International Court of Justice

Request for an Advisory Opinion from the 10th Emergency Special Session of the United Nations General Assembly on "the legal consequences arising from the construction of the wall being built by Israel"

Written Statement of the Government of Israel

on Jurisdiction and Propriety

30 January 2004

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OPENING STATEMENT

0.1 The reality of Israel today is that of an ongoing terrorist threat of the gravest proportions. Israel faces 40 to 50 significant security alerts every week, each one threatening an attack such as that carried out at the Park Hotel in the coastal town of Netanya on 27 March 2002 in which 30 people were killed, most in their 70s and 80s, and 145 others injured, by a suicide bomber from Tulkarem. In that same month, March 2002, by suicide bomb and other attacks, 135 people were killed and over 721 injured in 37 separate incidents. Over the past 12 months, as a result of more stringent security, the number of casualties have begun to decline. Yet terrorist attacks have still killed 218 people in this period and injured around 850 others. In one of the most horrific of these attacks, at Maxim's restaurant in Haifa on 4 October 2003, two families lost 5 members each, across three generations, to the suicide bomber.

0.2 On 8 December 2003, the 10th Emergency Special Session of the United Nations General Assembly requested an advisory opinion from the International Court Justice on the legal consequences arising from the construction by Israel of a "wall" in "Occupied Palestinian Territory". The resolution requesting the advisory opinion is silent on the reasons why such a barrier is necessary. Twenty paragraphs of text preceding the request for an opinion say nothing – not a single word – about Palestinian terrorism directed against Israeli civilians and the ongoing reality of such attacks which have left 916 people dead and over 5,000 injured, many critically, in the past 40 months of violence. The extensive dossier of 88 documents provided to the Court by the United Nations Secretariat to assist the Court in its work is likewise silent on the subject. The dossier purports to provide all relevant resolutions of the General Assembly and Security Council. Yet noticeable by its absence is any reference to Security Council resolution 1373 (2001) in which the Council reaffirmed that acts of terrorism, like those which have become the Palestinian *modus operandi* against Israeli civilians, constitute a threat to international peace and security. Resolution 1373 (2001), as do other resolutions of both the Security Council and the General Assembly which are omitted from the dossier, also reaffirms the duty to refrain from organising, instigating, assisting or participating in terrorist acts.

0.3 Israel is called to the bar of the Court by a resolution which was crafted and nurtured by the Palestinian Liberation Organisation ("PLO"). The PLO, as "Palestine", has been invited to participate in the proceedings of the Court and assail Israel on questions of law which challenge

Israel's right to defend its citizens from attack. Yet it is the PLO, through Fatah, the Al-Aqsa Martyrs' Brigades and its wider authority in the West Bank and Gaza, that is behind many of the most murderous attacks directed at Israeli civilians. In the most recent of these, on 14 January 2004, a young woman from Gaza, pleading illness and a prosthetic limb, managed to evade Israeli security to detonate her bomb to cause maximum casualties. Four Israelis were killed in that blast. The Al-Aqsa Martyrs' Brigades, closely associated with Yasser Arafat's Fatah party, was involved in the attack.

0.4 These acts of terrorism violate all established rules of customary and conventional international law. Yet responsibility for and the legal consequences of these attacks are not part of the request for an opinion from the Court. Those most responsible for the attacks are effectively given free rein in the proceedings. There is a travesty of imbalance in the exercise in which the Court is now engaged.

0.5 Israel's written statement addresses the jurisdiction of the Court and the propriety of any response by it on the substance of the request. It does not address the legality of the fence, legal consequences that flow from it or other matters pertaining to the question of substance presented to the Court. Israel considers that the Court does not have jurisdiction to entertain the request and that, even were it to have jurisdiction, it should not respond to the requested opinion.

0.6 The request for an opinion is *ultra vires* the competence of the 10th Emergency Special Session of the General Assembly by reference to the very rules by which the session was convened. Under the Uniting for Peace Resolution, the Emergency Special Session is only competent to act in circumstances in which the Security Council has failed to do so on the matter in question. Yet the Security Council did act, adopting, by unanimous vote, resolution 1515 (2003) endorsing the Quartet co-sponsored Roadmap just 19 days before the request for an advisory opinion was made. Moreover, any opinion from the Court on the substance of the request will without doubt upset the balance of the Roadmap and make any meaningful resumption of negotiations more difficult to achieve.

