging the power of UN Security Council.

In another odd conclusion, the ICJ ‘found’ in this case a “failure of the Security Council to discharge its responsibilities”<sup>3</sup> [E.H., without any reference to law] then in defiance of the limited powers delegated to it by the UN Charter, by-passed the Security Council’s powers and responsibilities.

Bypassing the Security Council is part of a broader campaign that should *alarm* all members of the Security Council, and the United States in particular. Nabil Elaraby, the Egyptian member of the ICJ Bench, openly advocated two main vehicles for institutionalizing it:

“The United Nations membership should, in my view, address ways and means to render the Security Council (a) accountable to the General Assembly, and (b) subject to the possibility, however remote, of a judicial review process.”<sup>4</sup>

And according to Gregory Khalil, the PLO legal advisor in the security barrier case, the ICJ consciously sought to engage the United States in a:

“... tango of mutual deterrence” and “chart a path for the international community to counter the United States’ veto power.” The significance of the ruling cannot be overstated, he underscores: It challenges the power of the veto and the Security Council’s management of “threats to world peace,” using the International Court of Justice’s interpretations of the rule of international law in matters of ‘threats to world peace’ coupled with claims that the international community is obliged to support its rulings and calling for sanctions – decisions that under Chapter VII of the UN Charter is the sole prerogative of the Security Council. Khalil calls this strategy “vetoing the veto.”<sup>5</sup>

<sup>3</sup> The Court cites UN GA Resolution 377 of November 3 1950 as its license to assume the Security Council Power. [E.H., The UN Charter vests no such power in GA Resolutions.] (11399)

<sup>4</sup> Nabil Elaraby, “Some Reflections on The Role of the Security Council and the Prohibition of the Use of Force in International Relations: Article 2(4) Revisited in Light of Recent Developments,” 2003, at [http://edoc.mpil.de/fs/2003/eitel/41\\_elaraby.pdf](http://edoc.mpil.de/fs/2003/eitel/41_elaraby.pdf). (11449) Not a lone voice, the same sentiments are echoed in Ahmad Faiz bin Abdul Rahman, “The ICJ on Trial” at: <http://www.iol.ie/~afifi/BICNews/Afaiz/afaiz21.htm>, (11448) who in 1998 took the ICJ to task for not “practice[ing] its powers of judicial review to the fullest extent” in the case brought by Libya against the UK and the United States regarding jurisdiction in the Lockerbie case.

<sup>5</sup> See Gregory Khalil, “Just Say No to Vetoes,” *The New York Times*, July 19 2004, at [http://www.pngo.net/publications/articles/gregory\\_khalil190704en.htm](http://www.pngo.net/publications/articles/gregory_khalil190704en.htm). (11450)

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The ‘Advisory Opinion’ signed by the Court’s president, Shi Jiuyong,<sup>6</sup> constitutes “a profound corruption of its mission and one with seismic implications for the future of international law.”<sup>7</sup> It threatens the security of America and its allies on three levels: first, in its groundbreaking attack on the ‘right to self-defence,’ proscribing an almost blanket prohibition of use of *lawful force*. Second, it erroneously adopts the exclusive powers granted to the Security Council by the United Nations Charter, a move that will render the Security Council ineffective, and third, in the willingness of the Bench to allow its chambers to become a *political instrument* and to abandon all semblance of fairness or professionalism, all for political gain.

The threats to the free and democratic states, consequently demand a far more serious, systematic and frank response, including a willingness to *challenge the competence* of this Court. Attempts to shield the International Court of Justice from this disgrace out of concern for its perceived reputation and effectiveness are short-sighted. At all too many junctures it appears that the ICJ’s conclusions are based solely on ‘gut feelings’ and unsubstantiated assumptions – almost taking a leap of faith based on a mixture of personal and collective prejudice and popular opinion.

The free and democratic world needs to ‘rein in’ the appetite of the General Assembly and to demand of the International Court of Justice to step beyond its mandate, and respect and obey international laws as set forth in the United Nations Charter.

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<sup>6</sup> “The court president, Shi Jiuyong, hails from China, one of the more dictatorial regimes in the world ... continues to deny basic political and religious rights, with large numbers of dissidents held in - prisons and labor camps for ‘crimes’ such as advocating free elections or practicing the Falun Gong religion. Israel, needless to say, has complete freedom of speech and religion. And, while Israel wants to annex only a small sliver of the West Bank, China has grabbed all of Tibet. But, with its veto power at the U.N. Security Council, Beijing is able to shield itself from well-deserved international obloquy.” See: Andrew McCarthy, “The End of the Right of Self-Defense: Israel, the World Court, and the War on Terror,” Commentary, November 1 2004 at: [http://www.defenddemocracy.org/in\\_the\\_media/in\\_the\\_media\\_show.htm?doc\\_id=245738](http://www.defenddemocracy.org/in_the_media/in_the_media_show.htm?doc_id=245738). (10447)

<sup>7</sup> Ibid.

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**LEAGUE OF NATIONS.**

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**MANDATE FOR PALESTINE,**

TOGETHER WITH A

**NOTE BY THE SECRETARY-GENERAL  
RELATING TO ITS APPLICATION**

TO THE

**TERRITORY KNOWN AS TRANS-JORDAN,  
under the provisions of Article 25.**

=====

*Presented to Parliament by Command of His Majesty,  
December, 1922*

=====



LONDON:  
PUBLISHED BY HIS MAJESTY'S STATIONARY OFFICE.

**MANDATE FOR PALESTINE,**  
together with a Note by the Secretary-General relating to its  
application to the Territory known as TransJordan, under the provisions of Article 25.

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**MANDATE FOR PALESTINE.**

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The Council of the League of Nations :

Whereas the Principal Allied Powers have agreed, for the purpose of giving effect to the provisions of Article 22 of the Covenant of the League of Nations, to entrust to a Mandatory selected by the said Powers the administration of the territory of Palestine, which formerly belonged to the Turkish Empire, within such boundaries as may be fixed by them; and

Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favor of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country; and

Whereas recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country; and

Whereas the Principal Allied Powers have selected His Britannic Majesty as the Mandatory for Palestine; and

Whereas the mandate in respect of Palestine has been formulated in the following terms and submitted to the Council of the League for approval; and

Whereas His Britannic Majesty has accepted the mandate in respect of Palestine and undertaken to exercise it on behalf of the League of Nations in conformity with the following provisions; and

Whereas by the afore-mentioned Article 22 (paragraph 8), it is provided that the degree of authority, control or administration to be exercised by the Mandatory, not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of Nations;

confirming the said Mandate, defines its terms as follows:

*Article 1.*

The Mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this mandate.

*Article 2.*

The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.

*Article 3.*

The Mandatory shall, so far as circumstances permit, encourage local autonomy.

*Article 4.*

An appropriate Jewish agency shall be recognised as a public body for the purpose of advising and co-operating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine, and, subject always to the control of the Administration to assist and take part in the development of the country.

The Zionist organization, so long as its organization and constitution are in the opinion of the Mandatory appropriate, shall be recognised as such agency. It shall take steps in consultation with His Britannic Majesty's Government to secure the co-operation of all Jews who are willing to assist in the establishment of the Jewish national home.

*Article 5.*

The Mandatory shall be responsible for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of the Government of any foreign Power.

*Article 6.*

The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes.

*Article 7.*

The Administration of Palestine shall be responsible for enacting a nationality law. There shall be included in this law provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine.

*Article 8.*

The privileges and immunities of foreigners, including the benefits of consular jurisdiction and protection as formerly enjoyed by Capitulation or usage in the Ottoman Empire, shall not be applicable in Palestine.

Unless the Powers whose nationals enjoyed the afore-mentioned privileges and immunities on August 1st, 1914, shall have previously renounced the right to their re-establishment, or shall have agreed to their non-application for a specified period, these privileges and immunities shall, at the expiration of the mandate, be immediately reestablished in their entirety or with such modifications as may have been agreed upon between the Powers concerned.

*Article 9.*

The Mandatory shall be responsible for seeing that the judicial system established in Palestine shall assure to foreigners, as well as to natives, a complete guarantee of their rights.

Respect for the personal status of the various peoples and communities and for their religious interests shall be fully guaranteed. In particular, the control and administration of Wakfs shall be exercised in accordance with religious law and the dispositions of the founders.

*Article 10.*

Pending the making of special extradition agreements relating to Palestine, the extradition treaties in force between the Mandatory and other foreign Powers shall apply to Palestine.

*Article 11.*

The Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the country, and, subject to any international obligations accepted by the Mandatory, shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein. It shall introduce a land system appropriate to the needs of the country, having regard, among other things, to the desirability of promoting the close settlement and intensive cultivation of the land.

The Administration may arrange with the Jewish agency mentioned in Article 4 to construct or operate, upon fair and equitable terms, any public works, services and utilities, and to develop any of the natural resources of the country, in so far as these matters are not directly undertaken by the Administration. Any such arrangements shall provide that no profits distributed by such agency, directly or indirectly, shall exceed a reasonable rate of interest on the capital, and any further profits shall be utilised by it for the benefit of the country in a manner approved by the Administration.

*Article 12.*

The Mandatory shall be entrusted with the control of the foreign relations of Palestine and the right to issue exequaturs to consuls appointed by foreign Powers. He shall also be entitled to afford diplomatic and consular protection to citizens of Palestine when outside its territorial limits.

*Article 13.*

All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, while ensuring the requirements of public order and decorum, is assumed by the Mandatory, who shall be responsible solely to the League of Nations in all matters connected herewith, provided that nothing in this article shall prevent the Mandatory from entering into such arrangements as he may deem reasonable with the Administration for the purpose of carrying the provisions of this article into effect; and provided also that nothing in this mandate shall be construed as conferring upon the Mandatory authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed.

*Article 14.*

A special commission shall be appointed by the Mandatory to study, define and determine the rights and claims in connection with the Holy Places and the rights and claims relating to the different religious communities in Palestine. The method of nomination, the composition and the functions of this Commission shall be submitted to the Council of the League for its approval, and the Commission shall not be appointed or enter upon its functions without the approval of the Council.

*Article 15.*

The Mandatory shall see that complete freedom of conscience and the free exercise of all forms of worship, subject only to the maintenance of public order and morals, are ensured to all. No discrimination of any kind shall be made between the inhabitants of Palestine on the ground of race, religion or language. No person shall be excluded from Palestine on the sole ground of his religious belief.

The right of each community to maintain its own schools for the education of its own members in its own language, while conforming to such educational requirements of a general nature as the Administration may impose, shall not be denied or impaired.

*Article 16.*

The Mandatory shall be responsible for exercising such supervision over religious or eleemosynary bodies of all faiths in Palestine as may be required for the maintenance of public order and good government. Subject to such supervision, no measures shall be taken in Palestine to obstruct or interfere with the enterprise of such bodies or to discriminate against any representative or member of them on the ground of his religion or nationality.

*Article 17.*

The Administration of Palestine may organist on a voluntary basis the forces necessary for the preservation of peace and order, and also for the defence of the country, subject, however, to the supervision of the Mandatory, but shall not use them for purposes other than those above specified save with the consent of the Mandatory. Except for such purposes, no military, naval or air forces shall be raised or maintained by the Administration of Palestine.

Nothing in this article shall preclude the Administration of Palestine from contributing to the cost of the maintenance of the forces of the Mandatory in Palestine.

The Mandatory shall be entitled at all times to use the roads, railways and ports of Palestine for the movement of armed forces and the carriage of fuel and supplies.

*Article 18.*

The Mandatory shall see that there is no discrimination in Palestine against the nationals of any State Member of the League of Nations (including companies incorporated under its laws) as compared with those of the Mandatory or of any foreign State in matters concerning taxation, commerce or navigation, the exercise of industries or professions, or in the treatment of merchant vessels or civil aircraft. Similarly, there shall be no discrimination in Palestine against goods originating in or destined for any of the said States, and there shall be freedom of transit under equitable conditions across the mandated area.

Subject as aforesaid and to the other provisions of this mandate, the Administration of Palestine may, on the advice of the Mandatory, impose such taxes and customs duties as it may consider necessary, and take such steps as it may think best to promote the development of the natural resources of the country and to safeguard the interests of the population. It may also, on the advice of the Mandatory, conclude a special customs agreement with any State the territory of which in 1914 was wholly included in Asiatic Turkey or Arabia.

*Article 19.*

The Mandatory shall adhere on behalf of the Administration of Palestine to any general international conventions already existing, or which may be concluded hereafter with the approval of the League of Nations, respecting the slave traffic, the traffic in arms and ammunition, or the traffic in drugs, or relating to commercial equality, freedom of transit and navigation, aerial navigation and postal, telegraphic and wireless communication or literary, artistic or industrial property.

*Article 20.*

The Mandatory shall co-operate on behalf of the Administration of Palestine, so far as religious, social and other conditions may permit, in the execution of any common policy adopted by the League of Nations for preventing and combating disease, including diseases of plants and animals.

*Article 21.*

The Mandatory shall secure the enactment within twelve months from this date, and shall ensure the execution of a Law of Antiquities based on the following rules. This law shall ensure equality of treatment in the matter of excavations and archaeological research to the nationals of all States Members of the League of Nations.

(1)

“Antiquity” means any construction or any product of human activity earlier than the year A. D. 1700.

(2)

The law for the protection of antiquities shall proceed by encouragement rather than by threat.

Any person who, having discovered an antiquity without being furnished with the authorization referred to in paragraph 5, reports the same to an official of the competent Department, shall be rewarded according to the value of the discovery.

(3)

No antiquity may be disposed of except to the competent Department, unless this Department renounces the acquisition of any such antiquity.

No antiquity may leave the country without an export licence from the said Department.

(4)

Any person who maliciously or negligently destroys or damages an antiquity shall be liable to a penalty to be fixed.

(5)

No clearing of ground or digging with the object of finding antiquities shall be permitted, under penalty of fine, except to persons authorised by the competent Department.

(6)

Equitable terms shall be fixed for expropriation, temporary or permanent, of lands which might be of historical or archaeological interest.

(7)

Authorization to excavate shall only be granted to persons who show sufficient guarantees of archaeological experience. The Administration of Palestine shall not, in granting these authorizations, act in such a way as to exclude scholars of any nation without good grounds.

(8)

The proceeds of excavations may be divided between the excavator and the competent Department in a proportion fixed by that Department. If division seems impossible for scientific reasons, the excavator shall receive a fair indemnity in lieu of a part of the find.

*Article 22.*

English, Arabic and Hebrew shall be the official languages of Palestine. Any statement or inscription in Arabic on stamps or money in Palestine shall be repeated in Hebrew and any statement or inscription in Hebrew shall be repeated in Arabic.

*Article 23.*

The Administration of Palestine shall recognise the holy days of the respective communities in Palestine as legal days of rest for the members of such communities.

*Article 24.*

The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council as to the measures taken during the year to carry out the provisions of the mandate. Copies of all laws and regulations promulgated or issued during the year shall be communicated with the report.

*Article 25.*

In the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined, the Mandatory shall be entitled, with the consent of the Council of the League of Nations, to postpone or withhold application of such provisions of this mandate as he may consider inapplicable to the existing local conditions, and to make such provision for the administration of the territories as he may consider suitable to those conditions, provided that no action shall be taken which is inconsistent with the provisions of Articles 15, 16 and 18.

*Article 26.*

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

*Article 27.*

The consent of the Council of the League of Nations is required for any modification of the terms of this mandate.

*Article 28.*

In the event of the termination of the mandate hereby conferred upon the Mandatory, the Council of the League of Nations shall make such arrangements as may be deemed necessary for safeguarding in perpetuity, under guarantee of the League, the rights secured by Articles 13 and 14, and shall use its influence for securing, under the guarantee of the League, that the Government of Palestine will fully honour the financial obligations legitimately incurred by the Administration of Palestine during the period of the mandate, including the rights of public servants to pensions or gratuities.

The present instrument shall be deposited in original in the archives of the League of Nations and certified copies shall be forwarded by the Secretary-General of the League of Nations to all members of the League.

Done at London the twenty-fourth day of July, one thousand nine hundred and twenty-two.

*Certified true copy:*

**FOR THE SECRETARY-GENERAL,  
RAPPARD,  
Director of the Mandates Section.**

NOTE.

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GENEVA,  
*September 23rd, 1922.*

**ARTICLE 25 OF THE PALESTINE MANDATE.**

*Territory known as Trans-Jordan.*

**NOTE BY THE SECRETARY-GENERAL.**

The Secretary-General has the honour to communicate for the information of the Members of the League, a memorandum relating to Article 25 of the Palestine Mandate presented by the British Government to the Council of the League on September 16th, 1922.

The memorandum was approved by the Council subject to the decision taken at its meeting in London on July 24th, 1922, with regard to the coming into force of the Palestine and Syrian mandates.

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**MEMORANDUM BY THE BRITISH REPRESENTATIVE.**

1. Article 25 of the Mandate for Palestine provides as follows:-

“In the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined, the Mandatory shall be entitled, with the consent of the Council of the League of Nations, to postpone or withhold application of such provision of this Mandate as he may consider inapplicable to the existing local conditions, and to make such provision for the administration of the territories as he may consider suitable to those conditions, provided no action shall be taken which is inconsistent with the provisions of Articles 15, 16 and 18.”

2. In pursuance of the provisions of this Article, His Majesty's Government invite the Council to pass the following resolution: -

“The following provisions of the Mandate for Palestine are not applicable to the territory known as Trans-Jordan, which comprises all territory lying to the east of a line drawn from a point two miles west of the town of Akaba on the Gulf of that name up the centre of the Wady Araba, Dead Sea and River Jordan to its junction with the River Yarmuk ; thence up the centre of that river to the Syrian Frontier.”

*Preamble.*- Recitals 2 and 3.

Article 2. - The words “placing the country under such political administration and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and”.

Article 4.



Article 6.

Article 7.- The sentence “The shall be included in this law provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine.”

Article 11.- The second sentence of the first paragraph and the second paragraph.

Article 13.

Article 14.

Article 22.

Article 23.

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In the application of the Mandate to Trans-Jordan, the action which, in Palestine, is taken by the Administration of the latter country, will be taken by the Administration of Trans-Jordan under the general supervision of the Mandatory.

3. His Majesty’s Government accept full responsibility as Mandatory for Trans-Jordan, and undertake that such provision as may be made for the administration of that territory in accordance with Article 25 of the Mandate shall be in no way inconsistent with those provisions of tile Mandate which are not by this resolution declared inapplicable.



## UN Security Council Resolution 1269

19 October 1999

*The Security Council,*

Deeply concerned by the increase in acts of international terrorism which endangers the lives and well-being of individuals worldwide as well as the peace and security of all States,

Condemning all acts of terrorism, irrespective of motive, wherever and by whomever committed,

Mindful of all relevant resolutions of the General Assembly, including resolution 49/60 of 9 December 1994, by which it adopted the Declaration on Measures to Eliminate International Terrorism,

Emphasizing the necessity to intensify the fight against terrorism at the national level and to strengthen, under the auspices of the United Nations, effective international cooperation in this field on the basis of the principles of the Charter of the United Nations and norms of international law, including respect for international humanitarian law and human rights,

Supporting the efforts to promote universal participation in and implementation of the existing international anti-terrorist conventions, as well as to develop new international instruments to counter the terrorist threat,

Commending the work done by the General Assembly, relevant United Nations organs and specialized agencies and regional and other organizations to combat international terrorism,

Determined to contribute, in accordance with the Charter of the United Nations, to the efforts to combat terrorism in all its forms,

Reaffirming that the suppression of acts of international terrorism, including those in which States are involved, is an essential contribution to the maintenance of international peace and security,

1. Unequivocally condemns all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten international peace and security;

2. Calls upon all States to implement fully the international anti-terrorist conventions to which they are parties, encourages all States to consider as a matter of priority adhering to those to which they are not parties, and encourages also the speedy adoption of the pending conventions;

3. Stresses the vital role of the United Nations in strengthening international cooperation in combating terrorism and, emphasizes the importance of enhanced coordination among States, international and regional organizations;

4. Calls upon all States to take, inter alia, in the context of such cooperation and coordination, appropriate steps to:

- cooperate with each other, particularly through bilateral and multilateral agreements and arrangements, to prevent and suppress terrorist acts, protect their nationals and other persons against terrorist attacks and bring to justice the perpetrators of such acts;

- prevent and suppress in their territories through all lawful means the preparation and financing of any acts of terrorism;

- deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition;
  - take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts;
  - exchange information in accordance with international and domestic law, and cooperate on administrative and judicial matters in order to prevent the commission of terrorist acts;
5. Requests the Secretary-General, in his reports to the General Assembly, in particular submitted in accordance with its resolution 50/53 on measures to eliminate international terrorism, to pay special attention to the need to prevent and fight the threat to international peace and security as a result of terrorist activities;
6. Expresses its readiness to consider relevant provisions of the reports mentioned in paragraph 5 above and to take necessary steps in accordance with its responsibilities under the Charter of the United Nations in order to counter terrorist threats to international peace and security;
7. Decides to remain seized of this matter.



## UN Security Council resolution 1368

12 September 2001

### *The Security Council,*

Reaffirming the principles and purposes of the Charter of the United Nations,

Determined to combat by all means threats to international peace and security caused by terrorist acts,

Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,

1. Unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security;
2. Expresses its deepest sympathy and condolences to the victims and their families and to the people and Government of the United States of America;
3. Calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;
4. Calls also on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular resolution 1269 (1999) of 19 October 1999;
5. Expresses its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations;
6. Decides to remain seized of the matter.



## UN Security Council Resolution 1373

September 28, 2001

*The Security Council,*

Reaffirming its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001, Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C., and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

Deeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism,

Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

Recognizing the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism,

Reaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts,

Acting under Chapter VII of the Charter of the United Nations,

1. Decides that all States shall:

- (a) Prevent and suppress the financing of terrorist acts;
- (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
- (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. Decides also that all States shall:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

3. Calls upon all States to:

(a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;

(b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;

(c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;

(d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;

(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts;

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;

4. Notes with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard emphasizes the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;

5. Declares that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

6. Decides to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and calls upon all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;

7. Directs the Committee to delineate its tasks, submit a work programme within 30 days of the adoption of this resolution, and to consider the support it requires, in consultation with the Secretary-General;

8. Expresses its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter;

9. Decides to remain seized of this matter.



## UN Security Council resolution 1377

12 November 2001

*The Security Council,  
Decides to adopt the attached declaration on the global effort to combat terrorism.*

### Annex

*The Security Council,  
Meeting at the Ministerial level,*

*Recalling its resolutions 1269 (1999) of 19 October 1999, 1368 (2001) of 12 September 2001 and 1373 (2001) of 28 September 2001,*

*Declares that acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century,*

*Further declares that acts of international terrorism constitute a challenge to all States and to all of humanity,*

*Reaffirms its unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed,*

*Stresses that acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations, and that the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of the Charter of the United Nations,*

*Underlines that acts of terrorism endanger innocent lives and the dignity and security of human beings everywhere, threaten the social and economic development of all States and undermine global stability and prosperity,*

*Affirms that a sustained, comprehensive approach involving the active participation and collaboration of all Member States of the United Nations, and in accordance with the Charter of the United Nations and international law, is essential to combat the scourge of international terrorism,*

*Stresses that continuing international efforts to broaden the understanding among civilizations and to address regional conflicts and the full range of global issues, including development issues, will contribute to international cooperation and collaboration, which themselves are necessary to sustain the broadest possible fight against international terrorism,*

*Welcomes the commitment expressed by States to fight the scourge of international terrorism, including during the General Assembly plenary debate from 1 to 5 October 2001, calls on all States to become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, and encourages Member States to take forward work in this area,*



*Calls* on all States to take urgent steps to implement fully resolution 1373 (2001), and to assist each other in doing so, and *underlines* the obligation on States to deny financial and all other forms of support and safe haven to terrorists and those supporting terrorism,

*Expresses* its determination to proceed with the implementation of that resolution in full cooperation with the whole membership of the United Nations, and *welcomes* the progress made so far by the Counter-Terrorism Committee established by paragraph 6 of resolution 1373 (2001) to monitor implementation of that resolution,

*Recognizes* that many States will require assistance in implementing all the requirements of resolution 1373 (2001), and *invites* States to inform the Counter-Terrorism Committee of areas in which they require such support, *In that context*, invites the Counter-Terrorism Committee to explore ways in which States can be assisted, and in particular to explore with international, regional and subregional organizations:

- the promotion of best-practice in the areas covered by resolution 1373 (2001), including the preparation of model laws as appropriate,
- the availability of existing technical, financial, regulatory, legislative or other assistance programmes which might facilitate the implementation of resolution 1373 (2001),
- the promotion of possible synergies between these assistance programmes, *Calls on* all States to intensify their efforts to eliminate the scourge of international terrorism.



## UN Security Council Resolution 242

22 November 1967

*The Security Council,*

Expressing its continuing concern with the grave situation in the Middle East,

Emphasizing the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security,

Emphasizing further that all Member States in their acceptance of the Charter of the United Nations have undertaken a commitment to act in accordance with Article 2 of the Charter,

1. 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;
- (ii) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;

2. Affirms further the necessity

- (a) For guaranteeing freedom of navigation through international waterways in the area;
- (b) For achieving a just settlement of the refugee problem;
- (c) For guaranteeing the territorial inviolability and political independence of every State in the area, through measures including the establishment of demilitarized zones;

3. Requests the Secretary-General to designate a Special Representative to proceed to the Middle East to establish and maintain contacts with the States concerned in order to promote agreement and assist efforts to achieve a peaceful and accepted settlement in accordance with the provisions and principles in this resolution;

4. Requests the Secretary-General to report to the Security Council on the progress of the efforts of the Special Representative as soon as possible.

*Adopted unanimously at the 1382nd meeting*

### **Charter of the United Nations**

#### **Article 2**

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

- 1. The Organization is based on the principle of the sovereign equality of all its Members.
- 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
- 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. 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.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.



## UN Security Council Resolution 338

22 October 1973

### *The Security Council*

1. *Calls* upon all parties to the present fighting to cease all firing and terminate all military activity immediately, no later than 12 hours after the moment of the adoption of this decision, in the positions they now occupy;

2. *Calls* upon the parties concerned to start immediately after the cease-fire the implementation of Security Council resolution 242 (1967) in all of its parts;

3. *Decides* that, immediately and concurrently with the cease-fire, negotiations shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East.

*Adopted at the 1747th meeting  
by 14 votes to none.*

1/ One member (China) did not participate in the voting.



## UN Security Council Resolution 1515

19 November 2003

*The Security Council,*

Recalling all its previous relevant resolutions, in particular resolutions 242 (1967), 338 (1973), 1397 (2002) and the Madrid principles,

Expressing its grave concern at the continuation of the tragic and violent events in the Middle East,

Reiterating the demand for an immediate cessation of all acts of violence, including all acts of terrorism, provocation, incitement and destruction,

Reaffirming its vision of a region where two States, Israel and Palestine, live side by side within secure and recognized borders,

Emphasizing the need to achieve a comprehensive, just and lasting peace in the Middle East, including the Israeli-Syrian and Israeli-Lebanese tracks,

Welcoming and encouraging the diplomatic efforts of the international Quartet and others,

1. Endorses the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict (S/2003/529);
2. Calls on the parties to fulfil their obligations under the Roadmap in cooperation with the Quartet and to achieve the vision of two States living side by side in peace and security;
3. Decides to remain seized of the matter.



## UN General Assembly Resolution 2625

24 October 1970

(Selective Applicable Paragraphs)

2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

### **The General Assembly,**

... Having considered the principles of international law relating to friendly relations and co-operation among States,

#### 1. Solemnly proclaims the following principles:

The principle that States 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

Every State has the duty to refrain in its 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. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations end shall never be employed as a means of settling international issues.

A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.

In accordance with the purposes and principles of the United Nations, States have the duty to refrain from propaganda for wars of aggression.

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special regimes or as effecting their temporary character.

States have a duty to refrain from acts of reprisal involving the use of force.

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal. Nothing in the foregoing shall be construed as affecting:

- (a) Provisions of the Charter or any international agreement prior to the Charter regime and valid under international law; or
- (b) The powers of the Security Council under the Charter.

All States shall pursue in good faith negotiations for the only conclusion of a universal treaty on general and complete disarmament under effective international control and strive to adopt appropriate measures to reduce international tensions and strengthen confidence among States.

All States shall comply in good faith with their obligations under the generally recognized principles and rules of international law with respect to the maintenance of international peace and security, and shall endeavour to make the United Nations security system based on the Charter more effective.

Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.

The principle that States shall settle their international disputes by peaceful means in such a manner that International peace and security and justice are not endangered

Every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered. ...

**...The principle of equal rights and self-determination at peoples**

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

- (a) To promote friendly relations and co-operation among States; and
- (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country. ...

## **GENERAL PART**

### **2. Declares that:**

In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles.

Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of Member States under the Charter or the rights of peoples under the Charter, taking into account the elaboration of these rights in this Declaration.

### **3. Declares further that:**

The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles.



## **UN General Assembly Resolution 3314**

14 December 1974  
(Definition of Aggression)

*The General Assembly,*

Having considered the report of the Special Committee on the Question of Defining Aggression, established pursuant to its resolution 2330 (XXII) of 18 December 1967, covering the work of its seventh session held from 11 March to 12 April 1974, including the draft Definition of Aggression adopted by the Special Committee by consensus and recommended for adoption by the General Assembly, Deeply convinced that the adoption of the Definition of Aggression would contribute to the strengthening of international peace and security,

1. Approves the Definition of Aggression, the text of which it annexed to the present resolution;
2. Expresses its appreciation to the Special Committee on the Question of Defining Aggression for its work which resulted in the elaboration of the Definition of Aggression;
3. Calls upon all States to refrain from all acts of aggression and other uses of force contrary to the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations;
4. Calls the attention of the Security Council to the Definition of Aggression, as set out below, and recommends that it should, as appropriate, take account of that Definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression.

### **ANNEX** **DEFINITION OF AGGRESSION**

*The General Assembly,*

Basing itself on the fact that one of the fundamental purposes of the United Nations is to maintain international peace and security and to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.

Recalling that the Security Council, in accordance with Article 39 of the Charter of the United Nations, shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Recalling also the duty of States under the Charter to settle their international disputes by peaceful means in order not to endanger international peace, security and justice,

Bearing in mind that nothing in this Definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations,



Considering also that, since aggression is the most serious and dangerous form of the illegal use of force, being fraught, in the conditions created by the existence of all types of weapons of mass destruction, with the possible threat of a world conflict and all its catastrophic consequences, aggression should be defined at the present stage,

Reaffirming the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial integrity,

Reaffirming also that the territory of a State shall not be violated by being the object, even temporarily, of military occupation or of other measures of force taken by another State in contravention of the Charter, and that it shall not be the object of acquisition by another State resulting from such measures or the threat thereof,

Reaffirming also the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,

Convinced that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim,

Believing that, although the question whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case, it is nevertheless desirable to formulate basic principles as guidance for such determination,

Adopts the following Definition of Aggression:

#### *Article 1*

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

Explanatory note: In this Definition the term “State”:

- (a) Is used without prejudice to questions of recognition or to whether a State is a Member of the United Nations;
- (b) Includes the concept of a “group of States” where appropriate.

#### *Article 2*

The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

#### *Article 3*

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, of any military occupation, however temporary, resulting from such invasion or attack. or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed hands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

#### *Article 4*

The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

#### *Article 5*

1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.
2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.
3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

#### *Article 6*

Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

#### *Article 7*

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

*Article 8*

In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions.

**EXPLANATORY NOTES FROM THE REPORT OF THE  
SPECIAL COMMITTEE ON THE QUESTION OF  
DEFINING AGGRESSION  
UN GAOR 29th Sess., Supp. No. 19.**

1. With reference to article 3, paragraph (b), the Special Committee agreed that the expression “any weapons” is used without making a distinction between conventional weapons, weapons of mass destruction and any other kind of weapon.
2. With reference to article 5, paragraph 1, the Committee had in mind, in particular, the principle contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations according to which “No State or group of States has the right to intervene, directly or indirectly for any reason whatever, in the internal affairs of any other State”.
3. With reference to article 5, paragraph 2, the words “international responsibility” are used without prejudice to the scope of this term.
4. With reference to article 5, paragraph 3, the Committee states that this paragraph should not be construed so as to prejudice the established principles of international law relating to the inadmissibility of territorial acquisition resulting from the threat or use of force.



**General Assembly**  
30 April 1947

**QUESTION OF PALESTINE**  
**ARTICLE 22 OF THE COVENANT OF THE LEAGUE OF NATIONS**

1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

3. The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic condition and other similar circumstances.

4. Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized, subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

5. Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

6. There are territories, such as South West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

7. In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

8. The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

9. A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.



[http://www.pna.gov.ps/Government/gov/plo\\_Charter.asp](http://www.pna.gov.ps/Government/gov/plo_Charter.asp). - As of July 19 2005

## PLO CHARTER

Also known as “the Palestinian National Charter” or “the Palestinian Covenant”. Adopted by the Palestine National Council, July 1-17, 1968:

**Article 1:** Palestine is the homeland of the Arab Palestinian people; it is an indivisible part of the Arab homeland, and the Palestinian people are an integral part of the Arab nation.

**Article 2:** Palestine, with the boundaries it had during the British Mandate, is an indivisible territorial unit.

**Article 3:** The Palestinian Arab people possess the legal right to their homeland and have the right to determine their destiny after achieving the liberation of their country in accordance with their wishes and entirely of their own accord and will.

**Article 4:** The Palestinian identity is a genuine, essential, and inherent characteristic; it is transmitted from parents to children. The Zionist occupation and the dispersal of the Palestinian Arab people, through the disasters which befell them, do not make them lose their Palestinian identity and their membership in the Palestinian community, nor do they negate them.

**Article 5:** The Palestinians are those Arab nationals who, until 1947, normally resided in Palestine regardless of whether they were evicted from it or have stayed there. Anyone born, after that date, of a Palestinian father – whether inside Palestine or outside it - is also a Palestinian.

**Article 6:** The Jews who had normally resided in Palestine until the beginning of the Zionist invasion will be considered Palestinians.

**Article 7:** That there is a Palestinian community and that it has material, spiritual, and historical connection with Palestine are indisputable facts. It is a national duty to bring up individual Palestinians in an Arab revolutionary manner. All means of information and education must be adopted in order to acquaint the Palestinian with his country in the most profound manner, both spiritual and material, that is possible. He must be prepared for the armed struggle and ready to sacrifice his wealth and his life in order to win back his homeland and bring about its liberation.

**Article 8:** The phase in their history, through which the Palestinian people are now living, is that of national (watani) struggle for the liberation of Palestine. Thus the conflicts among the Palestinian national forces are secondary, and should be ended for the sake of the basic conflict that exists between the forces of Zionism and of imperialism on the one hand, and the Palestinian Arab people on the other. On this basis the Palestinian masses, regardless of whether they are residing in the national homeland or in diaspora (mahajir) constitute – both their organizations and the individuals – one national front working for the retrieval of Palestine and its liberation through armed struggle.

**Article 9:** Armed struggle is the only way to liberate Palestine. Thus it is the overall strategy, not merely a tactical phase. The Palestinian Arab people assert their absolute determination and firm resolution to continue their armed struggle and to work for an armed popular revolution for the liberation of their country and their return to it. They also assert their right to normal life in Palestine and to exercise their right to self-determination and sovereignty over it.

**Article 10:** Commando action constitutes the nucleus of the Palestinian popular liberation war. This requires its escalation, comprehensiveness, and the mobilization of all the Palestinian popular and educational efforts and their organization and involvement in the armed Palestinian revolution. It also requires the achieving of unity for the national (watani) struggle among the different groupings of the Palestinian people, and between the Palestinian people and the Arab masses, so as to secure the continuation of the revolution, its escalation, and victory.

**Article 11:** The Palestinians will have three mottoes: national (wataniyya) unity, national (qawmiyya) mobilization, and liberation.

**Article 12:** The Palestinian people believe in Arab unity. In order to contribute their share toward the attainment of that objective, however, they must, at the present stage of their struggle, safeguard their Palestinian identity and develop their consciousness of that identity, and oppose any plan that may dissolve or impair it.

**Article 13:** Arab unity and the liberation of Palestine are two complementary objectives, the attainment of either of which facilitates the attainment of the other. Thus, Arab unity leads to the liberation of Palestine, the liberation of Palestine leads to Arab unity; and work toward the realization of one objective proceeds side by side with work toward the realization of the other.

**Article 14:** The destiny of the Arab nation, and indeed Arab existence itself, depend upon the destiny of the Palestine cause. From this interdependence springs the Arab nation's pursuit of, and striving for, the liberation of Palestine. The people of Palestine play the role of the vanguard in the realization of this sacred (qawmi) goal.

**Article 15:** The liberation of Palestine, from an Arab viewpoint, is a national (qawmi) duty and it attempts to repel the Zionist and imperialist aggression against the Arab homeland, and aims at the elimination of Zionism in Palestine. Absolute responsibility for this falls upon the Arab nation – peoples and governments – with the Arab people of Palestine in the vanguard. Accordingly, the Arab nation must mobilize all its military, human, moral, and spiritual capabilities to participate actively

with the Palestinian people in the liberation of Palestine. It must, particularly in the phase of the armed Palestinian revolution, offer and furnish the Palestinian people with all possible help, and material and human support, and make available to them the means and opportunities that will enable them to continue to carry out their leading role in the armed revolution, until they liberate their homeland.