0.7 The Court has a discretion whether to give the requested opinion. In the past, it has emphasised that it would refrain from giving an opinion when to do so would be incompatible with its judicial functions. This is just such a case. "Palestine" does not come to the Court with clean hands. The process is tainted. It is an abuse of the advisory opinion procedure. The

question is unbalanced. The Security Council has acted to different effect. And any response on the substance of the request would undoubtedly cut across the Roadmap initiative. In Israel's submission, the Court should decline to give a response on the requested opinion.

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PART ONE

PRELIMINARY MATTERS

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CHAPTER 1
INTRODUCTION

1.1 On 8 December 2003, the 10th Emergency Special Session of the United Nations General Assembly adopted resolution A/RES/ES-10/14 by which it requested the International Court of Justice "to urgently render an advisory opinion". The question referred to the Court was 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?"

1.2 This written statement of the Government of Israel ("Israel") addresses only questions of jurisdiction and propriety affecting the Court's treatment of the advisory opinion request. Israel does not deal, and does not intend to deal, with the substantive question put to the Court which, in Israel's submission, the Court does not have jurisdiction to examine. Moreover, and in any event, the Court should exercise its undoubted discretion to decline to give an advisory opinion on a matter that takes it deeply into the political arena.

1.3 In the following Chapters, Israel develops a number of objections of law going to jurisdiction and propriety. A more detailed scheme of this statement is given below. A number of common threads run through these objections. First, the advisory opinion request is at odds with the approach adopted by the United Nations Security Council for addressing the on-going Israeli-Palestinian conflict. The United Nations is a co-sponsor, as a member of the Quartet with the European Union, the Russian Federation and the United States of America, of the "Roadmap" (the short title of the proposal entitled *A Performance-Based Roadmap to a Permanent Two State Solution to the Israeli-Palestinian Conflict*). The Roadmap was expressly endorsed by the Security Council in resolution 1515 (2003) of 19 November 2003, less than three weeks before the adoption by the 10th Emergency Special Session of the advisory opinion request. The Roadmap has been accepted by both sides. It represents a concerted effort by the international community, endorsed by the Security Council, to get back to meaningful negotiations. The objective of the Roadmap is a two-State solution to the Israeli-Palestinian conflict. The first step in that direction – by the express terms of the Roadmap – is an end to violence and terrorism.

1.4 It is difficult, indeed impossible, to see how any response by the Court on the substance of the request can fail to cut across the scheme of the Roadmap. Elements pertinent to this appreciation are addressed throughout this statement, most directly in Chapters 3, 4 and 9. The Roadmap sets out an agreed sequence of conduct and negotiations. The acknowledged first step is that Palestinian terrorism and incitement against Israel must end. Israel affirms its commitment to the two-State vision of an independent, viable, sovereign Palestinian State living in peace and security alongside Israel. It has been agreed that negotiations on borders, settlements, the status of Jerusalem and other "permanent status" issues will follow in Phase III of the Roadmap once the basic building blocks of peace are in place. The reference by the Court to such matters – even incidentally – would be problematic and unhelpful.

1.5 The Roadmap was the product of careful discussion between the co-sponsors and the two sides. It represents the best efforts of the international community to restart a dialogue between Israelis and Palestinians. An opinion of the Court on the substance of the question now before it would exacerbate rather than ease relations between the two sides.

1.6 Second, Israel considers that, as a matter of law, the advisory opinion request is *ultra vires* the competence of the 10th Emergency Special Session of the General Assembly. The Emergency Special Session was convened in April 1997 on the basis of the Uniting for Peace Resolution. Under this Resolution, the General Assembly is competent to act where "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". There is, however, no failure by the Security Council to act. On the contrary. The Council has acted; just nineteen days before the adoption of the advisory opinion request. The actions of the Security Council may not sit comfortably with the objectives of the co-sponsors of the advisory opinion request. But the Council has not failed to exercise its responsibility in this case. It is not for the Emergency Special Session of the General Assembly to set down a path which would without question cut across the Security Council initiative.