**Article 16:** The liberation of Palestine, from a spiritual point of view, will provide the Holy Land with an atmosphere of safety and tranquility, which in turn will safeguard the country's religious sanctuaries and guarantee freedom of worship and of visit to all, without discrimination of race, color, language, or religion. Accordingly, the people of Palestine look to all spiritual forces in the world for support.

**Article 17:** The liberation of Palestine, from a human point of view, will restore to the Palestinian individual his dignity, pride, and freedom. Accordingly the Palestinian Arab people look forward to the support of all those who believe in the dignity of man and his freedom in the world.

**Article 18:** The liberation of Palestine, from an international point of view, is a defensive action necessitated by the demands of self-defense. Accordingly the Palestinian people, desirous as they are of the friendship of all people, look to freedom-loving, and peace-loving states for support in order to restore their legitimate rights in Palestine, to re-establish peace and security in the country, and to enable its people to exercise national sovereignty and freedom.

**Article 19:** The partition of Palestine in 1947 and the establishment of the state of Israel are entirely illegal, regardless of the passage of time, because they were contrary to the will of the Palestinian people and to their natural right in their homeland, and inconsistent with the principles embodied in the Charter of the United Nations, particularly the right to self-determination.

**Article 20:** The Balfour Declaration, the Mandate for Palestine, and everything that has been based upon them, are deemed null and void. Claims of historical or religious ties of Jews with Palestine are incompatible with the facts of history and the true conception of what constitutes statehood. Judaism, being a religion, is not an independent nationality. Nor do Jews constitute a single nation with an identity of its own; they are citizens of the states to which they belong.

**Article 21:** The Arab Palestinian people, expressing themselves by the armed Palestinian revolution, reject all solutions which are substitutes for the total liberation of Palestine and reject all proposals aiming at the liquidation of the Palestinian problem, or its internationalization.

**Article 22:** Zionism is a political movement organically associated with international imperialism and antagonistic to all action for liberation and to progressive movements in the world. It is racist and fanatic in its nature, aggressive, expansionist, and colonial in its aims, and fascist in its methods. Israel is the instrument of the Zionist movement, and geographical base for world imperialism placed strategically in the midst of the Arab homeland to combat the hopes of the Arab nation for liberation, unity, and progress. Israel is a constant source of threat vis-a-vis peace in the Middle East and the whole world. Since the liberation of Palestine will destroy the Zionist and imperialist presence and will contribute to the establishment of peace in the Middle East, the Palestinian people look for the support of all the progressive and peaceful forces and urge them all, irrespective of their affiliations and beliefs, to offer the Palestinian people all aid and support in their just struggle for the liberation of their homeland.

**Article 23:** The demand of security and peace, as well as the demand of right and justice, require all states to consider Zionism an illegitimate movement, to outlaw its existence, and to ban its operations, in order that friendly relations among peoples may be preserved, and the loyalty of citizens to their respective homelands safeguarded.

**Article 24:** The Palestinian people believe in the principles of justice, freedom, sovereignty, self-determination, human dignity, and in the right of all peoples to exercise them.

**Article 25:** For the realization of the goals of this Charter and its principles, the Palestine Liberation Organization will perform its role in the liberation of Palestine in accordance with the Constitution of this Organization.

**Article 26:** The Palestine Liberation Organization, representative of the Palestinian revolutionary forces, is responsible for the Palestinian Arab people's movement in its struggle – to retrieve its homeland, liberate and return to it and exercise the right to self-determination in it – in all military, political, and financial fields and also for whatever may be required by the Palestine case on the inter-Arab and international levels.



**Article 27:** The Palestine Liberation Organization shall cooperate with all Arab states, each according to its potentialities; and will adopt a neutral policy among them in the light of the requirements of the war of liberation; and on this basis it shall not interfere in the internal affairs of any Arab state.

**Article 28:** The Palestinian Arab people assert the genuineness and independence of their national (wataniyya) revolution and reject all forms of intervention, trusteeship, and subordination.

**Article 29:** The Palestinian people possess the fundamental and genuine legal right to liberate and retrieve their homeland. The Palestinian people determine their attitude toward all states and forces on the basis of the stands they adopt vis-a-vis to the Palestinian revolution to fulfill the aims of the Palestinian people.

**Article 30:** Fighters and carriers of arms in the war of liberation are the nucleus of the popular army which will be the protective force for the gains of the Palestinian Arab people.

**Article 31:** The Organization shall have a flag, an oath of allegiance, and an anthem. All this shall be decided upon in accordance with a special regulation.

**Article 32:** Regulations, which shall be known as the Constitution of the Palestinian Liberation Organization, shall be annexed to this Charter. It will lay down the manner in which the Organization, and its organs and institutions, shall be constituted; the respective competence of each; and the requirements of its obligation under the Charter.

**Article 33:** This Charter shall not be amended save by [vote of ] a majority of two-thirds of the total membership of the National Congress of the Palestine Liberation Organization [taken] at a special session convened for that purpose.

# Fateh Online

[http://www.fateh.net/e\\_public/constitution.htm](http://www.fateh.net/e_public/constitution.htm). As of July 19 2005

## **FATEH Constitution – Chapter One**

### **Principles... Goals.... Methods**

#### **The Movement's Essential Principles**

**Article (1)** Palestine is part of the Arab World, and the Palestinian people are part of the Arab Nation, and their struggle is part of its struggle.

**Article (2)** The Palestinian people have an independent identity. They are the sole authority that decides their own destiny, and they have complete sovereignty on all their lands.

**Article (3)** The Palestinian Revolution plays a leading role in liberating Palestine.

**Article (4)** The Palestinian struggle is part and parcel of the world-wide struggle against Zionism, colonialism and international imperialism.

**Article (5)** Liberating Palestine is a national obligation which necessities the materialistic and human support of the Arab Nation.

**Article (6)** UN projects, accords and reso, or those of any individual cowhich undermine the Palestinian people's right in their homeland are illegal and rejected.

**Article (7)** The Zionist Movement is racial, colonial and aggressive in ideology, goals, organisation and method.

**Article (8)** The Israeli existence in Palestine is a Zionist invasion with a colonial expansive base, and it is a natural ally to colonialism and international imperialism.

**Article (9)** Liberating Palestine and protecting its holy places is an Arab, religious and human obligation.

**Article (10)** Palestinian National Liberation Movement, "FATEH", is an independent national revolutionary movement representing the revolutionary vanguard of the Palestinian people.

**Article (11)** The crowds which participate in the revolution and liberation are the proprietors of the Palestinian land.

### **Goals**

**Article (12)** Complete liberation of Palestine, and eradication of Zionist economic, political, military and cultural existence.

**Article (13)** Establishing an independent democratic state with complete sovereignty on all Palestinian lands, and Jerusalem is its capital city, and protecting the citizens' legal and equal rights without any racial or religious discrimination.

**Article (14)** Setting up a progressive society that warrants people’s rights and their public freedom.

**Article (15)** Active participation in achieving the Arab Nation’s goals in liberation and building an independent, progressive and united Arab society.

**Article (16)** Backing up all oppressed people in their struggle for liberation and self-determination in order to build a just, international peace.

### **Method**

**Article (17)** Armed public revolution is the inevitable method to liberating Palestine.

**Article (18)** Entire dependence on the Palestinian people which is the pedestal forefront and on the Arab Nation as a partner in the fight, and realising actual interaction between the Arab Nation and the Palestinian people by involving the Arab people in the fight through a united Arab front.

**Article (19)** Armed struggle is a strategy and not a tactic, and the Palestinian Arab People’s armed revolution is a decisive factor in the liberation fight and in uprooting the Zionist existence, and this struggle will not cease unless the Zionist state is demolished and Palestine is completely liberated.

**Article (20)** Achieving mutual understanding with all the national forces participating in the armed struggle to attain the national unity.

**Article (21)** Revealing the revolutionary nature of the Palestinian identity at the international level, and this does not contradict the everlasting unity between the Arab Nation and the Palestinian people.

**Article (22)** Opposing any political solution offered as an alternative to demolishing the Zionist occupation in Palestine, as well as any project intended to liquidate the Palestinian case or impose any international mandate on its people.

**Article (23)** Maintaining relations with Arab countries with the objective of developing the positive aspects in their attitudes with the proviso that the armed struggle is not negatively affected.

**Article (24)** Maintaining relations with all liberal forces supporting our just struggle in order to resist together Zionism and imperialism.

**Article (25)** Convincing concerned countries in the world to prevent Jewish immigration to Palestine as a method of solving the problem.

**Article (26)** Avoiding attempts to exploit the Palestinian case in any Arab or international problems and considering the case above all contentions.

**Article (27)** “FATEH” does not interfere with local Arab affairs and hence, does not tolerate such interference or obstructing its struggle by any party.



**INTERNATIONAL COURT OF JUSTICE**

**YEAR 2004**  
**9 July 2004**

**2004**  
**9 July**  
**General List**  
**No. 131**

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

*Jurisdiction of the Court to give the advisory opinion requested.*

*Article 65, paragraph 1, of the Statute – Article 96, paragraph 1, of the Charter – Power of General Assembly to request advisory opinions – Activities of Assembly.*

*Events leading to the adoption of General Assembly resolution ES-10/14 requesting the advisory opinion.*

*Contention that General Assembly acted ultra vires under the Charter – Article 12, paragraph 1, and Article 24 of the Charter – United Nations practice concerning the interpretation of Article 12, paragraph 1, of Charter – General Assembly did not exceed its competence.*

*Request for opinion adopted by the Tenth Emergency Special Session of the General Assembly – Session convened pursuant to resolution 377 A (V) (“Uniting for Peace”) – Conditions set by that resolution – Regularity of procedure followed.*

*Alleged lack of clarity of the terms of the question – Purportedly abstract nature of the question – Political aspects of the question – Motives said to have inspired the request and opinion’s possible implications – “Legal” nature of question unaffected.*

*Court having jurisdiction to give advisory opinion requested.*

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*Discretionary power of Court to decide whether it should give an opinion.*

*Article 65, paragraph 1, of Statute – Relevance of lack of consent of a State concerned – Question cannot be regarded only as a bilateral matter between Israel and Palestine but is directly*

*of concern to the United Nations – Possible effects of opinion on a political, negotiated solution to the Israeli-Palestinian conflict – Question representing only one aspect of Israeli-Palestinian conflict – Sufficiency of information and evidence available to Court – Useful purpose of opinion – Nullus commodum capere potest de sua injuria propria – Opinion to be given to the General Assembly, not to a specific State or entity.*

*No “compelling reason” for Court to use its discretionary power not to give an advisory opinion.*

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*“Legal consequences ” of a wall in Occupied Palestinian Territory, including in and around East Jerusalem – Scope of question posed – Request for opinion limited to the legal consequences of the construction of those parts of the wall situated in Occupied Palestinian Territory – Use of the term “wall”.*

*Historical background.*

*Description of the wall.*

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*Applicable law.*

*United Nations Charter – General Assembly resolution 2625 (XXV) – Illegality of any territorial acquisition resulting from the threat or use of force – Right of peoples to self-determination.*

*International humanitarian law – Regulations annexed to the Fourth Hague Convention of 1907 – Fourth Geneva Convention of 1949 – Applicability of Fourth Geneva Convention in the Occupied Palestinian Territory – Human rights law – International Covenant on Civil and Political Rights – International Covenant on Economic, Social and Cultural Rights – Convention on the Rights of the Child – Relationship between international humanitarian law and human rights law – Applicability of human rights instruments outside national territory – Applicability of those instruments in the Occupied Palestinian Territory.*

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*Settlements established by Israel in breach of international law in the Occupied Palestinian Territory – Construction of the wall and its associated régime create a “fait accompli” on the ground that could well become permanent – Risk of situation tantamount to de facto annexation – Construction of 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.*

*Applicable provisions of international humanitarian law and human rights instruments relevant to the present case – Destruction and requisition of properties – Restrictions on freedom of movement of inhabitants of the Occupied Palestinian Territory – Impediments to the exercise by those concerned of the right to work, to health, to education and to an adequate standard of living – Demographic changes in the Occupied Palestinian Territory – Provisions of international humanitarian law enabling account to be taken of military exigencies – Clauses in human rights instruments qualifying rights guaranteed or providing for derogation – Construction of the wall and its associated régime cannot be justified by military exigencies or by the requirements of national*

*security or public order – Breach by Israel of various of its obligations under the applicable provisions of international humanitarian law and human rights instruments.*

*Self-defence – Article 51 of the Charter – Attacks against Israel not imputable to a foreign State – Threat invoked to justify the construction of the wall originating within a territory over which Israel exercises control – Article 51 not relevant in the present case.*

*State of necessity – Customary international law – Conditions – Construction of the wall not the only means to safeguard Israel's interests against the peril invoked.*

*Construction of the wall and its associated régime are contrary to international law.*

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*Legal consequences of the violation by Israel of its obligations.*

*Israel's international responsibility – Israel obliged to comply with the international obligations it has breached by the construction of the wall – Israel obliged to put an end to the violation of its international obligations – Obligation to cease forthwith the works of construction of the wall, to dismantle it forthwith and to repeal or render ineffective forthwith the legislative and regulatory acts relating to its construction, save where relevant for compliance by Israel with its obligation to make reparation for the damage caused – Israel obliged to make reparation for the damage caused to all natural or legal persons affected by construction of the wall.*

*Legal consequences for States other than Israel – Erga omnes character of certain obligations violated by Israel – Obligation for all States not to recognize the illegal situation resulting from construction of the wall and not to render aid or assistance in maintaining the situation created by such construction – Obligation for all States, while respecting the Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end – Obligation for all States parties to the Fourth Geneva Convention, while respecting the Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention – Need for the United Nations, and especially the General Assembly and the Security Council, to consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and its associated régime, taking due account of the Advisory Opinion.*

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*Construction of the wall must be placed in a more general context – Obligation of Israel and Palestine scrupulously to observe international humanitarian law – Implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973) – “Roadmap” – Need for efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, with peace and security for all in the region.*

## ADVISORY OPINION

*Present:* President SHI; Vice-President RANJEVA; Judges GUILLAUME, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, ELARABY, OWADA, SIMMA, TOMKA; Registrar COUVREUR.

On the legal consequences of the construction of a wall in the Occupied Palestinian Territory,  
THE COURT,

Composed as above,

*Gives the following Advisory Opinion:*

1. The question on which the advisory opinion of the Court has been requested is set forth in resolution ES-10/14 adopted by the General Assembly of the United Nations (hereinafter the “General Assembly”) on 8 December 2003 at its Tenth Emergency Special Session. By a letter dated 8 December 2003 and received in the Registry by facsimile on 10 December 2003, the original of which reached the Registry subsequently, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit the question for an advisory opinion. Certified true copies of the English and French versions of resolution ES-10/14 were enclosed with the letter. The resolution reads as follows:

*“The General Assembly,*

*Reaffirming* its resolution ES-10/13 of 21 October 2003,

*Guided by* the principles of the Charter of the United Nations,

*Aware* of the established principle of international law on the inadmissibility of the acquisition of territory by force,

*Aware also* that developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples is among the purposes and principles of the Charter of the United Nations,

*Recalling* relevant General Assembly resolutions, including resolution 181 (II) of 29 November 1947, which partitioned mandated Palestine into two States, one Arab and one Jewish,

*Recalling also* the resolutions of the tenth emergency special session of the General Assembly,

*Recalling further* relevant Security Council resolutions, including resolutions 242 (1967) of 22 November 1967, 338 (1973) of 22 October 1973, 267 (1969) of 3 July 1969, 298 (1971) of 25 September 1971, 446 (1979) of 22 March 1979, 452 (1979) of 20 July 1979, 465 (1980) of 1 March 1980, 476 (1980) of 30 June 1980, 478 (1980) of 20 August 1980, 904 (1994) of 18 March 1994, 1073 (1996) of 28 September 1996, 1397 (2002) of 12 March 2002 and 1515 (2003) of 19 November 2003,



*Reaffirming* the applicability of the Fourth Geneva Convention<sup>1</sup> as well as Additional Protocol I to the Geneva Conventions<sup>2</sup> to the Occupied Palestinian Territory, including East Jerusalem,

*Recalling* the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land of 1907<sup>3</sup>,

*Welcoming* the convening of the Conference of High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, at Geneva on 15 July 1999,

*Expressing its support* for the declaration adopted by the reconvened Conference of High Contracting Parties at Geneva on 5 December 2001,

*Recalling in particular* relevant United Nations resolutions affirming that Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, are illegal and an obstacle to peace and to economic and social development as well as those demanding the complete cessation of settlement activities,

*Recalling* relevant United Nations resolutions affirming that actions taken by Israel, the occupying Power, to change the status and demographic composition of Occupied East Jerusalem have no legal validity and are null and void,

*Noting* the agreements reached between the Government of Israel and the Palestine Liberation Organization in the context of the Middle East peace process,

*Gravely concerned* at the commencement and continuation of construction by Israel, the occupying Power, of a wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure from the Armistice Line of 1949 (Green Line) and which has involved the confiscation and destruction of Palestinian land and resources, the disruption of the lives of thousands of protected civilians and the de facto annexation of large areas of territory, and underlining the unanimous opposition by the international community to the construction of that wall,

*Gravely concerned also* at the even more devastating impact of the projected parts of the wall on the Palestinian civilian population and on the prospects for solving the Palestinian-Israeli conflict and establishing peace in the region,

*Welcoming* the report of 8 September 2003 of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967<sup>4</sup>, in particular the section regarding the wall,

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

<sup>2</sup> *Ibid.*, Vol. 1125, No. 17512.

<sup>3</sup> See Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915).

<sup>4</sup> E/CN.4/2004/6.

*Affirming* the necessity of ending the conflict on the basis of the two-State solution of Israel and Palestine living side by side in peace and security based on the Armistice Line of 1949, in accordance with relevant Security Council and General Assembly resolutions,

*Having received with appreciation* the report of the Secretary-General, submitted in accordance with resolution ES-10/13<sup>5</sup>,

*Bearing in mind* that the passage of time further compounds the difficulties on the ground, as Israel, the occupying Power, continues to refuse to comply with international law vis-à-vis its construction of the above-mentioned wall, with all its detrimental implications and consequences,

*Decides*, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to urgently render an advisory opinion on the following question:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

Also enclosed with the letter were the certified English and French texts of the report of the Secretary-General dated 24 November 2003, prepared pursuant to General Assembly resolution ES-10/13 (A/ES-10/248), to which resolution ES-10/14 makes reference.

2. By letters dated 10 December 2003, the Registrar notified the request for an advisory opinion to all States entitled to appear before the Court, in accordance with Article 66, paragraph 1, of the Statute.

3. By a letter dated 11 December 2003, the Government of Israel informed the Court of its position on the request for an advisory opinion and on the procedure to be followed.

4. By an Order of 19 December 2003, the Court decided that the United Nations and its Member States were likely, in accordance with Article 66, paragraph 2, of the Statute, to be able to furnish information on all aspects raised by the question submitted to the Court for an advisory opinion and fixed 30 January 2004 as the time-limit within which written statements might be submitted to it on the question in accordance with Article 66, paragraph 4, of the Statute. By the same Order, the Court further decided that, in the light of resolution ES-10/14 and the report of the Secretary-General transmitted with the request, and taking into account the fact that the General Assembly had granted Palestine a special status of observer and that the latter was co-sponsor of the

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<sup>5</sup> A/ES-10/248.”

draft resolution requesting the advisory opinion, Palestine might also submit a written statement on the question within the above time-limit.

5. By the aforesaid Order, the Court also decided, in accordance with Article 105, paragraph 4, of the Rules of Court, to hold public hearings during which oral statements and comments might be presented to it by the United Nations and its Member States, regardless of whether or not they had submitted written statements, and fixed 23 February 2004 as the date for the opening of the said hearings. By the same Order, the Court decided that, for the reasons set out above (see paragraph 4), Palestine might also take part in the hearings. Lastly, it invited the United Nations and its Member States, as well as Palestine, to inform the Registry, by 13 February 2004 at the latest, if they were intending to take part in the above-mentioned hearings. By letters of 19 December 2004, the Registrar informed them of the Court's decisions and transmitted to them a copy of the Order.

6. Ruling on requests submitted subsequently by the League of Arab States and the Organization of the Islamic Conference, the Court decided, in accordance with Article 66 of its Statute, that those two international organizations were likely to be able to furnish information on the question submitted to the Court, and that consequently they might for that purpose submit written statements within the time-limit fixed by the Court in its Order of 19 December 2003 and take part in the hearings.

7. Pursuant to Article 65, paragraph 2, of the Statute, the Secretary-General of the United Nations communicated to the Court a dossier of documents likely to throw light upon the question.

8. By a reasoned Order of 30 January 2004 regarding its composition in the case, the Court decided that the matters brought to its attention by the Government of Israel in a letter of 31 December 2003, and in a confidential letter of 15 January 2004 addressed to the President pursuant to Article 34, paragraph 2, of the Rules of Court, were not such as to preclude Judge Elaraby from sitting in the case.

9. Within the time-limit fixed by the Court for that purpose, written statements were filed by, in order of their receipt: Guinea, Saudi Arabia, League of Arab States, Egypt, Cameroon, Russian Federation, Australia, Palestine, United Nations, Jordan, Kuwait, Lebanon, Canada, Syria, Switzerland, Israel, Yemen, United States of America, Morocco, Indonesia, Organization of the Islamic Conference, France, Italy, Sudan, South Africa, Germany, Japan, Norway, United Kingdom, Pakistan, Czech Republic, Greece, Ireland on its own behalf, Ireland on behalf of the European Union, Cyprus, Brazil, Namibia, Malta, Malaysia, Netherlands, Cuba, Sweden, Spain, Belgium, Palau, Federated States of Micronesia, Marshall Islands, Senegal, Democratic People's Republic of Korea. Upon receipt of those statements, the Registrar transmitted copies thereof to the United Nations and its Member States, to Palestine, to the League of Arab States and to the Organization of the Islamic Conference.

10. Various communications were addressed to these latter by the Registry, concerning in particular the measures taken for the organization of the oral proceedings. By communications of 20 February 2004, the Registry transmitted a detailed timetable of the hearings to those of the latter who, within the time-limit fixed for that purpose by the Court, had expressed their intention of taking part in the aforementioned proceedings.

11. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements accessible to the public, with effect from the opening of the oral proceedings.

12. In the course of hearings held from 23 to 25 February 2004, the Court heard oral statements, in the following order, by:

*For Palestine:*

H.E. Mr. Nasser Al-Kidwa, Ambassador, Permanent Observer of Palestine to the United Nations,  
Ms Stephanie Koury, Member, Negotiations Support Unit, Counsel,  
Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Member of the Institute of International Law, Counsel and Advocate,  
Mr. Georges Abi-Saab, Professor of International Law, Graduate Institute of International Studies, Geneva, Member of the Institute of International Law, Counsel and Advocate,  
Mr. Vaughan Lowe, Chichele Professor of International Law, University of Oxford, Counsel and Advocate,  
Mr. Jean Salmon, Professor Emeritus of International Law, Université libre de Bruxelles, Member of the Institute of International Law, Counsel and Advocate;

*For the Republic of South Africa:*

H.E. Mr. Aziz Pahad, Deputy Minister for Foreign Affairs, Head of Delegation,  
Judge M. R. W. Madlanga, S.C.;

*For the People's Democratic Republic of Algeria:*

Mr. Ahmed Laraba, Professor of International Law;

*For the Kingdom of Saudi Arabia:*

H.E. Mr. Fawzi A. Shobokshi, Ambassador and Permanent Representative of the Kingdom of Saudi Arabia to the United Nations in New York, Head of Delegation;

*For the People's Republic of Bangladesh:*

H.E. Mr. Liaquat Ali Choudhury, Ambassador of the People's Republic of Bangladesh to the Kingdom of the Netherlands;

*For Belize:*

Mr. Jean-Marc Sorel, Professor at the University of Paris I (Panthéon-Sorbonne);

*For the Republic of Cuba:*

H.E. Mr. Abelardo Moreno Fernández, Deputy Minister for Foreign Affairs;

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| <i>For the Republic of Indonesia:</i>                  | H.E. Mr. Mohammad Jusuf, Ambassador of the Republic of Indonesia to the Kingdom of the Netherlands, Head of Delegation;  |
| <i>For the Hashemite Kingdom of Jordan:</i>            | H.R.H. Ambassador Zeid Ra'ad Zeid Al-Hussein, Permanent Representative of the Hashemite Kingdom of Jordan to the United Nations, New York, Head of Delegation,<br>Sir Arthur Watts, K.C.M.G., Q.C., Senior Legal Adviser to the Government of the Hashemite Kingdom of Jordan; |
| <i>For the Republic of Madagascar:</i>                 | H.E. Mr. Alfred Rambeloson, Permanent Representative of Madagascar to the Office of the United Nations at Geneva and to the Specialized Agencies, Head of Delegation;  |
| <i>For Malaysia:</i>                                   | H.E. Datuk Seri Syed Hamid Albar, Foreign Minister of Malaysia, Head of Delegation;  |
| <i>For the Republic of Senegal:</i>                    | H.E. Mr. Saliou Cissé, Ambassador of the Republic of Senegal to the Kingdom of the Netherlands, Head of Delegation;  |
| <i>For the Republic of the Sudan:</i>                  | H.E. Mr. Abuelgasim A. Idris, Ambassador of the Republic of the Sudan to the Kingdom of the Netherlands;   |
| <i>For the League of Arab States:</i>                  | Mr. Michael Bothe, Professor of Law, Head of the Legal Team;   |
| <i>For the Organization of the Islamic Conference:</i> | H.E. Mr. Abdelouahed Belkeziz, Secretary General of the Organization of the Islamic Conference,<br>Ms Monique Chemillier-Gendreau, Professor of Public Law, University of Paris VII-Denis Diderot, as Counsel.   |

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13. When seised of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why it should decline to exercise any such jurisdiction (see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 232, para. 10).

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14. The Court will thus first address the question whether it possesses jurisdiction to give the advisory opinion requested by the General Assembly on 8 December 2003. The competence of the Court in this regard is based on Article 65, paragraph 1, of its Statute, according to which the Court “may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request”. The Court has already had occasion to indicate that:

“It is . . . a precondition of the Court’s competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ.” (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, pp. 333-334, para. 21.)

15. It is for the Court to satisfy itself that the request for an advisory opinion comes from an organ or agency having competence to make it. In the present instance, the Court notes that the General Assembly, which seeks the advisory opinion, is authorized to do so by Article 96, paragraph 1, of the Charter, which provides: “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.”

16. Although the above-mentioned provision states that the General Assembly may seek an advisory opinion “on any legal question”, the Court has sometimes in the past given certain indications as to the relationship between the question the subject of a request for an advisory opinion and the activities of the General Assembly (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, p. 70; *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, pp. 232 and 233, paras. 11 and 12).

17. The Court will so proceed in the present case. The Court would observe that Article 10 of the Charter has conferred upon the General Assembly a competence relating to “any questions or any matters” within the scope of the Charter, and that Article 11, paragraph 2, has specifically provided it with competence on “questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations . . .” and to make recommendations under certain conditions fixed by those Articles. As will be explained below, the question of the construction of the wall in the Occupied Palestinian Territory was brought before the General Assembly by a number of Member States in the context of the Tenth Emergency Special Session of the Assembly, convened to deal with what the Assembly, in its resolution ES-10/2 of 25 April 1997, considered to constitute a threat to international peace and security.

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18. Before further examining the problems of jurisdiction that have been raised in the present proceedings, the Court considers it necessary to describe the events that led to the adoption of resolution ES-10/14, by which the General Assembly requested an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

19. The Tenth Emergency Special Session of the General Assembly, at which that resolution was adopted, was first convened following the rejection by the Security Council, on 7 March and 21 March 1997, as a result of negative votes by a permanent member, of two draft resolutions concerning certain Israeli settlements in the Occupied Palestinian Territory (see, respectively, S/1997/199 and S/PV.3747, and S/1997/241 and S/PV.3756). By a letter of 31 March 1997, the Chairman of the Arab Group then requested “that an emergency special session of the General

Assembly be convened pursuant to resolution 377 A (V) entitled ‘Uniting for Peace’” with a view to discussing “Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory” (letter dated 31 March 1997 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General, A/ES-10/1, 22 April 1997, Annex). The majority of Members of the United Nations having concurred in this request, the first meeting of the Tenth Emergency Special Session of the General Assembly took place on 24 April 1997 (see A/ES-10/1, 22 April 1997). Resolution ES-10/2 was adopted the following day; the General Assembly thereby expressed its conviction that:

“the repeated violation by Israel, the occupying Power, of international law and its failure to comply with relevant Security Council and General Assembly resolutions and the agreements reached between the parties undermine the Middle East peace process and constitute a threat to international peace and security”,

and condemned the “illegal Israeli actions” in occupied East Jerusalem and the rest of the Occupied Palestinian Territory, in particular the construction of settlements in that territory. The Tenth Emergency Special Session was then adjourned temporarily and has since been reconvened 11 times (on 15 July 1997, 13 November 1997, 17 March 1998, 5 February 1999, 18 October 2000, 20 December 2001, 7 May 2002, 5 August 2002, 19 September 2003, 20 October 2003 and 8 December 2003).

20. By a letter dated 9 October 2003, the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, requested an immediate meeting of the Security Council to consider the “grave and ongoing Israeli violations of international law, including international humanitarian law, and to take the necessary measures in this regard” (letter of 9 October 2003 from the Permanent Representative of the Syrian Arab Republic to the United Nations to the President of the Security Council, S/2003/973, 9 October 2003). This letter was accompanied by a draft resolution for consideration by the Council, which condemned as illegal the construction by Israel of a wall in the Occupied Palestinian Territory departing from the Armistice Line of 1949. The Security Council held its 4841st and 4842nd meetings on 14 October 2003 to consider the item entitled “The situation in the Middle East, including the Palestine question”. It then had before it another draft resolution proposed on the same day by Guinea, Malaysia, Pakistan and the Syrian Arab Republic, which also condemned the construction of the wall. This latter draft resolution was put to a vote after an open debate and was not adopted owing to the negative vote of a permanent member of the Council (S/PV.4841 and S/PV.4842).

On 15 October 2003, the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, requested the resumption of the Tenth Emergency Special Session of the General Assembly to consider the item of “Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory” (A/ES-10/242); this request was supported by the Non-Aligned Movement (A/ES-10/243) and the Organization of the Islamic Conference Group at the United Nations (A/ES-10/244). The Tenth Emergency Special Session resumed its work on 20 October 2003.

21. On 27 October 2003, the General Assembly adopted resolution ES-10/13, by which it demanded that “Israel stop and reverse the construction of the wall in the Occupied Palestinian



Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law” (para. 1). In paragraph 3, the Assembly requested the Secretary-General “to report on compliance with the . . . resolution periodically, with the first report on compliance with paragraph 1 [of that resolution] to be submitted within one month . . .”. The Tenth Emergency Special Session was temporarily adjourned and, on 24 November 2003, the report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13 (hereinafter the “report of the Secretary-General”) was issued (A/ES-10/248).

22. Meanwhile, on 19 November 2003, the Security Council adopted resolution 1515 (2003), by which it “*Endorse[d]* the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict”. The Quartet consists of representatives of the United States of America, the European Union, the Russian Federation and the United Nations. That resolution “*Call[ed]* on the parties to fulfil their obligations under the Roadmap in cooperation with the Quartet and to achieve the vision of two States living side by side in peace and security.” Neither the “Roadmap” nor resolution 1515 (2003) contained any specific provision concerning the construction of the wall, which was not discussed by the Security Council in this context.

23. Nineteen days later, on 8 December 2003, the Tenth Emergency Special Session of the General Assembly again resumed its work, following a new request by the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, and pursuant to resolution ES-10/13 (letter dated 1 December 2003 to the President of the General Assembly from the Chargé d’affaires a.i. of the Permanent Mission of Kuwait to the United Nations, A/ES-10/249, 2 December 2003). It was during the meeting convened on that day that resolution ES-10/14 requesting the present Advisory Opinion was adopted.

...

24. Having thus recalled the sequence of events that led to the adoption of resolution ES-10/14, the Court will now turn to the questions of jurisdiction that have been raised in the present proceedings. First, Israel has alleged that, given the active engagement of the Security Council with the situation in the Middle East, including the Palestinian question, the General Assembly acted *ultra vires* under the Charter when it requested an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

25. The Court has already indicated that the subject of the present request for an advisory opinion falls within the competence of the General Assembly under the Charter (see paragraphs 15-17 above). However, Article 12, paragraph 1, of the Charter provides that:

“While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”

A request for an advisory opinion is not in itself a “recommendation” by the General Assembly “with regard to [a] dispute or situation”. It has however been argued in this case that the adoption by the General Assembly of resolution ES-10/14 was *ultra vires* as not in accordance with Article 12. The



Court thus considers that it is appropriate for it to examine the significance of that Article, having regard to the relevant texts and the practice of the United Nations.

26. Under Article 24 of the Charter the Security Council has “primary responsibility for the maintenance of international peace and security”. In that regard it can impose on States “an explicit obligation of compliance if for example it issues an order or command . . . under Chapter VII” and can, to that end, “require enforcement by coercive action” (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, p. 163*). However, the Court would emphasize that Article 24 refers to a primary, but not necessarily exclusive, competence. The General Assembly does have the power, *inter alia*, under Article 14 of the Charter, to “recommend measures for the peaceful adjustment” of various situations (*Certain Expenses of the United Nations, ibid.*, p. 163). “[T]he only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so.” (*Ibid.*).

27. As regards the practice of the United Nations, both the General Assembly and the Security Council initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council’s agenda. Thus the Assembly during its fourth session refused to recommend certain measures on the question of Indonesia, on the ground, *inter alia*, that the Council remained seised of the matter (*Official Records of the General Assembly, Fourth Session, Ad Hoc Political Committee, Summary Records of Meetings, 27 September-7 December 1949, 56th Meeting, 3 December 1949, p. 339, para. 118*). As for the Council, on a number of occasions it deleted items from its agenda in order to enable the Assembly to deliberate on them (for example, in respect of the Spanish question (*Official Records of the Security Council, First Year: Second Series, No. 21, 79th Meeting, 4 November 1946, p. 498*), in connection with incidents on the Greek border (*Official Records of the Security Council, Second Year, No. 89, 202nd Meeting, 15 September 1947, pp. 2404-2405*) and in regard to the Island of Taiwan (Formosa) (*Official Records of the Security Council, Fifth Year, No. 48, 506th Meeting, 29 September 1950, p. 5*)). In the case of the Republic of Korea, the Council decided on 31 January 1951 to remove the relevant item from the list of matters of which it was seised in order to enable the Assembly to deliberate on the matter (*Official Records of the Security Council, Sixth Year, S/PV.531, 531st Meeting, 31 January 1951, pp. 11-12, para. 57*).

However, this interpretation of Article 12 has evolved subsequently. Thus the General Assembly deemed itself entitled in 1961 to adopt recommendations in the matter of the Congo (resolutions 1955 (XV) and 1600 (XVI)) and in 1963 in respect of the Portuguese colonies (resolution 1913 (XVIII)) while those cases still appeared on the Council’s agenda, without the Council having adopted any recent resolution concerning them. In response to a question posed by Peru during the Twenty-third session of the General Assembly, the Legal Counsel of the United Nations confirmed that the Assembly interpreted the words “is exercising the functions” in Article 12 of the Charter as meaning “is exercising the functions at this moment” (Twenty-third General Assembly, Third Committee, 1637th meeting, A/C.3/SR.1637, para. 9). Indeed, the Court notes that there has

been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security (see, for example, the matters involving Cyprus, South Africa, Angola, Southern Rhodesia and more recently Bosnia and Herzegovina and Somalia). It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.

28. The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter.

The Court is accordingly of the view that the General Assembly, in adopting resolution ES-10/14, seeking an advisory opinion from the Court, did not contravene the provisions of Article 12, paragraph 1, of the Charter. The Court concludes that by submitting that request the General Assembly did not exceed its competence.

29. It has however been contended before the Court that the present request for an advisory opinion did not fulfil the essential conditions set by resolution 377 A (V), under which the Tenth Emergency Special Session was convened and has continued to act. In this regard, it has been said, first, that “The Security Council was never seised of a draft resolution proposing that the Council itself should request an advisory opinion from the Court on the matters now in contention”, and, that specific issue having thus never been brought before the Council, the General Assembly could not rely on any inaction by the Council to make such a request. Secondly, it has been claimed that, in adopting resolution 1515 (2003), which endorsed the “Roadmap”, before the adoption by the General Assembly of resolution ES-10/14, the Security Council continued to exercise its responsibility for the maintenance of international peace and security and that, as a result, the General Assembly was not entitled to act in its place. The validity of the procedure followed by the Tenth Emergency Special Session, especially the Session’s “rolling character” and the fact that its meeting was convened to deliberate on the request for the advisory opinion at the same time as the General Assembly was meeting in regular session, has also been questioned.

30. The Court would recall that resolution 377 A (V) states that:

“if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures . . .”