1.7 Third, there is a wider factual context of considerable importance which informs Israel's objections. The advisory opinion request ignores half of the reality of the Israeli-Palestinian conflict. It is striking that, in the twenty preambular paragraphs of the resolution that precede the advisory opinion request, no reference is made to the on-going Palestinian terrorism that is

directed against Israel and its citizens. These attacks, through suicide bombings and other indiscriminate attacks against Israeli civilians, have left 916 Israelis dead in the past 40 months of violence and many others injured and scarred. The Palestinian Authority and Palestine Liberation Organisation ("PLO") have done nothing to assert control over the groups perpetrating these attacks. Indeed, some of these groups act pursuant to the direction and control of the Palestinian political establishment. These acts, by reference to established principles of attribution and responsibility, engage the responsibility of "Palestine", the principal motivator and co-sponsor of the request to the Court. By reason of this, the advisory opinion request is a travesty, challenging Israel's right to defend itself against on-going attacks but saying not a word about the perpetrators of the terrorist violence.

1.8 Israel has said time and again that the fence is intended solely as a temporary, non-violent, defensive measure to guard against suicide and other attacks against Israel and Israelis. The fence does not, and is not intended, to prejudice the outcome of political negotiations on borders, Jerusalem, settlements or any other issue. Israel expects, in due course, when the terrorist threat has ceased, that the fence will be moved to reflect any agreement between the two sides. Israel is fully committed to doing so. It has moved such fences before – on its borders with Egypt, Jordan and Lebanon in the context of peace agreements or other arrangements.

1.9 These and other issues are developed in detail in this statement. To the extent that issues of a factual nature are addressed, they are directed solely at questions of jurisdiction and propriety. This statement does not address issues of detail relevant to the fence – routing, military necessity, fabric of life concerns and other elements. These are not matters which are properly before the Court or on which the Court should give an opinion.

1.10 This statement proceeds as follows. **Chapter 2** addresses issues of fairness and natural justice in relation to the advisory opinion request and the Court's Order of 19 December 2003. **Chapter 3** then sets out some essential contextual material relevant to the Court's consideration of Israel's submissions on jurisdiction and propriety. This includes in particular material on the search for peace in the Israeli-Palestinian conflict, including the scheme of the Roadmap, and the nature and extent of the terrorist threat against Israel and Israelis from Palestinian suicide bomb and other attacks. Israel submits that the fact that these are attacks for which "Palestine" bears responsibility is a matter that the Court should take fully into account in any exercise of discretion by the Court in accordance with Article 65(1) of the Statute.

1.11 **Chapters 4 to 9** then develop Israel's objections on jurisdiction and the propriety of any response on the substance of the request under the following headings:

- the request is *ultra vires* the competence of the 10th Emergency Special Session and/or the General Assembly (**Chapter 4**);

- the request does not raise a legal question within the scope of Article 96(1) of the Charter and Article 65(1) of the Statute – it is uncertain and incapable of response within its terms (**Chapter 5**);

- the considerations relevant to the question of propriety and the exercise by the Court of its discretion under Article 65(1) of the Statute exclude the examination of the request (**Chapter 6**);

- the request concerns a contentious matter in respect of which Israel has not given consent to the jurisdiction of the Court (**Chapter 7**);

- a response to the question would require the Court to speculate about essential facts and make assumptions about arguments of law which it cannot properly make in the context of advisory proceedings (**Chapter 8**); and

- other compelling reasons why the Court, in the exercise of its discretion, should decline to examine the question (**Chapter 9**).

1.12 These Chapters are followed by a short summary of argument and statement of conclusions (**Chapter 10**), and a list of annexes.

1.13 Before turning to these issues, it is appropriate in an introductory statement of this kind to sketch a broad picture for the attention of the Court. Israel, more than any other country in the world, faces today a distinct, declared and ongoing threat of terrorism aimed at all levels of its society. It is an existential threat by the declared intention of its authors. It goes to the heart of Israeli society. Israelis live daily with fabric of life constraints ranging from personal searches in public places to the daily expectation of the next suicide attack at the local community hall or

university cafeteria or teenagers' discotheque that will take from them their children or parents or grandparents.

1.14 Looking at Israeli society today as a passing visitor, one has a sense of solidity and normality and self-confidence. This, however, belies a more fundamental reality. It is the reality of the thoughts of a parent who, when unable to reach the teenager out with her friends, thinks immediately of the Tel Aviv Dolphinarium in June 2001 when 21 were killed, mostly 15 and 16 year olds, and 120 injured, at the hands of a suicide bomber at work late on a Friday night. It is a reality in which the elderly, gathering to celebrate the festival of Passover, think of their friends in Netanya in March 2002 when 30 were killed, most in their 70s and 80s, by a suicide bomber in the Park Hotel. It is the reality that, when one stops for a snack at a restaurant in Haifa, one is vulnerable to an attack like that which, in March 2002, killed 15 in the Matza restaurant in Haifa. It is the reality, too, of wondering, every time one steps onto a bus, whether one will see one's family again in the evening, something denied the 17 killed on the bus from Tel Aviv to Tiberius at the hands of a suicide bomber in June 2002, as well as to countless others on similar journeys. The roll call is long. It reaches into the very heart of Israeli society. No one is unaffected by it. It unites the political spectrum.

1.15 The dates of these attacks in Netanya and Haifa have a particular significance. In March 2002, largely as a result of indiscriminate suicide bomb attacks directed at Israeli civilians, 135 Israelis were killed and 721 injured, many critically. As a ratio per head of population, that would correspond to terrorist attacks killing in a single month over 25,000 people in China or around 5,700 people in the United States or around 2,900 people in Russia or around 1,200 people in France or the United Kingdom.

1.16 In direct response to this murderous onslaught, the Government of Israel, in April 2002, approved the plans for the construction of the fence as a non-violent and temporary measure of last resort. At the time of writing this statement, Israel is faced with 40 to 50 security alerts each week, many of these threatening another Dolphinarium or Park Hotel or Haifa restaurant or Tel Aviv bus. The fence, for all its controversy and difficulties, is aiding this fight against terrorism. No one, on any side of the political divide in Israel, whatever their views on the fence, thinks otherwise.

1.17 Fabric of life concerns exercise Israel greatly. Questions of necessity and routing are constantly addressed by Israel. The Israeli Supreme Court, sitting as the High Court of Justice ("High Court"), has been seised of a series of petitions concerning various aspects of the fence. Israel, being a society based on the rule of law, abides scrupulously by the decisions of its courts.

1.18 There is also a broader dimension to the request now before the Court which is germane to questions of jurisdiction and propriety. Following the request, if the Court responds on the merits, where does it stop? Armed with an advisory opinion on this request, will "Palestine" and others proceed to reconvene the ongoing 10th Emergency Special Session for purposes of requesting yet further opinions? Is the Middle East dispute to come for resolution piecemeal to the Court by way of expedited requests for advisory opinions at six monthly intervals? And what about other conflicts – the security fence currently under construction by India along the Line of Control in Kashmir, or Russia's involvement in Georgia or Chechnya, or China's in Tibet? There are significant risks down the path which the present request urges upon the Court.

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CHAPTER 2
ISSUES OF FAIRNESS AND NATURAL JUSTICE

2.1 The present Chapter sets out a number of aspects of the treatment that the Court has already given the request which raise serious questions about the fairness of the Court's approach and its compliance with the requirements of natural justice. It also addresses questions concerning the Secretary-General's Report attached to the request and the Secretariat's Dossier submitted to the Court in this case.

2.2 Resolution A/RES/ES-10/14 was communicated to the President of the Court by the Secretary-General by letter on the day of its adoption, ie, 8 December 2003. On 11 December 2003, Israel, through its Ambassador in The Hague, wrote to the Registrar of the Court. A copy of that letter is annexed to this statement.[1] The letter reserved Israel's position in respect of the proceedings but raised a number of issues for early consideration by the Court. It noted Israel's position that the Court should not entertain the advisory opinion request for reasons of jurisdiction and admissibility. It also noted that sufficient time would have to be allowed for the preparation and exchange of written statements, and comments thereon by others. Given the seriousness of the issues raised by the request, Israel observed that the written phase of the proceedings could not be "adequately, or fairly, achieved in the space of weeks but would have to allow at least a number of months".