The procedure provided for by that resolution is premised on two conditions, namely that the Council has failed to exercise its primary responsibility for the maintenance of international peace and security as a result of a negative vote of one or more permanent members, and that the situation is one in which there appears to be a threat to the peace, breach of the peace, or act of aggression. The Court must accordingly ascertain whether these conditions were fulfilled as regards the convening of the

Tenth Emergency Special Session of the General Assembly, in particular at the time when the Assembly decided to request an advisory opinion from the Court.

31. In the light of the sequence of events described in paragraphs 18 to 23 above, the Court observes that, at the time when the Tenth Emergency Special Session was convened in 1997, the Council had been unable to take a decision on the case of certain Israeli settlements in the Occupied Palestinian Territory, due to negative votes of a permanent member; and that, as indicated in resolution ES-10/2 (see paragraph 19 above), there existed a threat to international peace and security.

The Court further notes that, on 20 October 2003, the Tenth Emergency Special Session of the General Assembly was reconvened on the same basis as in 1997 (see the statements by the representatives of Palestine and Israel, A/ES-10/PV.21, pp. 2 and 5), after the rejection by the Security Council, on 14 October 2003, again as a result of the negative vote of a permanent member, of a draft resolution concerning the construction by Israel of the wall in the Occupied Palestinian Territory. The Court considers that the Security Council again failed to act as contemplated in resolution 377 A (V). It does not appear to the Court that the situation in this regard changed between 20 October 2003 and 8 December 2003, since the Council neither discussed the construction of the wall nor adopted any resolution in that connection. Thus, the Court is of the view that, up to 8 December 2003, the Council had not reconsidered the negative vote of 14 October 2003. It follows that, during that period, the Tenth Emergency Special Session was duly reconvened and could properly be seised, under resolution 377 A (V), of the matter now before the Court.

32. The Court would also emphasize that, in the course of this Emergency Special Session, the General Assembly could adopt any resolution falling within the subject-matter for which the Session had been convened, and otherwise within its powers, including a resolution seeking the Court's opinion. It is irrelevant in that regard that no proposal had been made to the Security Council to request such an opinion.

33. Turning now to alleged further procedural irregularities of the Tenth Emergency Special Session, the Court does not consider that the "rolling" character of that Session, namely the fact of its having been convened in April 1997 and reconvened 11 times since then, has any relevance with regard to the validity of the request by the General Assembly. The Court observes in that regard that the Seventh Emergency Special Session of the General Assembly, having been convened on 22 July 1980, was subsequently reconvened four times (on 20 April 1982, 25 June 1982, 16 August 1982 and 24 September 1982), and that the validity of resolutions or decisions of the Assembly adopted under such circumstances was never disputed. Nor has the validity of any previous resolutions adopted during the Tenth Emergency Special Session been challenged.

34. The Court also notes the contention by Israel that it was improper to reconvene the Tenth Emergency Special Session at a time when the regular Session of the General Assembly was in progress. The Court considers that, while it may not have been originally contemplated that it would be appropriate for the General Assembly to hold simultaneous emergency and regular sessions, no rule of the Organization has been identified which would be thereby violated, so as to render invalid the resolution adopting the present request for an advisory opinion.

35. Finally, the Tenth Emergency Special Session appears to have been convened in accordance with Rule 9 (b) of the Rules of Procedure of the General Assembly, and the relevant meetings have been convened in pursuance of the applicable rules. As the Court stated in its Advisory Opinion of 21 June 1971 concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, a “resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ’s rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted” (*I.C.J. Reports 1971*, p. 22, para. 20). In view of the foregoing, the Court cannot see any reason why that presumption is to be rebutted in the present case.

...

36. The Court now turns to a further issue related to jurisdiction in the present proceedings, namely the contention that the request for an advisory opinion by the General Assembly is not on a “legal question” within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute of the Court. It has been contended in this regard that, for a question to constitute a “legal question” for the purposes of these two provisions, it must be reasonably specific, since otherwise it would not be amenable to a response by the Court. With regard to the request made in the present advisory proceedings, it has been argued that it is not possible to determine with reasonable certainty the legal meaning of the question asked of the Court for two reasons.

First, it has been argued that the question regarding the “legal consequences” of the construction of the wall only allows for two possible interpretations, each of which would lead to a course of action that is precluded for the Court. The question asked could first be interpreted as a request for the Court to find that the construction of the wall is illegal, and then to give its opinion on the legal consequences of that illegality. In this case, it has been contended, the Court should decline to respond to the question asked for a variety of reasons, some of which pertain to jurisdiction and others rather to the issue of propriety. As regards jurisdiction, it is said that, if the General Assembly had wished to obtain the view of the Court on the highly complex and sensitive question of the legality of the construction of the wall, it should have expressly sought an opinion to that effect (cf. *Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10*, p. 17). A second possible interpretation of the request, it is said, is that the Court should assume that the construction of the wall is illegal, and then give its opinion on the legal consequences of that assumed illegality. It has been contended that the Court should also decline to respond to the question on this hypothesis, since the request would then be based on a questionable assumption and since, in any event, it would be impossible to rule on the legal consequences of illegality without specifying the nature of that illegality.

Secondly, it has been contended that the question asked of the Court is not of a “legal” character because of its imprecision and abstract nature. In particular, it has been argued in this regard that the question fails to specify whether the Court is being asked to address legal consequences for “the General Assembly or some other organ of the United Nations”, “Member States of the United Nations”, “Israel”, “Palestine” or “some combination of the above, or some different entity”.

37. As regards the alleged lack of clarity of the terms of the General Assembly’s request and its effect on the “legal nature” of the question referred to the Court, the Court observes that this ques-

tion is directed to the legal consequences arising from a given factual situation considering the rules and principles of international law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter the “Fourth Geneva Convention”) and relevant Security Council and General Assembly resolutions. The question submitted by the General Assembly has thus, to use the Court’s phrase in its Advisory Opinion on *Western Sahara*, “been framed in terms of law and raise[s] problems of international law”; it is by its very nature susceptible of a reply based on law; indeed it is scarcely susceptible of a reply otherwise than on the basis of law. In the view of the Court, it is indeed a question of a legal character (see *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15).

38. The Court would point out that lack of clarity in the drafting of a question does not deprive the Court of jurisdiction. Rather, such uncertainty will require clarification in interpretation, and such necessary clarifications of interpretation have frequently been given by the Court.

In the past, both the Permanent Court and the present Court have observed in some cases that the wording of a request for an advisory opinion did not accurately state the question on which the Court’s opinion was being sought (*Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16 (I)*, pp. 14-16), or did not correspond to the “true legal question” under consideration (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, pp. 87-89, paras. 34-36). The Court noted in one case that “the question put to the Court is, on the face of it, at once infelicitously expressed and vague” (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, para. 46).

Consequently, the Court has often been required to broaden, interpret and even reformulate the questions put (see the three Opinions cited above; see also *Jaworzina, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8; Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 25; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, pp. 157-162).

In the present instance, the Court will only have to do what it has often done in the past, namely “identify the existing principles and rules, interpret them and apply them . . . , thus offering a reply to the question posed based on law” (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, p. 234, para. 13).

39. In the present instance, if the General Assembly requests the Court to state the “legal consequences” arising from the construction of the wall, the use of these terms necessarily encompasses an assessment of whether that construction is or is not in breach of certain rules and principles of international law. Thus, the Court is first called upon to determine whether such rules and principles have been and are still being breached by the construction of the wall along the planned route.

40. The Court does not consider that what is contended to be the abstract nature of the question posed to it raises an issue of jurisdiction. Even when the matter was raised as an issue of propriety rather than one of jurisdiction, in the case concerning the *Legality of the Threat or Use of*

*Nuclear Weapons*, the Court took the position that to contend that it should not deal with a question couched in abstract terms is “a mere affirmation devoid of any justification” and that “the Court may give an advisory opinion on any legal question, abstract or otherwise” (*I.C.J. Reports 1996 (I)*, p. 236, para. 15, referring to *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, 1948, *I.C.J. Reports 1947-1948*, p. 61; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, *I.C.J. Reports 1954*, p. 51; and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, p. 27, para. 40). In any event, the Court considers that the question posed to it in relation to the legal consequences of the construction of the wall is not an abstract one, and moreover that it would be for the Court to determine for whom any such consequences arise.

41. Furthermore, the Court cannot accept the view, which has also been advanced in the present proceedings, that it has no jurisdiction because of the “political” character of the question posed. As is clear from its long-standing jurisprudence on this point, the Court considers that the fact that a legal question also has political aspects,

“as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a ‘legal question’ and to ‘deprive the Court of a competence expressly conferred on it by its Statute’ (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, *I.C.J. Reports 1973*, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, 1948, *I.C.J. Reports 1947-1948*, pp. 61-62; *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, *I.C.J. Reports 1950*, pp. 6-7; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, *I.C.J. Reports 1962*, p. 155).” (*Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996 (I)*, p. 234, para. 13.)

In its Opinion concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the Court indeed emphasized that, “in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate . . .” (*I.C.J. Reports 1980*, p. 87, para. 33). Moreover, the Court has affirmed in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that “the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion” (*I.C.J. Reports 1996 (I)*, p. 234, para. 13). The Court is of the view that there is no element in the present proceedings which could lead it to conclude otherwise.

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42. The Court accordingly has jurisdiction to give the advisory opinion requested by resolution ES-10/14 of the General Assembly.

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43. It has been contended in the present proceedings, however, that the Court should decline to exercise its jurisdiction because of the presence of specific aspects of the General Assembly's request that would render the exercise of the Court's jurisdiction improper and inconsistent with the Court's judicial function.

44. The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that "The Court *may* give an advisory opinion . . ." (emphasis added), should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 234, para. 14). The Court however is mindful of the fact that its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; see also, for example, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29.) Given its responsibilities as the "principal judicial organ of the United Nations" (Article 92 of the Charter), the Court should in principle not decline to give an advisory opinion. In accordance with its consistent jurisprudence, only "compelling reasons" should lead the Court to refuse its opinion (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155; see also, for example, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29.)

The present Court has never, in the exercise of this discretionary power, declined to respond to a request for an advisory opinion. Its decision not to give the advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* requested by the World Health Organization was based on the Court's lack of jurisdiction, and not on considerations of judicial propriety (see *I.C.J. Reports 1996 (I)*, p. 235, para. 14). Only on one occasion did the Court's predecessor, the Permanent Court of International Justice, take the view that it should not reply to a question put to it (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*), but this was due to

"the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute, one of the States parties to which was neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, objected to the proceedings, and refused to take part in any way" (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, pp. 235-236, para. 14).

45. These considerations do not release the Court from the duty to satisfy itself, each time it is seized of a request for an opinion, as to the propriety of the exercise of its judicial function, by ref-

erence to the criterion of “compelling reasons” as cited above. The Court will accordingly examine in detail and in the light of its jurisprudence each of the arguments presented to it in this regard.

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46. The first such argument is to the effect that the Court should not exercise its jurisdiction in the present case because the request concerns a contentious matter between Israel and Palestine, in respect of which Israel has not consented to the exercise of that jurisdiction. According to this view, the subject-matter of the question posed by the General Assembly “is an integral part of the wider Israeli-Palestinian dispute concerning questions of terrorism, security, borders, settlements, Jerusalem and other related matters”. Israel has emphasized that it has never consented to the settlement of this wider dispute by the Court or by any other means of compulsory adjudication; on the contrary, it contends that the parties repeatedly agreed that these issues are to be settled by negotiation, with the possibility of an agreement that recourse could be had to arbitration. It is accordingly contended that the Court should decline to give the present Opinion, on the basis *inter alia* of the precedent of the decision of the Permanent Court of International Justice on the *Status of Eastern Carelia*.

47. The Court observes that the lack of consent to the Court’s contentious jurisdiction by interested States has no bearing on the Court’s jurisdiction to give an advisory opinion. In an Advisory Opinion of 1950, the Court explained that:

“The consent of States, parties to a dispute, is the basis of the Court’s jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court’s reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court’s Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an ‘organ of the United Nations’, represents its participation in the activities of the Organization, and, in principle, should not be refused.” (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; see also *Western Sahara, I.C.J. Reports 1975*, p. 24, para. 31.)

It followed from this that, in those proceedings, the Court did not refuse to respond to the request for an advisory opinion on the ground that, in the particular circumstances, it lacked jurisdiction. The Court did however examine the opposition of certain interested States to the request by the General Assembly in the context of issues of judicial propriety. Commenting on its 1950 decision, the Court explained in its Advisory Opinion on *Western Sahara* that it had “Thus . . . recognized that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion.” The Court continued:

“In certain circumstances . . . the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court’s judicial char-



acter. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.” (*Western Sahara, I.C.J. Reports 1975*, p. 25, paras. 32-33.)

In applying that principle to the request concerning *Western Sahara*, the Court found that a legal controversy did indeed exist, but one which had arisen during the proceedings of the General Assembly and in relation to matters with which the Assembly was dealing. It had not arisen independently in bilateral relations (*ibid.*, p. 25, para. 34).

48. As regards the request for an advisory opinion now before it, the Court acknowledges that Israel and Palestine have expressed radically divergent views on the legal consequences of Israel’s construction of the wall, on which the Court has been asked to pronounce. However, as the Court has itself noted, “Differences of views . . . on legal issues have existed in practically every advisory proceeding” (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 24, para. 34).

49. Furthermore, the Court does not consider that the subject-matter of the General Assembly’s request can be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court’s view that the construction of the wall must be deemed to be directly of concern to the United Nations. The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine (see paragraphs 70 and 71 below). This responsibility has been described by the General Assembly as “a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy” (General Assembly resolution 57/107 of 3 December 2002). Within the institutional framework of the Organization, this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people.

50. The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute. In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground.

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51. The Court now turns to another argument raised in the present proceedings in support of the view that it should decline to exercise its jurisdiction. Some participants have argued that an advisory opinion from the Court on the legality of the wall and the legal consequences of its construction could impede a political, negotiated solution to the Israeli-Palestinian conflict. More par-

ticularly, it has been contended that such an opinion could undermine the scheme of the “Roadmap” (see paragraph 22 above), which requires Israel and Palestine to comply with certain obligations in various phases referred to therein. The requested opinion, it has been alleged, could complicate the negotiations envisaged in the “Roadmap”, and the Court should therefore exercise its discretion and decline to reply to the question put.

This is a submission of a kind which the Court has already had to consider several times in the past. For instance, in its Advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court stated:

“It has . . . been submitted that a reply from the Court in this case might adversely affect disarmament negotiations and would, therefore, be contrary to the interest of the United Nations. The Court is aware that, no matter what might be its conclusions in any opinion it might give, they would have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter. Beyond that, the effect of the opinion is a matter of appreciation. The Court has heard contrary positions advanced and there are no evident criteria by which it can prefer one assessment to another.” (*I.C.J. Reports 1996 (I)*, p. 237, para. 17; see also *Western Sahara, I.C.J. Reports 1975*, p. 37, para. 73.)

52. One participant in the present proceedings has indicated that the Court, if it were to give a response to the request, should in any event do so keeping in mind

“two key aspects of the peace process: the fundamental principle that permanent status issues must be resolved through negotiations; and the need during the interim period for the parties to fulfill their security responsibilities so that the peace process can succeed”.

53. The Court is conscious that the “Roadmap”, which was endorsed by the Security Council in resolution 1515 (2003) (see paragraph 22 above), constitutes a negotiating framework for the resolution of the Israeli-Palestinian conflict. It is not clear, however, what influence the Court’s opinion might have on those negotiations: participants in the present proceedings have expressed differing views in this regard. The Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.

54. It was also put to the Court by certain participants that the question of the construction of the wall was only one aspect of the Israeli-Palestinian conflict, which could not be properly addressed in the present proceedings. The Court does not however consider this a reason for it to decline to reply to the question asked. The Court is indeed aware that the question of the wall is part of a greater whole, and it would take this circumstance carefully into account in any opinion it might give. At the same time, the question that the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall, and the Court would only examine other issues to the extent that they might be necessary to its consideration of the question put to it.

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55. Several participants in the proceedings have raised the further argument that the Court should decline to exercise its jurisdiction because it does not have at its disposal the requisite facts and evidence to enable it to reach its conclusions. In particular, Israel has contended, referring to the Advisory Opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, that the Court could not give an opinion on issues which raise questions of fact that cannot be elucidated without hearing all parties to the conflict. According to Israel, if the Court decided to give the requested opinion, it would be forced to speculate about essential facts and make assumptions about arguments of law. More specifically, Israel has argued that the Court could not rule on the legal consequences of the construction of the wall without enquiring, first, into the nature and scope of the security threat to which the wall is intended to respond and the effectiveness of that response, and, second, into the impact of the construction for the Palestinians. This task, which would already be difficult in a contentious case, would be further complicated in an advisory proceeding, particularly since Israel alone possesses much of the necessary information and has stated that it chooses not to address the merits. Israel has concluded that the Court, confronted with factual issues impossible to clarify in the present proceedings, should use its discretion and decline to comply with the request for an advisory opinion.

56. The Court observes that the question whether the evidence available to it is sufficient to give an advisory opinion must be decided in each particular instance. In its Opinion concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (I.C.J. Reports 1950, p. 72) and again in its Opinion on the *Western Sahara*, the Court made it clear that what is decisive in these circumstances is “whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character” (*Western Sahara*, I.C.J. Reports 1975, pp. 28-29, para. 46). Thus, for instance, in the proceedings concerning the *Status of Eastern Carelia*, the Permanent Court of International Justice decided to decline to give an Opinion *inter alia* because the question put “raised a question of fact which could not be elucidated without hearing both parties” (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, I.C.J. Reports 1950, p. 72; see *Status of Eastern Carelia*, P.C.I.J., Series B, No. 5, p. 28). On the other hand, in the *Western Sahara* Opinion, the Court observed that it had been provided with very extensive documentary evidence of the relevant facts (I.C.J. Reports 1975, p. 29, para. 47).

57. In the present instance, the Court has at its disposal the report of the Secretary-General, as well as a voluminous dossier submitted by him to the Court, comprising not only detailed information on the route of the wall but also on its humanitarian and socio-economic impact on the Palestinian population. The dossier includes several reports based on on-site visits by special rapporteurs and competent organs of the United Nations. The Secretary-General has further submitted to the Court a written statement updating his report, which supplemented the information contained therein. Moreover, numerous other participants have submitted to the Court written statements which contain information relevant to a response to the question put by the General Assembly. The Court notes in particular that Israel’s Written Statement, although limited to issues of jurisdiction and judicial propriety, contained observations on other matters, including Israel’s concerns in terms of security, and was accompanied by corresponding annexes; many other documents issued by the Israeli Government on those matters are in the public domain.

58. The Court finds that it has before it sufficient information and evidence to enable it to give the advisory opinion requested by the General Assembly. Moreover, the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task. There is therefore in the present case no lack of information such as to constitute a compelling reason for the Court to decline to give the requested opinion.