2.3 In the circumstances, mindful of the potentially prejudicial effect of impending proceedings on attempts to restart the process of political negotiation, Israel proposed that the Court should bifurcate the proceedings to allow an early response to the question of whether the advisory opinion request should be entertained by the Court. Israel also drew attention to Article 17(2) of the Statute and Article 34 of the Rules of Court which address circumstances in which Members of the Court who have had some connection with a matter under consideration should recuse themselves from the proceedings.

2.4 Israel's request was disregarded. On 19 December 2003, the Court issued an Order in respect of these proceedings. Four aspects of the Order may be noted. First, the Court named the

[1] Letter from H.E. Eitan Margalit, Ambassador of Israel, The Hague, to H.E. Philippe Couvreur, Registrar, International Court of Justice, 11 December 2003. **(Annex 1)**

case *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In doing so, it adopted the language of the question, although with some variation. Second, the Court fixed an exceptionally short time period of six weeks for the filing of written statements and fixed 23 February 2004 as the date for the opening of the hearing. Third, the Court, "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", permitted "Palestine" to submit a written statement in the proceedings and to participate in the hearing. Fourth, the decision of the Court was taken by the full Court after the deliberation of all of its Members.

2.5 In response to the Court's Order, Israel sent a letter to the Registrar of the Court on 31 December 2003. A copy of the letter is annexed to this statement.[2] In that letter, and specifically in the light of the Court's Order, Israel again reserved its position. The object of the letter was to place on record Israel's disquiet with the four elements of the Order noted in the preceding paragraph. These concerns are as follows.

A. The Title Given to the Case

2.6 The question asks the Court to address the legal consequences arising from the construction of the "wall" by Israel. In his report prepared pursuant to General Assembly resolution ES-10/13 to which the requesting resolution makes reference, the Secretary-General refers to Israel's decision to "build a system of fences, walls, ditches and barriers in the West Bank ('the Barrier')". A footnote to this sentence notes that "Palestinians often call this system the Separation Wall and Israelis use the term Security Fence. For the purposes of the present report, the more general term 'the Barrier' is used."[3]

2.7 The use of the term "wall" in the resolution requesting an opinion is neither happenstance nor oversight. It reflects a calculated media campaign to raise pejorative connotations in the mind of the Court of great concrete constructions of separation such as the Berlin Wall, intended to stop people escaping from tyranny. The reality, however, is different. Along a 180 kilometre route of the fence so far constructed, 8.8 kilometres, or less than 5 percent,

[2] Letter from H.E. Eitan Margalit, Ambassador of Israel, The Hague, to H.E. Philippe Couvreur, Registrar, International Court of Justice, 31 December 2003. **(Annex 2)**

[3] Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13, A/ES-10/248, 24 November 2003, at paragraph 2. **(Dossier No.52)**

is made up of a concrete barrier, generally in areas where Palestinian population centres abut onto Israel.[4] This barrier, mostly comprising a system of wire fences, with access and crossing points, has as its intention achieving security for Israel while trying as best as possible to facilitate access. Neither objective is assured, as recent suicide attacks in Israel have sadly attested.

2.8 Given the intentionally pejorative use of the term "wall", and the ready availability of the neutral term "barrier" used in the Secretary-General's report, Israel in its letter of 31 December 2003 objected to the Court's adoption of the term "wall" in the formulation of the name of the case. In this statement, Israel will use the term "fence" to describe the barrier in general terms and the terms "fence" or "wall" as appropriate to the context to describe particular elements of the barrier.

2.9 An additional element of terminology raises similar concerns. The question put to the Court refers to the "Occupied Palestinian Territory". The underlying assumption appears to be that the so-called "Green Line" or Armistice Demarcation Line ("ADL") is the presumptive and immutable border of a putative Palestinian State. This, however, is to prejudge the outcome of a settlement between the parties in a manner that has never before been accepted – by the UN, by the parties themselves, or by the sponsors of the Roadmap.[5] The sponsors of the request seek the imprimatur of the Court merely by having the Court accept the validity of the question itself. It is not the formula of Security Council resolution 242 (1967). It is not the formula of the 1993 Declaration of Principles on Interim Self-Government Arrangements signed by Israel and the PLO, which defers discussions on borders to the permanent status negotiations.[6] Perhaps most important of all for present purposes, it is not the formula of the Roadmap, co-sponsored by the United Nations,[7] and endorsed by the Security Council in resolution 1515 (2003),[8] which likewise envisages negotiations on borders as part of Phase III of the plan. For the Court now to adopt, by design or default, language of the kind used in the advisory request, is inconsistent with carefully crafted formulations aimed at facilitating the search for peace over more than 3 ½ decades of conflict. It would also be to elevate a highly contentious and politicised resolution of a General Assembly Emergency Special Session over a UN co-sponsored, Security Council endorsed, plan

[4] See the Report of the Secretary-General, at paragraph 11. **(Dossier No.52)**
[5] This is addressed further in Chapter 3 below.
[6] Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993, at Article V.3. **(Dossier No.65)**
[7] A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, S/2003/529, 7 May 2003. **(Dossier No.70)**
[8] S/RES/1515 of 19 November 2003, at operative paragraph 1. **(Dossier No.36)**

for the resolution of a dispute that continues to engage the Security Council in the exercise of its primary responsibility under Article 24 of the Charter.

B. The Fixing of Time-Limits

2.10 The Court has fixed time-limits that are so short as significantly to affect the ability of Israel to put its case. Time-limits of comparable brevity to those in this case are the exception rather than the rule, even in priority advisory opinion requests. For example, in the advisory proceedings in *Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights*, the Court fixed an 8 ½ week period for the filing of first round written statement and a further 30 days after that for second round written comments on the written statements.[9] The subsequent procedure was reserved for further decision, once the extent of the written statements was known.

2.11 In other priority cases, such as the *Namibia* advisory proceedings, time-limits were significantly longer than those fixed in this case.[10] Yet, if the Court proceeds with the present case, it will be entering into matters that are considerably more complex than most, if not all, advisory proceedings to come before the Court. The underlying issues go to Israel's essential security and defence interests. Moreover, in the letter sent to the Court before the Court's procedural deliberations, Israel explicitly noted that, given the seriousness of the issues raised by the question, sufficient time would have to be allowed for the preparation of initial written statements.

2.12 The peremptory constraints of time under which the Court has required written statements to be prepared gives rise to very serious concerns about the fairness of the procedures in this matter. Even if Israel had considered it appropriate to address the issues of substance, the procedure adopted by the Court would not have allowed it properly to do so. The same point may also be made as regards:

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[9] *Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights,* Order of 10 August 1998, *I.C.J. Reports 1998*, p.423.

[10] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Orders of 5 and 28 August 1970, *I.C.J. Reports, 1970*, pp.359 and 362.

(a) the exclusion of a written reply phase and the fixing of a date for the opening of the hearing without regard to the number or volume of written statements to be submitted by others;

(b) the facility left open to Member States, "Palestine" and international organisations to present oral statements and comments at the hearing regardless of whether or not they have submitted written statements. This procedure would leave Israel no or only limited opportunity to address such oral statements and comments with no prior notice at all.

2.13 The Court in this case has been asked, at the insistence of many in the General Assembly who would deny Israel's very right to exist, for an opinion on Israeli policies that go directly to Israel's most fundamental security needs. For the Court to set a timetable for the proceedings to unfold with such expedition raises serious questions as to the fairness of the process.

C. The Participation of "Palestine" in the Proceedings

2.14 The presence of "Palestine" before the Court signals clearly the contentious nature of the proceedings. Israel is nevertheless constrained to observe that the Court's decision inviting "Palestine" to participate has no basis in the Charter, the Statute or the Rules of Court. On the contrary, Article 35(1) of the Statute provides that the Court shall be open to "states parties to the present Statute". The remainder of the Article addresses the conditions under which the Court shall be open to other States – conditions which do not operate in the present circumstances. Article 66 of the Statute, addressing advisory proceedings directly, refers to "States entitled to appear before the Court" and international organisations.