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59. In their written statements, some participants have also put forward the argument that the Court should decline to give the requested opinion on the legal consequences of the construction of the wall because such opinion would lack any useful purpose. They have argued that the advisory opinions of the Court are to be seen as a means to enable an organ or agency in need of legal clarification for its future action to obtain that clarification. In the present instance, the argument continues, the General Assembly would not need an opinion of the Court because it has already declared the construction of the wall to be illegal and has already determined the legal consequences by demanding that Israel stop and reverse its construction, and further, because the General Assembly has never made it clear how it intended to use the opinion.

60. As is clear from the Court's jurisprudence, advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action. In its Opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court observed: "The object of this request for an Opinion is to guide the United Nations in respect of its own action." (*I.C.J. Reports 1951*, p. 19.) Likewise, in its Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court noted: "The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions." (*I.C.J. Reports 1971*, p. 24, para. 32.) The Court found on another occasion that the advisory opinion it was to give would "furnish the General Assembly with elements of a legal character relevant to its further treatment of the decolonization of Western Sahara" (*Western Sahara, I.C.J. Reports 1975*, p. 37, para. 72).

61. With regard to the argument that the General Assembly has not made it clear what use it would make of an advisory opinion on the wall, the Court would recall, as equally relevant in the present proceedings, what it stated in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons*:

"Certain States have observed that the General Assembly has not explained to the Court for what precise purposes it seeks the advisory opinion. Nevertheless, it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." (*I.C.J. Reports 1996 (I)*, p. 237, para. 16.)

62. It follows that the Court cannot decline to answer the question posed based on the ground that its opinion would lack any useful purpose. The Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General

Assembly. Furthermore, and in any event, the Court considers that the General Assembly has not yet determined all the possible consequences of its own resolution. The Court's task would be to determine in a comprehensive manner the legal consequences of the construction of the wall, while the General Assembly – and the Security Council – may then draw conclusions from the Court's findings.

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63. Lastly, the Court will turn to another argument advanced with regard to the propriety of its giving an advisory opinion in the present proceedings. Israel has contended that Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the Court a remedy for a situation resulting from its own wrongdoing. In this context, Israel has invoked the maxim *nullus commodum capere potest de sua injuria propria*, which it considers to be as relevant in advisory proceedings as it is in contentious cases. Therefore, Israel concludes, good faith and the principle of “clean hands” provide a compelling reason that should lead the Court to refuse the General Assembly's request.

64. The Court does not consider this argument to be pertinent. As was emphasized earlier, it was the General Assembly which requested the advisory opinion, and the opinion is to be given to the General Assembly, and not to a specific State or entity.

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65. In the light of the foregoing, the Court concludes not only that it has jurisdiction to give an opinion on the question put to it by the General Assembly (see paragraph 42 above), but also that there is no compelling reason for it to use its discretionary power not to give that opinion.

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66. The Court will now address the question put to it by the General Assembly in resolution ES-10/14. The Court recalls that the question is as follows:

“What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”

67. As explained in paragraph 82 below, the “wall” in question is a complex construction, so that that term cannot be understood in a limited physical sense. However, the other terms used, either by Israel (“fence”) or by the Secretary-General (“barrier”), are no more accurate if understood in the physical sense. In this Opinion, the Court has therefore chosen to use the terminology employed by the General Assembly.

The Court notes furthermore that the request of the General Assembly concerns the legal consequences of the wall being built “in the Occupied Palestinian Territory, including in and around East Jerusalem”. As also explained below (see paragraphs 79-84 below), some parts of the complex are being built, or are planned to be built, on the territory of Israel itself; the Court does not consider

that it is called upon to examine the legal consequences arising from the construction of those parts of the wall.

68. The question put by the General Assembly concerns the legal consequences of the construction of the wall in the Occupied Palestinian Territory. However, in order to indicate those consequences to the General Assembly the Court must first determine whether or not the construction of that wall breaches international law (see paragraph 39 above). It will therefore make this determination before dealing with the consequences of the construction.

69. To do so, the Court will first make a brief analysis of the status of the territory concerned, and will then describe the works already constructed or in course of construction in that territory. It will then indicate the applicable law before seeking to establish whether that law has been breached.

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70. Palestine was part of the Ottoman Empire. At the end of the First World War, a class “A” Mandate for Palestine was entrusted to Great Britain by the League of Nations, pursuant to paragraph 4 of Article 22 of the Covenant, which provided that:

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

The Court recalls that in its Advisory Opinion on the *International Status of South West Africa*, speaking of mandates in general, it observed that “The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object - a sacred trust of civilization.” (*I.C.J. Reports 1950*, p. 132.) The Court also held in this regard that “two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of . . . peoples [not yet able to govern themselves] form[ed] ‘a sacred trust of civilization’” (*ibid.*, p. 131).

The territorial boundaries of the Mandate for Palestine were laid down by various instruments, in particular on the eastern border by a British memorandum of 16 September 1922 and an Anglo-Transjordanian Treaty of 20 February 1928.

71. In 1947 the United Kingdom announced its intention to complete evacuation of the mandated territory by 1 August 1948, subsequently advancing that date to 15 May 1948. In the meantime, the General Assembly had on 29 November 1947 adopted resolution 181 (II) on the future government of Palestine, which “*Recommends* to the United Kingdom . . . and to all other Members of the United Nations the adoption and implementation . . . of the Plan of Partition” of the territory, as set forth in the resolution, between two independent States, one Arab, the other Jewish, as well as the creation of a special international régime for the City of Jerusalem. The Arab population of Palestine and the Arab States rejected this plan, contending that it was unbalanced; on 14 May 1948, Israel proclaimed its independence on the strength of the General Assembly resolution; armed conflict then broke out between Israel and a number of Arab States and the Plan of Partition was not implemented.

72. By resolution 62 (1948) of 16 November 1948, the Security Council decided that “an armistice shall be established in all sectors of Palestine” and called upon the parties directly involved in the conflict to seek agreement to this end. In conformity with this decision, general armistice agreements were concluded in 1949 between Israel and the neighbouring States through mediation by the United Nations. In particular, one such agreement was signed in Rhodes on 3 April 1949 between Israel and Jordan. Articles V and VI of that Agreement fixed the armistice demarcation line between Israeli and Arab forces (often later called the “Green Line” owing to the colour used for it on maps; hereinafter the “Green Line”). Article III, paragraph 2, provided that “No element of the . . . military or para-military forces of either Party . . . shall advance beyond or pass over for any purpose whatsoever the Armistice Demarcation Lines . . .” It was agreed in Article VI, paragraph 8, that these provisions would not be “interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties”. It was also stated that “the Armistice Demarcation Lines defined in articles V and VI of [the] Agreement [were] agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto”. The Demarcation Line was subject to such rectification as might be agreed upon by the parties.

73. In the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under British Mandate (including those known as the West Bank, lying to the east of the Green Line).

74. On 22 November 1967, the Security Council unanimously adopted resolution 242 (1967), which emphasized the inadmissibility of acquisition of territory by war and called for the “Withdrawal of Israel armed forces from territories occupied in the recent conflict”, and “Termination of all claims or states of belligerency”.

75. From 1967 onwards, Israel took a number of measures in these territories aimed at changing the status of the City of Jerusalem. The Security Council, after recalling on a number of occasions “the principle that acquisition of territory by military conquest is inadmissible”, condemned those measures and, by resolution 298 (1971) of 25 September 1971, confirmed in the clearest possible terms that:

“all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section, are totally invalid and cannot change that status”.

Later, following the adoption by Israel on 30 July 1980 of the Basic Law making Jerusalem the “complete and united” capital of Israel, the Security Council, by resolution 478 (1980) of 20 August 1980, stated that the enactment of that Law constituted a violation of international law and that “all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem . . . are null and void”. It further decided “not to recognize the ‘basic law’ and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem”.

76. Subsequently, a peace treaty was signed on 26 October 1994 between Israel and Jordan.



That treaty fixed the boundary between the two States “with reference to the boundary definition under the Mandate as is shown in Annex I (a) . . . without prejudice to the status of any territories that came under Israeli military government control in 1967” (Article 3, paragraphs 1 and 2). Annex I provided the corresponding maps and added that, with regard to the “territory that came under Israeli military government control in 1967”, the line indicated “is the administrative boundary” with Jordan.

77. Lastly, a number of agreements have been signed since 1993 between Israel and the Palestine Liberation Organization imposing various obligations on each party. Those agreements *inter alia* required Israel to transfer to Palestinian authorities certain powers and responsibilities exercised in the Occupied Palestinian Territory by its military authorities and civil administration. Such transfers have taken place, but, as a result of subsequent events, they remained partial and limited.

78. The Court would observe that, under customary international law as reflected (see paragraph 89 below) in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (hereinafter “the Hague Regulations of 1907”), territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.

The territories situated between the Green Line (see paragraph 72 above) 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, as described in paragraphs 75 to 77 above, 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.

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79. It is essentially in these territories that Israel has constructed or plans to construct the works described in the report of the Secretary-General. The Court will now describe those works, basing itself on that report. For developments subsequent to the publication of that report, the Court will refer to complementary information contained in the Written Statement of the United Nations, which was intended by the Secretary-General to supplement his report (hereinafter “Written Statement of the Secretary-General”).

80. The report of the Secretary-General states that “The Government of Israel has since 1996 considered plans to halt infiltration into Israel from the central and northern West Bank . . .” (Para. 4.) According to that report, a plan of this type was approved for the first time by the Israeli Cabinet in July 2001. Then, on 14 April 2002, the Cabinet adopted a decision for the construction of works, forming what Israel describes as a “security fence”, 80 kilometres in length, in three areas of the West Bank.

The project was taken a stage further when, on 23 June 2002, the Israeli Cabinet approved the first phase of the construction of a “continuous fence” in the West Bank (including East Jerusalem).



On 14 August 2002, it adopted the line of that “fence” for the work in Phase A, with a view to the construction of a complex 123 kilometres long in the northern West Bank, running from the Salem checkpoint (north of Jenin) to the settlement at Elkana. Phase B of the work was approved in December 2002. It entailed a stretch of some 40 kilometres running east from the Salem checkpoint towards Beth Shean along the northern part of the Green Line as far as the Jordan Valley. Furthermore, on 1 October 2003, the Israeli Cabinet approved a full route, which, according to the report of the Secretary-General, “will form one continuous line stretching 720 kilometres along the West Bank”. A map showing completed and planned sections was posted on the Israeli Ministry of Defence website on 23 October 2003. According to the particulars provided on that map, a continuous section (Phase C) encompassing a number of large settlements will link the north-western end of the “security fence” built around Jerusalem with the southern point of Phase A construction at Elkana. According to the same map, the “security fence” will run for 115 kilometres from the Har Gilo settlement near Jerusalem to the Carmel settlement south-east of Hebron (Phase D). According to Ministry of Defence documents, work in this sector is due for completion in 2005. Lastly, there are references in the case file to Israel’s planned construction of a “security fence” following the Jordan Valley along the mountain range to the west.

81. According to the Written Statement of the Secretary-General, the first part of these works (Phase A), which ultimately extends for a distance of 150 kilometres, was declared completed on 31 July 2003. It is reported that approximately 56,000 Palestinians would be encompassed in enclaves. During this phase, two sections totalling 19.5 kilometres were built around Jerusalem. In November 2003 construction of a new section was begun along the Green Line to the west of the Nazlat Issa-Baqa al-Sharqiya enclave, which in January 2004 was close to completion at the time when the Secretary-General submitted his Written Statement.

According to the Written Statement of the Secretary-General, the works carried out under Phase B were still in progress in January 2004. Thus an initial section of this stretch, which runs near or on the Green Line to the village of al-Mutilla, was almost complete in January 2004. Two additional sections diverge at this point. Construction started in early January 2004 on one section that runs due east as far as the Jordanian border. Construction of the second section, which is planned to run from the Green Line to the village of Taysir, has barely begun. The United Nations has, however, been informed that this second section might not be built.

The Written Statement of the Secretary-General further states that Phase C of the work, which runs from the terminus of Phase A, near the Elkana settlement, to the village of Nu’mān, south-east of Jerusalem, began in December 2003. This section is divided into three stages. In Stage C1, between *inter alia* the villages of Rantis and Budrus, approximately 4 kilometres out of a planned total of 40 kilometres have been constructed. Stage C2, which will surround the so-called “Ariel Salient” by cutting 22 kilometres into the West Bank, will incorporate 52,000 Israeli settlers. Stage C3 is to involve the construction of two “depth barriers”; one of these is to run north-south, roughly parallel with the section of Stage C1 currently under construction between Rantis and Budrus, whilst the other runs east-west along a ridge said to be part of the route of Highway 45, a motorway under construction. If construction of the two barriers were completed, two enclaves would be formed, encompassing 72,000 Palestinians in 24 communities.

Further construction also started in late November 2003 along the south-eastern part of the municipal boundary of Jerusalem, following a route that, according to the Written Statement of the Secretary-General, cuts off the suburban village of El-Ezariya from Jerusalem and splits the neighbouring Abu Dis in two.

As at 25 January 2004, according to the Written Statement of the Secretary-General, some 190 kilometres of construction had been completed, covering Phase A and the greater part of Phase B. Further construction in Phase C had begun in certain areas of the central West Bank and in Jerusalem. Phase D, planned for the southern part of the West Bank, had not yet begun.

The Israeli Government has explained that the routes and timetable as described above are subject to modification. In February 2004, for example, an 8-kilometre section near the town of Baqa al-Sharqiya was demolished, and the planned length of the wall appears to have been slightly reduced.

82. According to the description in the report and the Written Statement of the Secretary-General, the works planned or completed have resulted or will result in a complex consisting essentially of:

- (1) a fence with electronic sensors;
- (2) a ditch (up to 4 metres deep);
- (3) a two-lane asphalt patrol road;
- (4) a trace road (a strip of sand smoothed to detect footprints) running parallel to the fence;
- (5) a stack of six coils of barbed wire marking the perimeter of the complex.

The complex has a width of 50 to 70 metres, increasing to as much as 100 metres in some places. “Depth barriers” may be added to these works.

The approximately 180 kilometres of the complex completed or under construction as of the time when the Secretary-General submitted his report included some 8.5 kilometres of concrete wall. These are generally found where Palestinian population centres are close to or abut Israel (such as near Qalqiliya and Tulkarm or in parts of Jerusalem).

83. According to the report of the Secretary-General, in its northernmost part, the wall as completed or under construction barely deviates from the Green Line. It nevertheless lies within occupied territories for most of its course. The works deviate more than 7.5 kilometres from the Green Line in certain places to encompass settlements, while encircling Palestinian population areas. A stretch of 1 to 2 kilometres west of Tulkarm appears to run on the Israeli side of the Green Line. Elsewhere, on the other hand, the planned route would deviate eastward by up to 22 kilometres. In the case of Jerusalem, the existing works and the planned route lie well beyond the Green Line and even in some cases beyond the eastern municipal boundary of Jerusalem as fixed by Israel.

84. On the basis of that route, approximately 975 square kilometres (or 16.6 per cent of the West Bank) would, according to the report of the Secretary-General, lie between the Green Line and the wall. This area is stated to be home to 237,000 Palestinians. If the full wall were completed as planned, another 160,000 Palestinians would live in almost completely encircled communities,

described as enclaves in the report. As a result of the planned route, nearly 320,000 Israeli settlers (of whom 178,000 in East Jerusalem) would be living in the area between the Green Line and the wall.

85. Lastly, it should be noted that the construction of the wall has been accompanied by the creation of a new administrative régime. Thus in October 2003 the Israeli Defence Forces issued Orders establishing the part of the West Bank lying between the Green Line and the wall as a “Closed Area”. Residents of this area may no longer remain in it, nor may non-residents enter it, unless holding a permit or identity card issued by the Israeli authorities. According to the report of the Secretary-General, most residents have received permits for a limited period. Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel in accordance with the Law of Return may remain in, or move freely to, from and within the Closed Area without a permit. Access to and exit from the Closed Area can only be made through access gates, which are opened infrequently and for short periods.

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86. The Court will now determine the rules and principles of international law which are relevant in assessing the legality of the measures taken by Israel. Such rules and principles can be found in the United Nations Charter and certain other treaties, in customary international law and in the relevant resolutions adopted pursuant to the Charter by the General Assembly and the Security Council. However, doubts have been expressed by Israel as to the applicability in the Occupied Palestinian Territory of certain rules of international humanitarian law and human rights instruments. The Court will now consider these various questions.

87. The Court first recalls that, pursuant to Article 2, paragraph 4, of 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.”

On 24 October 1970, the General Assembly adopted resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States” (hereinafter “resolution 2625 (XXV)”), in which it emphasized that “No territorial acquisition resulting from the threat or use of force shall be recognized as legal.” As the Court stated in its Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the principles as to the use of force incorporated in the Charter reflect customary international law (see *I.C.J. Reports 1986*, pp. 98-101, paras. 187-190); the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.

88. The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant to which “Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] . . . of their right to self-determination.” Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-deter-

mination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter.

The Court would recall that in 1971 it emphasized that current developments in “international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]”. The Court went on to state that “These developments leave little doubt that the ultimate objective of the sacred trust” referred to in Article 22, paragraph 1, of the Covenant of the League of Nations “was the self-determination . . . of the peoples concerned” (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, paras. 52-53). The Court has referred to this principle on a number of occasions in its jurisprudence (*ibid.*; see also *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 68, para. 162). The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes* (see *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29).

89. As regards international humanitarian law, the Court would first note that Israel is not a party to the Fourth Hague Convention of 1907, to which the Hague Regulations are annexed. The Court observes that, in the words of the Convention, those Regulations were prepared “to revise the general laws and customs of war” existing at that time. Since then, however, the International Military Tribunal of Nuremberg has found that the “rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war” (Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, p. 65). The Court itself reached the same conclusion when examining the rights and duties of belligerents in their conduct of military operations (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 256, para. 75). The Court considers that the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court.

The Court also observes that, pursuant to Article 154 of the Fourth Geneva Convention, that Convention is supplementary to Sections II and III of the Hague Regulations. Section III of those Regulations, which concerns “Military authority over the territory of the hostile State”, is particularly pertinent in the present case.

90. Secondly, with regard to the Fourth Geneva Convention, differing views have been expressed by the participants in these proceedings. Israel, contrary to the great majority of the other participants, disputes the applicability *de jure* of the Convention to the Occupied Palestinian Territory. In particular, in paragraph 3 of Annex I to the report of the Secretary-General, entitled “Summary Legal Position of the Government of Israel”, it is stated that Israel does not agree that the Fourth Geneva Convention “is applicable to the occupied Palestinian Territory”, citing “the lack of recognition of the territory as sovereign prior to its annexation by Jordan and Egypt” and inferring that it is “not a territory of a High Contracting Party as required by the Convention”.

91. The Court would recall that the Fourth Geneva Convention was ratified by Israel on 6 July 1951 and that Israel is a party to that Convention. Jordan has also been a party thereto since

29 May 1951. Neither of the two States has made any reservation that would be pertinent to the present proceedings.

Furthermore, Palestine gave a unilateral undertaking, by declaration of 7 June 1982, to apply the fourth Geneva Convention. Switzerland, as Depositary State, considered that unilateral undertaking valid. It concluded, however, that it “[was] not – as a depositary – in a position to decide whether” “the request [dated 14 June 1989] from the Palestine Liberation Movement in the name of the ‘State of Palestine’ to accede” *inter alia* to the Fourth Geneva Convention “can be considered as an instrument of accession”.

92. Moreover, for the purpose of determining the scope of application of the Fourth Geneva Convention, it should be recalled that under common Article 2 of the four Conventions of 12 August 1949:

“In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”

93. After the occupation of the West Bank in 1967, the Israeli authorities issued an order No. 3 stating in its Article 35 that:

“the Military Court . . . must apply the provisions of the Geneva Convention dated 12 August 1949 relative to the Protection of Civilian Persons in Time of War with respect to judicial procedures. In case of conflict between this Order and the said Convention, the Convention shall prevail.”

Subsequently, the Israeli authorities have indicated on a number of occasions that in fact they generally apply the humanitarian provisions of the Fourth Geneva Convention within the occupied territories. However, according to Israel’s position as briefly recalled in paragraph 90 above, that Convention is not applicable *de jure* within those territories because, under Article 2, paragraph 2, it applies only in the case of occupation of territories falling under the sovereignty of a High Contracting Party involved in an armed conflict. Israel explains that Jordan was admittedly a party to the Fourth Geneva Convention in 1967, and that an armed conflict broke out at that time between Israel and Jordan, but it goes on to observe that the territories occupied by Israel subsequent to that conflict had not previously fallen under Jordanian sovereignty. It infers from this that that Convention is not applicable *de jure* in those territories. According however to the great majority of other participants in the proceedings, the Fourth Geneva Convention is applicable to those territories

pursuant to Article 2, paragraph 1, whether or not Jordan had any rights in respect thereof prior to 1967.

94. The Court would recall that, according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Article 32 provides that:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 . . . leaves the meaning ambiguous or obscure; or . . . leads to a result which is manifestly obscure or unreasonable.” (See *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objections*, *I.C.J. Reports 1996 (II)*, p. 812, para. 23; see, similarly, *Kasikili/Sedudu Island (Botswana/Namibia)*, *I.C.J. Reports 1999 (II)*, p. 1059, para. 18, and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *Judgment*, *I.C.J. Reports 2002*, p. 645, para. 37.)

95. The Court notes that, according to the first paragraph of Article 2 of the Fourth Geneva Convention, that Convention is applicable when two conditions are fulfilled: that there exists an armed conflict (whether or not a state of war has been recognized); and that the conflict has arisen between two contracting parties. If those two conditions are satisfied, the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties.

The object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties. It is directed simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.

This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power. Whilst the drafters of the Hague Regulations of 1907 were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories, as is shown by Article 47 of the Convention.

That interpretation is confirmed by the Convention’s *travaux préparatoires*. The Conference of Government Experts convened by the International Committee of the Red Cross (hereinafter, “ICRC”) in the aftermath of the Second World War for the purpose of preparing the new Geneva Conventions recommended that these conventions be applicable to any armed conflict “whether [it] is or is not recognized as a state of war by the parties” and “in cases of occupation of territories in the absence of any state of war” (*Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims*, Geneva, 14-26 April 1947, p. 8). The drafters of the second paragraph of Article 2 thus had no intention, when they inserted that paragraph into the Convention, of restricting the latter’s scope of application. They were merely seeking to pro-

vide for cases of occupation without combat, such as the occupation of Bohemia and Moravia by Germany in 1939.

96. The Court would moreover note that the States parties to the Fourth Geneva Convention approved that interpretation at their Conference on 15 July 1999. They issued a statement in which they “reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem”. Subsequently, on 5 December 2001, the High Contracting Parties, referring in particular to Article 1 of the Fourth Geneva Convention of 1949, once again reaffirmed the “applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem”. They further reminded the Contracting Parties participating in the Conference, the parties to the conflict, and the State of Israel as occupying Power, of their respective obligations.

97. Moreover, the Court would observe that the ICRC, whose special position with respect to execution of the Fourth Geneva Convention must be “recognized and respected at all times” by the parties pursuant to Article 142 of the Convention, has also expressed its opinion on the interpretation to be given to the Convention. In a declaration of 5 December 2001, it recalled that “the ICRC has always affirmed the *de jure* applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem”.

98. The Court notes that the General Assembly has, in many of its resolutions, taken a position to the same effect. Thus on 10 December 2001 and 9 December 2003, in resolutions 56/60 and 58/97, it reaffirmed “that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967”.

99. The Security Council, for its part, had already on 14 June 1967 taken the view in resolution 237 (1967) that “all the obligations of the Geneva Convention relative to the Treatment of Prisoners of War . . . should be complied with by the parties involved in the conflict”. Subsequently, on 15 September 1969, the Security Council, in resolution 271 (1969), called upon “Israel scrupulously to observe the provisions of the Geneva Conventions and international law governing military occupation”.

Ten years later, the Security Council examined “the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967”. In resolution 446 (1979) of 22 March 1979, the Security Council considered that those settlements had “no legal validity” and affirmed “*once more* that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem”. It called “*once more upon* Israel, as the occupying Power, to abide scrupulously” by that Convention.

On 20 December 1990, the Security Council, in resolution 681 (1990), urged “the Government of Israel to accept the *de jure* applicability of the Fourth Geneva Convention . . . to all the territories occupied by Israel since 1967 and to abide scrupulously by the provisions of the Convention”. It further called upon “the high contracting parties to the said Fourth Geneva Convention to ensure respect



by Israel, the occupying Power, for its obligations under the Convention in accordance with article 1 thereof”.

Lastly, in resolutions 799 (1992) of 18 December 1992 and 904 (1994) of 18 March 1994, the Security Council reaffirmed its position concerning the applicability of the Fourth Geneva Convention in the occupied territories.

100. The Court would note finally that the Supreme Court of Israel, in a judgment dated 30 May 2004, also found that:

“The military operations of the [Israeli Defence Forces] in Rafah, to the extent they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907 . . . and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949.”

101. In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that 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.

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102. The participants in the proceedings before the Court also disagree whether the international human rights conventions to which Israel is party apply within the Occupied Palestinian Territory. Annex I to the report of the Secretary-General states:

“4. Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.”

Of the other participants in the proceedings, those who addressed this issue contend that, on the contrary, both Covenants are applicable within the Occupied Palestinian Territory.

103. On 3 October 1991 Israel ratified both the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 and the International Covenant on Civil and Political Rights of the same date, as well as the United Nations Convention on the Rights of the Child of 20 November 1989. It is a party to these three instruments.

104. In order to determine whether these texts are applicable in the Occupied Palestinian Territory, the Court will first address the issue of the relationship between international humanitarian law and human rights law and then that of the applicability of human rights instruments outside national territory.



105. In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the Court had occasion to address the first of these issues in relation to the International Covenant on Civil and Political Rights. In those proceedings certain States had argued that “the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict” (*I.C.J. Reports 1996 (I)*, p. 239, para. 24).

The Court rejected this argument, stating that:

“the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.” (*Ibid.*, p. 240, para. 25.)

106. More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

107. It remains to be determined whether the two international Covenants and the Convention on the Rights of the Child are applicable only on the territories of the States parties thereto or whether they are also applicable outside those territories and, if so, in what circumstances.

108. The scope of application of the International Covenant on Civil and Political Rights is defined by Article 2, paragraph 1, thereof, which provides:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

This provision can be interpreted as covering only individuals who are both present within a State’s territory and subject to that State’s jurisdiction. It can also be construed as covering both individuals present within a State’s territory and those outside that territory but subject to that State’s jurisdiction. The Court will thus seek to determine the meaning to be given to this text.

109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *López Burgos v. Uruguay*; case No. 56/79, *Lilian Celiberti de Casariego v. Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, *Montero v. Uruguay*).

The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, *Official Records of the General Assembly, Tenth Session, Annexes, A/2929*, Part II, Chap. V, para. 4 (1955)).

110. The Court takes note in this connection of the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee.

In 1998, Israel stated that, when preparing its report to the Committee, it had had to face the question “whether individuals resident in the occupied territories were indeed subject to Israel’s jurisdiction” for purposes of the application of the Covenant (CCPR/C/SR.1675, para. 21). Israel took the position that “the Covenant and similar instruments did not apply directly to the current situation in the occupied territories” (*ibid.*, para. 27).

The Committee, in its concluding observations after examination of the report, expressed concern at Israel’s attitude and pointed “to the long-standing presence of Israel in [the occupied] territories, Israel’s ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein” (CCPR/C/79/Add.93, para. 10). In 2003 in face of Israel’s consistent position, to the effect that “the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza . . .”, the Committee reached the following conclusion:

“in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party’s authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law” (CCPR/CO/78/ISR, para. 11).

111. In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.

112. The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction. Thus Article 14 makes provision for transitional measures in the case of any State which “at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge”.

It is not without relevance to recall in this regard the position taken by Israel in its reports to the Committee on Economic, Social and Cultural Rights. In its initial report to the Committee of 4 December 1998, Israel provided “statistics indicating the enjoyment of the rights enshrined in the Covenant by Israeli settlers in the occupied Territories”. The Committee noted that, according to Israel, “the Palestinian population within the same jurisdictional areas were excluded from both the report and the protection of the Covenant” (E/C.12/1/Add. 27, para. 8). The Committee expressed its concern in this regard, to which Israel replied in a further report of 19 October 2001 that it has “consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction” (a formula inspired by the language of the International Covenant on Civil and Political Rights). This position, continued Israel, is “based on the well-established distinction between human rights and humanitarian law under international law”. It added: “the Committee’s mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights” (E/1990/6/Add. 32, para. 5). In view of these observations, the Committee reiterated its concern about Israel’s position and reaffirmed “its view that the State party’s obligations under the Covenant apply to all territories and populations under its effective control” (E/C.12/1/Add.90, paras. 15 and 31).

For the reasons explained in paragraph 106 above, the Court cannot accept Israel’s view. It would also observe that the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.

113. As regards the Convention on the Rights of the Child of 20 November 1989, that instrument contains an Article 2 according to which “States Parties shall respect and ensure the rights set forth in the . . . Convention to each child within their jurisdiction . . .”. That Convention is therefore applicable within the Occupied Palestinian Territory.

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114. Having determined the rules and principles of international law relevant to reply to the question posed by the General Assembly, and having ruled in particular on the applicability within the Occupied Palestinian Territory of international humanitarian law and human rights law, the Court will now seek to ascertain whether the construction of the wall has violated those rules and principles.

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115. In this regard, Annex II to the report of the Secretary-General, entitled “Summary Legal Position of the Palestine Liberation Organization”, states that “The construction of the Barrier is an attempt to annex the territory contrary to international law” and that “The de facto annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination.” This view was echoed in certain of the written statements submitted to the Court and in the views expressed at the hearings. *Inter alia*, it was contended that: “The wall severs the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination and constitutes a violation of the legal principle prohibiting the acquisition of territory by the use of force.” In this connection, it was in particular emphasized that “The route of the wall is designed to change the demographic composition of the Occupied Palestinian Territory, including East Jerusalem, by reinforcing the Israeli settlements” illegally established on the Occupied Palestinian Territory. It was further contended that the wall aimed at “reducing and parcelling out the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination”.

116. For its part, Israel has argued that the wall’s sole purpose is to enable it effectively to combat terrorist attacks launched from the West Bank. Furthermore, Israel has repeatedly stated that the Barrier is a temporary measure (see report of the Secretary-General, para. 29). It did so *inter alia* through its Permanent Representative to the United Nations at the Security Council meeting of 14 October 2003, emphasizing that “[the fence] does not annex territories to the State of Israel”, and that Israel is “ready and able, at tremendous cost, to adjust or dismantle a fence if so required as part of a political settlement” (S/PV.4841, p. 10). Israel’s Permanent Representative restated this view before the General Assembly on 20 October and 8 December 2003. On this latter occasion, he added: “As soon as the terror ends, the fence will no longer be necessary. The fence is not a border and has no political significance. It does not change the legal status of the territory in any way.” (A/ES-10/PV.23, p. 6.)

117. The Court would recall that both the General Assembly and the Security Council have referred, with regard to Palestine, to the customary rule of “the inadmissibility of the acquisition of territory by war” (see paragraphs 74 and 87 above). Thus in resolution 242 (1967) of 22 November 1967, the Security Council, after recalling this rule, affirmed 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;
- (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force”.

It is on this same basis that the Council has several times condemned the measures taken by Israel to change the status of Jerusalem (see paragraph 75 above).

118. As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a “Palestinian people” is no longer in issue. Such existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr. Yitzhak Rabin, Israeli Prime Minister. In that correspondence, the President of the PLO recognized “the right of the State of Israel to exist in peace and security” and made various other commitments. In reply, the Israeli Prime Minister informed him that, in the light of those commitments, “the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people”. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 also refers a number of times to the Palestinian people and its “legitimate rights” (Preamble, paras. 4, 7, 8; Article II, para. 2; Article III, paras. 1 and 3; Article XXII, para. 2). The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions (see, for example, resolution 58/163 of 22 December 2003).

119. The Court notes that the route of the wall as fixed by the Israeli Government includes within the “Closed Area” (see paragraph 85 above) some 80 per cent of the settlers living in the Occupied Palestinian Territory. Moreover, it is apparent from an examination of the map mentioned in paragraph 80 above that the wall’s 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).

120. As regards these settlements, the Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.

In this respect, the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited.

The Security Council has thus taken the view that such policy and practices “have no legal validity”. It has also called upon “Israel, as the occupying Power, to abide scrupulously” by the Fourth Geneva Convention and:

“to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories” (resolution 446 (1979) of 22 March 1979).

The Council reaffirmed its position in resolutions 452 (1979) of 20 July 1979 and 465 (1980) of

1 March 1980. Indeed, in the latter case it described “Israel’s policy and practices of settling parts of its population and new immigrants in [the occupied] territories” as a “flagrant violation” of the Fourth Geneva Convention.

The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.

121. 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 (see paragraph 116 above), 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.

122. 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 (see paragraphs 84, 85 and 119 above).

In other terms, the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council (see paragraphs 75 and 120 above). There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing, as will be further explained in paragraph 133 below, to the departure of Palestinian populations from certain areas. That construction, along with measures taken previously, thus 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.

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123. The construction of the wall also raises a number of issues in relation to the relevant provisions of international humanitarian law and of human rights instruments.

124. With regard to the Hague Regulations of 1907, the Court would recall that these deal, in Section II, with hostilities and in particular with “means of injuring the enemy, sieges, and bombardments”. Section III deals with military authority in occupied territories. Only Section III is currently applicable in the West Bank and Article 23 (*g*) of the Regulations, in Section II, is thus not pertinent.

Section III of the Hague Regulations includes Articles 43, 46 and 52, which are applicable in the Occupied Palestinian Territory. Article 43 imposes a duty on the occupant to “take all measures

within his power to restore, and, as far as possible, to insure public order and life, respecting the laws in force in the country”. Article 46 adds that private property must be “respected” and that it cannot “be confiscated”. Lastly, Article 52 authorizes, within certain limits, requisitions in kind and services for the needs of the army of occupation.

125. A distinction is also made in the Fourth Geneva Convention between provisions applying during military operations leading to occupation and those that remain applicable throughout the entire period of occupation. It thus states in Article 6:

“The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.”

Since the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3, remain applicable in that occupied territory.

126. These provisions include Articles 47, 49, 52, 53 and 59 of the Fourth Geneva Convention. According to Article 47:

“Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.”

Article 49 reads as follows:

“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so



demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”

According to Article 52:

“No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power’s intervention.

All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited.”

Article 53 provides that:

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

Lastly, according to Article 59:

“If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.

Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.



A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.”

127. The International Covenant on Civil and Political Rights also contains several relevant provisions. Before further examining these, the Court will observe that Article 4 of the Covenant allows for derogation to be made, under various conditions, to certain provisions of that instrument. Israel made use of its right of derogation under this Article by addressing the following communication to the Secretary-General of the United Nations on 3 October 1991:

“Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.

These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings.

In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4 (1) of the Covenant.

The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention.

In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision.”

The Court notes that the derogation so notified concerns only Article 9 of the International Covenant on Civil and Political Rights, which deals with the right to liberty and security of person and lays down the rules applicable in cases of arrest or detention. The other Articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory.

128. Among these mention must be made of Article 17, paragraph 1 of which reads as follows: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”

Mention must also be made of Article 12, paragraph 1, which provides: “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”

129. In addition to the general guarantees of freedom of movement under Article 12 of the International Covenant on Civil and Political Rights, account must also be taken of specific guarantees of access to the Christian, Jewish and Islamic Holy Places. The status of the Christian Holy Places in the Ottoman Empire dates far back in time, the latest provisions relating thereto having been incorporated into Article 62 of the Treaty of Berlin of 13 July 1878. The Mandate for Palestine given to the British Government on 24 July 1922 included an Article 13, under which:

“All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, while ensuring the requirements of public order and decorum, is assumed by the Mandatory . . .”

Article 13 further stated: “nothing in this mandate shall be construed as conferring . . . authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed”.

In the aftermath of the Second World War, the General Assembly, in adopting resolution 181 (II) on the future government of Palestine, devoted an entire chapter of the Plan of Partition to the Holy Places, religious buildings and sites. Article 2 of this Chapter provided, in so far as the Holy Places were concerned:

“the liberty of access, visit and transit shall be guaranteed, in conformity with existing rights, to all residents and citizens [of the Arab State, of the Jewish State] and of the City of Jerusalem, as well as to aliens, without distinction as to nationality, subject to requirements of national security, public order and decorum”.

Subsequently, in the aftermath of the armed conflict of 1948, the 1949 General Armistice Agreement between Jordan and Israel provided in Article VIII for the establishment of a special committee for “the formulation of agreed plans and arrangements for such matters as either Party may submit to it” for the purpose of enlarging the scope of the Agreement and of effecting improvement in its application. Such matters, on which an agreement of principle had already been concluded, included “free access to the Holy Places”.

This commitment concerned mainly the Holy Places located to the east of the Green Line. However, some Holy Places were located west of that Line. This was the case of the Room of the Last Supper and the Tomb of David, on Mount Zion. In signing the General Armistice Agreement, Israel thus undertook, as did Jordan, to guarantee freedom of access to the Holy Places. The Court considers that this undertaking by Israel has remained valid for the Holy Places which came under its control in 1967. This undertaking has further been confirmed by Article 9, paragraph 1, of the 1994 Peace Treaty between Israel and Jordan, by virtue of which, in more general terms, “Each party will provide freedom of access to places of religious and historical significance.”