2.15 Whatever may be the status of "Palestine", it is neither a State entitled to appear before the Court, nor an international organisation. Furthermore, it is quite clear from the General Assembly resolutions, which, in the language of the Court's Order, have "granted Palestine a special status as observer", that they can in no way form the foundation for the direct participation of "Palestine" in the proceedings. Quite to the contrary:

(a) By resolution 3237 (XXIX) of 22 November 1974, the General Assembly invited "the Palestine Liberation Organisation to participate in the sessions and work of the General Assembly in the capacity of observer".[11]

(b) Resolution 43/160 A of 9 December 1988 addressed certain administrative details regarding PLO participation as observer in the work of the General Assembly.[12]

(c) By resolution 43/177 of 15 December 1988, the General Assembly decided that "the designation 'Palestine' should be used in place of the designation 'Palestine Liberation Organization' in the United Nations system, without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system, in conformity with relevant United Nations resolutions and practice".[13]

(d) Finally, by resolution 52/250 of 7 July 1998, the General Assembly decided "to confer upon Palestine, in its capacity as observer, and as contained in the Annex to the present resolution, additional rights and privileges".[14] An examination of the Annex to the resolution, however, discloses no extension of rights and privileges to Palestine as regards the International Court of Justice, which in any event would not be within the competence of the General Assembly to confer.

2.16 Israel does not seek to deny to the Palestinian people a voice of their own. It is concerned, however, that in a matter as delicate as the Israeli – Palestinian conflict, the Court, *en passant* and without discussion in a procedural Order, considered it appropriate to take a decision that accords "Palestine" a status that has been highly contentious amongst UN Members for many years. The Court's Order on this aspect reinforces Israel's wider concerns about the fairness of the process in which the Court is engaged, and the Order itself is already being viewed as an additional substantive factor in the political debate about Palestinian statehood.

[11] A/RES/3237 (XXIX), 22 November 1974, at operative paragraph 1 (emphasis added). **(Annex 3)**
[12] A/RES/43/160 A, 9 December 1988. **(Annex 4)**
[13] A/RES/43/177, 15 December 1988, at operative paragraph 3. **(Annex 5)**
[14] A/RES/52/250, 7 July 1998, at operative paragraph 1. **(Annex 6)**

D. The Application of Article 17(2) of the Statute

2.17 In its letter of 11 December 2003, Israel drew attention to Article 17(2) of the Court's Statute and Article 34 of the Rules of Court concerning the participation in the decisions of the Court in this case by Members of the Court who have a prior involvement in the underlying dispute. The Court's Order of 19 December 2003 was nonetheless made by decision of the full Court after deliberation of all of its Members.

2.18 Israel, with reluctance, has felt obliged to pursue the matter further as regards the participation in the proceedings of one Member of the Court whose previous involvement manifestly raises questions of the application of Article 17(2) of the Statute. By its letter of 31 December 2003, Israel observed that it was inappropriate for a Member of the Court to participate in the decisions of the Court in this case in circumstances in which he had previously played a leading role in the very Emergency Special Session from which the advisory opinion request has emerged, and had also acted in an official capacity as an advocate for a cause that was in contention in the proceedings. Israel went on thereafter to write to the President of the Court confidentially on this matter, pursuant to Article 34(2) of the Rules, challenging Judge Elaraby's participation in the proceedings.

2.19 There is little reasoned jurisprudence of the Court on the application of Article 17 of the Statute and Article 34 of the Rules. In the past, in cases like *Namibia*, the Court showed a reluctance to acknowledge that the previous involvement of a Member of the Court in a political role on the matter that was subsequently referred to the Court was a reason requiring that Member to step down. More recently, however, in a number of cases, Members of the Court have *proprio motu*, pursuant to Article 24(1) of the Statute, chosen to step down where there has been some previous involvement with the matters in contention.

2.20 Absent authoritative guidance on this matter from the Court, Israel submits that the appropriate test is to be found in the practice and jurisprudence of other courts and tribunals, including municipal courts, faced with similar issues. A review of this practice and jurisprudence shows a remarkable consistency of approach.

2.21 For example, after examining both international and national decisions on the matter, the general principles of law in this area were addressed by the Appeals Chamber of the

International Criminal Tribunal for the Former Yugoslavia in the case of *Prosecutor v. Anto Furundzija* in the following terms:

> "189. … the Appeals Chamber finds that there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:
>
> A. A Judge is not impartial if it is shown that actual bias exists.
>
> B. There is an unacceptable appearance of bias if:
>
> i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
>
> ii) the circumstances would lead a reasonable observer, properly informed, to a reasonably apprehended bias."[15]

2.22 This principle is echoed in a wide range of other municipal and international cases.[16]

2.23 Judge Elaraby, in both his previous professional capacity and in his private statements, has been actively engaged in opposition to Israel on matters which go directly to aspects of the question now before the Court. Israel contends that Judge Elaraby's involvement in the case raises an unacceptable appearance of bias and, with respect, that the Judge should therefore not take part in any aspect of the present proceedings.