130. As regards the International Covenant on Economic, Social and Cultural Rights, that instrument includes a number of relevant provisions, namely: the right to work (Articles 6 and 7); protection and assistance accorded to the family and to children and young persons (Article 10); the right to an adequate standard of living, including adequate food, clothing and housing, and the right

“to be free from hunger” (Art. 11); the right to health (Art. 12); the right to education (Arts. 13 and 14).

131. Lastly, the United Nations Convention on the Rights of the Child of 20 November 1989 includes similar provisions in Articles 16, 24, 27 and 28.

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132. From the information submitted to the Court, particularly the report of the Secretary-General, it appears that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention.

133. That construction, the establishment of a closed area between the Green Line and the wall itself and the creation of enclaves have moreover imposed substantial restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto). Such restrictions are most marked in urban areas, such as the Qalqiliya enclave or the City of Jerusalem and its suburbs. They are aggravated by the fact that the access gates are few in number in certain sectors and opening hours appear to be restricted and unpredictably applied. For example, according to the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967, “Qalqiliya, a city with a population of 40,000, is completely surrounded by the Wall and residents can only enter and leave through a single military checkpoint open from 7 a.m. to 7 p.m.” (Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 1993/2 A and entitled “Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine”, E/CN.4/2004/6, 8 September 2003, para. 9.)

There have also been serious repercussions for agricultural production, as is attested by a number of sources. According to the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories

“an estimated 100,000 dunums [approximately 10,000 hectares] of the West Bank’s most fertile agricultural land, confiscated the Israeli Occupation Forces, have been destroyed during the first phase of the wall construction, which involves the disappearance of vast amounts of property, notably private agricultural land and olive trees, wells, citrus grows and hothouses upon which tens of thousands of Palestinians rely for their survival” (Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, A/58/311, 22 August 2003, para. 26).

Further, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that “Much of the Palestinian land on the Israeli side of the Wall consists of fertile agricultural land and some of the most important water wells in the region” and adds that “Many fruit and olive trees had been destroyed in the course of building the barrier.” (E/CN.4/2004/6, 8 September 2003, para. 9.) The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights states that construction of the wall “cuts off

Palestinians from their agricultural lands, wells and means of subsistence” (Report by the Special Rapporteur of the United Nations Commission on Human Rights, Jean Ziegler, “The Right to Food”, Addendum, Mission to the Occupied Palestinian Territories, E/CN.4/2004/10/Add.2, 31 October 2003, para. 49). In a recent survey conducted by the World Food Programme, it is stated that the situation has aggravated food insecurity in the region, which reportedly numbers 25,000 new beneficiaries of food aid (report of the Secretary-General, para. 25).

It has further led to increasing difficulties for the population concerned regarding access to health services, educational establishments and primary sources of water. This is also attested by a number of different information sources. Thus the report of the Secretary-General states generally that “According to the Palestinian Central Bureau of Statistics, so far the Barrier has separated 30 localities from health services, 22 from schools, 8 from primary water sources and 3 from electricity networks.” (Report of the Secretary-General, para. 23.) The Special Rapporteur of the United Nations Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that “Palestinians between the Wall and Green Line will effectively be cut off from their land and workplaces, schools, health clinics and other social services.” (E/CN.4/2004/6, 8 September 2003, para. 9.) In relation specifically to water resources, the Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights observes that “By constructing the fence Israel will also effectively annex most of the western aquifer system (which provides 51 per cent of the West Bank’s water resources).” (E/CN.4/2004/10/Add.2, 31 October 2003, para. 51.) Similarly, in regard to access to health services, it has been stated that, as a result of the enclosure of Qalqiliya, a United Nations hospital in that town has recorded a 40 per cent decrease in its caseload (report of the Secretary-General, para. 24).

At Qalqiliya, according to reports furnished to the United Nations, some 600 shops or businesses have shut down, and 6,000 to 8,000 people have already left the region (E/CN.4/2004/6, 8 September 2003, para. 10; E/CN.4/2004/10/Add.2, 31 October 2003, para. 51). The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights has also observed that “With the fence/wall cutting communities off from their land and water without other means of subsistence, many of the Palestinians living in these areas will be forced to leave.” (E/CN.4/2004/10/Add.2, 31 October 2003, para. 51.) In this respect also the construction of the wall would effectively deprive a significant number of Palestinians of the “freedom to choose [their] residence”. In addition, however, in the view of the Court, since a significant number of Palestinians have already been compelled by the construction of the wall and its associated régime to depart from certain areas, a process that will continue as more of the wall is built, that construction, coupled with the establishment of the Israeli settlements mentioned in paragraph 120 above, is tending to alter the demographic composition of the Occupied Palestinian Territory.

134. To sum up, the Court is of the opinion that the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and

its associated régime, by contributing to the demographic changes referred to in paragraphs 122 and 133 above, contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council resolutions cited in paragraph 120 above.

135. The Court would observe, however, that the applicable international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances.

Neither Article 46 of the Hague Regulations of 1907 nor Article 47 of the Fourth Geneva Convention contain any qualifying provision of this type. With regard to forcible transfers of population and deportations, which are prohibited under Article 49, paragraph 1, of the Convention, paragraph 2 of that Article provides for an exception in those cases in which “the security of the population or imperative military reasons so demand”. This exception however does not apply to paragraph 6 of that Article, which prohibits the occupying Power from deporting or transferring parts of its own civilian population into the territories it occupies. As to Article 53 concerning the destruction of personal property, it provides for an exception “where such destruction is rendered absolutely necessary by military operations”.

The Court considers that the military exigencies contemplated by these texts may be invoked in occupied territories even after the general close of the military operations that led to their occupation. However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.

136. The Court would further observe that some human rights conventions, and in particular the International Covenant on Civil and Political Rights, contain provisions which States parties may invoke in order to derogate, under various conditions, from certain of their conventional obligations. In this respect, the Court would however recall that the communication notified by Israel to the Secretary-General of the United Nations under Article 4 of the International Covenant on Civil and Political Rights concerns only Article 9 of the Covenant, relating to the right to freedom and security of person (see paragraph 127 above); Israel is accordingly bound to respect all the other provisions of that instrument.

The Court would note, moreover, that certain provisions of human rights conventions contain clauses qualifying the rights covered by those provisions. There is no clause of this kind in Article 17 of the International Covenant on Civil and Political Rights. On the other hand, Article 12, paragraph 3, of that instrument provides that restrictions on liberty of movement as guaranteed under that Article “shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant”. As for the International Covenant on Economic, Social and Cultural Rights, Article 4 thereof contains a general provision as follows:

“The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only

in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

The Court would observe that the restrictions provided for under Article 12, paragraph 3, of the International Covenant on Civil and Political Rights are, by the very terms of that provision, exceptions to the right of freedom of movement contained in paragraph 1. In addition, it is not sufficient that such restrictions be directed to the ends authorized; they must also be necessary for the attainment of those ends. As the Human Rights Committee put it, they “must conform to the principle of proportionality” and “must be the least intrusive instrument amongst those which might achieve the desired result” (CCPR/C/21/Rev.1/Add.9, General Comment No. 27, para. 14). On the basis of the information available to it, the Court finds that these conditions are not met in the present instance.

The Court would further observe that the restrictions on the enjoyment by the Palestinians living in the territory occupied by Israel of their economic, social and cultural rights, resulting from Israel’s construction of the wall, fail to meet a condition laid down by Article 4 of the International Covenant on Economic, Social and Cultural Rights, that is to say that their implementation must be “solely for the purpose of promoting the general welfare in a democratic society”.

137. To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. 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 the infringements resulting from that route 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 of its obligations under the applicable international humanitarian law and human rights instruments.

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138. The Court has thus concluded that the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel. However, Annex I to the report of the Secretary-General states that, according to Israel: “the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and Security Council resolutions 1368 (2001) and 1373 (2001)”. More specifically, Israel’s Permanent Representative to the United Nations asserted in the General Assembly on 20 October 2003 that “the fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter”; the Security Council resolutions referred to, he continued, “have clearly recognized the right of States to use force in self-defence against terrorist attacks”, and therefore surely recognize the right to use non-forcible measures to that end (A/ES-10/PV.21, p. 6).

139. Under the terms of Article 51 of the Charter of the United Nations:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

140. The Court has, however, considered whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance include qualifying clauses of the rights guaranteed or provisions for derogation (see paragraphs 135 and 136 above). Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged. However, the Court will not need to consider that question. As the Court observed in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, “the state of necessity is a ground recognized by customary international law” that “can only be accepted on an exceptional basis”; it “can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met” (*I.C.J. Reports 1997*, p. 40, para. 51). One of those conditions was stated by the Court in terms used by the International Law Commission, in a text which in its present form requires that the act being challenged be “the only way for the State to safeguard an essential interest against a grave and imminent peril” (Article 25 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts; see also former Article 33 of the Draft Articles on the International Responsibility of States, with slightly different wording in the English text). In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.

141. 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 in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law.

142. In conclusion, the Court considers that Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall resulting from the considerations mentioned in paragraphs 122 and 137 above. The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law.



143. The Court having concluded that, by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and by adopting its associated régime, Israel has violated various international obligations incumbent upon it (see paragraphs 114-137 above), it must now, in order to reply to the question posed by the General Assembly, examine the consequences of those violations.

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144. In their written and oral observations, many participants in the proceedings before the Court contended that Israel's action in illegally constructing this wall has legal consequences not only for Israel itself, but also for other States and for the United Nations; in its Written Statement, Israel, for its part, presented no arguments regarding the possible legal consequences of the construction of the wall.

145. As regards the legal consequences for Israel, it was contended that Israel has, first, a legal obligation to bring the illegal situation to an end by ceasing forthwith the construction of the wall in the Occupied Palestinian Territory, and to give appropriate assurances and guarantees of non-repetition.

It was argued that, secondly, Israel is under a legal obligation to make reparation for the damage arising from its unlawful conduct. It was submitted that such reparation should first of all take the form of restitution, namely demolition of those portions of the wall constructed in the Occupied Palestinian Territory and annulment of the legal acts associated with its construction and the restoration of property requisitioned or expropriated for that purpose; reparation should also include appropriate compensation for individuals whose homes or agricultural holdings have been destroyed.

It was further contended that Israel is under a continuing duty to comply with all of the international obligations violated by it as a result of the construction of the wall in the Occupied Palestinian Territory and of the associated régime. It was also argued that, under the terms of the Fourth Geneva Convention, Israel is under an obligation to search for and bring before its courts persons alleged to have committed, or to have ordered to be committed, grave breaches of international humanitarian law flowing from the planning, construction and use of the wall.

146. As regards the legal consequences for States other than Israel, it was contended before the Court that all States are under an obligation not to recognize the illegal situation arising from the construction of the wall, not to render aid or assistance in maintaining that situation and to co-operate with a view to putting an end to the alleged violations and to ensuring that reparation will be made therefor.

Certain participants in the proceedings further contended that the States parties to the Fourth Geneva Convention are obliged to take measures to ensure compliance with the Convention and that, inasmuch as the construction and maintenance of the wall in the Occupied Palestinian Territory constitutes grave breaches of that Convention, the States parties to that Convention are under an obligation to prosecute or extradite the authors of such breaches. It was further observed that "the United Nations Security Council should consider flagrant and systematic violation of international law norm[s] and principles by Israel, particularly . . . international humanitarian law, and take all necessary measures to put an end [to] these violations", and that the Security Council and the General Assembly must take due account of the advisory opinion to be given by the Court.

...



147. Since the Court has concluded that the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to various of Israel's international obligations, it follows that the responsibility of that State is engaged under international law.

148. The Court will now examine the legal consequences resulting from the violations of international law by Israel by distinguishing between, on the one hand, those arising for Israel and, on the other, those arising for other States and, where appropriate, for the United Nations. The Court will begin by examining the legal consequences of those violations for Israel.

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149. The Court notes that Israel is first obliged to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory (see paragraphs 114-137 above). Consequently, 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 freedom of access to the Holy Places that came under its control following the 1967 War (see paragraph 129 above).

150. The Court observes that Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 149; *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, p. 44, para. 95; *Haya de la Torre*, Judgment, I.C.J. Reports 1951, p. 82).

151. Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. Moreover, in view of the Court's finding (see paragraph 143 above) that Israel's violations of its international obligations stem from the construction of the wall and from its associated régime, cessation of those violations entails the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem. All legislative and regulatory acts adopted with a view to its construction, and to the establishment of its associated régime, must forthwith be repealed or rendered ineffective, except in so far as such acts, by providing for compensation or other forms of reparation for the Palestinian population, may continue to be relevant for compliance by Israel with the obligations referred to in paragraph 153 below.

152. Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. The Court would recall that the essential forms of reparation in customary law were laid down by the Permanent Court of International Justice in the following terms:

“The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.” (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.)

153. Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. 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.

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154. The Court will now consider the legal consequences of the internationally wrongful acts flowing from Israel’s construction of the wall as regards other States.

155. The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature “the concern of all States” and, “In view of the importance of the rights involved, all States can be held to have a legal interest in their protection.” (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33.) The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.

156. As regards the first of these, the Court has already observed (paragraph 88 above) that in the *East Timor* case, it described as “irreproachable” the assertion that “the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character” (*I.C.J. Reports 1995*, p. 102, para. 29). The Court would also recall that under the terms of General Assembly resolution 2625 (XXV), already mentioned above (see paragraph 88),

“Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . .”

157. With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, it stated that “a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ . . .”, that they are “to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law” (*I.C.J. Reports 1996 (I)*, p. 257, para. 79). In the Court’s view, these rules incorporate obligations which are essentially of an *erga omnes* character.

158. The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.

159. Given the character and the importance of the rights and obligations involved, the Court is of the view that 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 are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

160. Finally, the Court is of the view that the United Nations, and especially 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 régime, taking due account of the present Advisory Opinion.

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161. The Court, being concerned to lend its support to the purposes and principles laid down in the United Nations Charter, in particular the maintenance of international peace and security and the peaceful settlement of disputes, would emphasize the urgent necessity for the United Nations as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy conclusion, thereby establishing a just and lasting peace in the region.

162. The Court has reached the conclusion that the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law and has stated the legal consequences that are to be drawn from that illegality. The Court considers itself bound to add that this construction must be placed in a more general context. Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a

succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that 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 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). The "Roadmap" approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and 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.

...

163. For these reasons,

THE COURT,

(1) Unanimously,

*Finds* that it has jurisdiction to give the advisory opinion requested;

(2) By fourteen votes to one,

*Decides* to comply with the request for an advisory opinion;

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;*

AGAINST: *Judge Buergenthal;*

(3) *Replies* in the following manner to the question put by the General Assembly:

A. By fourteen votes to one,

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 régime, are contrary to international law;

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;*

AGAINST: *Judge Buergenthal;*

B. By fourteen votes to one,

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;

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;*

AGAINST: *Judge Buergenthal;*

C. By fourteen votes to one,

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;

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;*

AGAINST: *Judge Buergenthal;*

D. By thirteen votes to two,

All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention;

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;*

AGAINST: *Judges Kooijmans, Buergenthal;*

E. By fourteen votes to one,

The United Nations, and especially 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 régime, taking due account of the present Advisory Opinion.

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;*

AGAINST: *Judge Buergenthal.*

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this ninth day of July, two thousand and four, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

*(Signed)* SHI Jiuyong,  
President.

*(Signed)* Philippe COUVREUR,  
Registrar.

Judges KOROMA, HIGGINS, KOIIMA and AL-KHASAWNEH append separate opinions to the Advisory Opinion of the Court; Judge BURG appends a declaration to the Advisory Opinion of the Court; Judges ELARA and OWADA append separate opinions to the Advisory Opinion of the Court.

*(Initialed)* J.Y.S.

*(Initialed)* Ph.C.

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In fact, the International Court of Justice's Advisory Opinion on Israel's security barrier merits the same treatment as another shameful United Nations document – the 1975 General Assembly Resolution 3379 that equated Zionism with racism. Israel's ambassador to the UN, the late Haim Herzog, tore up that insidious document from the General Assembly's podium.

An ICJ that welcomed the arguments of a master terrorist such as Yasser Arafat, but gives no weight to the words and opinions of former members of the International Court of Justice, and turns a deaf ear to Israeli victims of terror, and that cites conventions, declarations, and resolutions of the General Assembly as a source of customary international law, can only be held in contempt of its own mandate.

*The Truth May Not Always Win, But it is Always Right.*



# Reply

Even the most sacred precepts of international law can be manipulated to pervert the truth. In its Advisory Opinion of 9 July 2004, the UN's International Court of Justice ruled that Israel's security fence to protect civilian populations from barbarous terror was in violation of international law.

The ICJ ruled that the inconvenience of the fence for Palestinians was more serious than the lives of Jewish children systematically murdered by Palestinian terrorists.

An informed "Reply" to this jurisprudential mockery by the World Court has been prepared by Eli Hertz of New York City. Not a lawyer, Hertz applied his considerable intellectual talents to a meticulously researched and academically refined rejoinder - one that should be read not only by the members of the Court and other UN officials, but also by the broader community of international law scholars.

Eli Hertz has prepared an important and valuable document for all who would seek justice and fairness in our corrupted legal universe. It deserves a wide and very careful reading.

**Louis Rene Beres**

*(Ph.D., Princeton University, 1971, International Law)  
Professor of International Law, Purdue University*

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The ICJ advisory opinion on Israel's security fence was a legal travesty denying the people of Israel their inherent right to self-defense and, at the same time, ignoring their historical national rights that the UN and the League of Nations once readily recognized. Eli Hertz has done an enormous service by providing a cogent point-by-point rebuttal and, by doing so, not letting this terrible document stand without a reply.

**Ambassador Dore Gold**

*Former Permanent Representative of Israel to the United Nations*

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## About the author

Eli Hertz is the President of Myths and Facts, Inc. a nonprofit organization devoted to research and publication of information regarding U.S. global interests - particularly in the Middle East. Hertz published and sponsored books and articles regarding the Arab-Israeli conflict. Most notably are "Partners for Change, How U.S.-Israel Cooperation Can Benefit America" (1993), "Myths and Facts, a Guide to the Arab-Israeli conflict" (September, 2001 edition), and "Who is Humiliating Whom." A new volume on the Arab-Israeli conflict "Negotiating Over Quicksand - A Realistic Look at the Arab-Israeli Conflict," is scheduled for release shortly.

Hertz is also a recognized pioneer in the personal computer industry. He has authored and published many technology-related articles and books. *Marketing Computers*, an *ADWEEK* magazine, stated "Hertz is a barometer for the future." Hertz is actively involved in numerous international, industry and community associations and panels, and devotes a great deal of time and resources to charity.



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