E. The Secretary-General's Report and the Secretariat's Dossier

2.24 Israel is also compelled to note its concerns with both the Secretary-General's Report attached to the advisory opinion request transmitted to the Court and the Secretariat's Dossier prepared pursuant to Article 65(2) of the Statute. As regards the Secretary-General's Report,

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[15] *Prosecutor v. Anto Furundzija*, IT-95-17/1-T, Judgment of 21 July 2000, at paragraph 189. See also paragraphs 164 – 215.

[16] See, for example, *In re Pinochet* (House of Lords), Judgment of 15 January 1999, [2000] 1 AC 119; *In re Murchison et al.* (US SC), 349 U.S. 133 (1955); *Liteky v. United States* (US SC), 510 U.S. 540 (1994); *Miglin v. Miglin* (SC of Canada), 2003 SCC 24; *Webb v. R* (High Court of Australia), 122 A.L.R. 41 (1994). The growing body of international jurisprudence in this area is surveyed in Brown, C., "The Evolution and Application of Rules Concerning Independence of the 'International Judiciary'", in *The Law and Practice of International Courts and Tribunals*, 2 (2003) 63 – 96.

Israel notes that Annex I of this Report, described as "Summary legal position of the Government of Israel", is both materially inaccurate and failed to take account of information expressly provided to the Secretary-General's envoy in the region. It does not reflect Israel's position. Moreover, the language of the Annex, by comparison to Annex II representing the Palestinian position, raises questions of balance which are prejudicial to Israel's position.

2.25 In the main body of the Report, Israel considers that the passing acknowledgement, immediately qualified, of Israel's right to protect its citizens,[17] fails to accord sufficient weight to the now accepted appreciation that stands at the core of Security Council resolution 1373 (2001) and other related resolutions in the response against terrorism. That resolution reaffirmed that terrorist attacks of the kind faced by Israel "constitute a threat to international peace and security". It reaffirmed "the inherent right of individual and collective self-defence" in such circumstances. It reaffirmed "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 Report is entirely one-sided in its treatment of these issues.

2.26 The Report is also fundamentally misleading on the question of the Roadmap. It condemns Israel's position but fails to reflect the Roadmap's principal requirement, that "the Palestinians immediately undertake an unconditional cessation of violence". These are its opening words. The Report's "Observations" are simply not credible in the face of such glaring omissions.

2.27 As to the Secretariat's Dossier, Israel addressed a letter to the Secretary-General dated 26 January 2004 on the subject. It is set out here in full in its operative parts:

> "Israel must register its dismay and concern at the dossier submitted by the Secretariat to the International Court of Justice, in the request for an advisory opinion on Israel's security fence. The dossier is rife with what we hope are oversights, and cannot, in any way, be said to present a balanced picture of the relevant United Nations documents salient in this case.
>
> The context in which the security fence was constructed – Israel's exercise of its legitimate right of self-defence in accordance with principles of international law and the UN Charter – has been entirely overlooked. Indeed, those resolutions which speak not only of a right, but rather of an obligation,

[17] Secretary-General's Report, at paragraph 30. **(Dossier No.52)**

> to fight terrorism have not been included in the dossier. The most relevant of these are undoubtedly Security Council Resolutions 1269 and 1373.
>
> At the same time, various documents have been included whose relevance is questionable, at the least. For example, the inclusion of General Assembly Resolution 194, as well as the Rome Statue of the ICC, could only be considered 'relevant' in the context of a broad political campaign against Israel. At times, the lack of balance in the dossier borders on the absurd. I am at a loss to understand the justification for the inclusion of reports written by the Special Rapporteur of the CHR to the territories, while no mention is made of detailed responses by Israel, themselves circulated as documents of the United Nations.
>
> I must protest these shortcomings in the strongest of terms. Both the inclusion of irrelevant materials, as well as the exclusion of salient documents, may have effect upon the work of the Court. I would therefore ask that these oversights be urgently corrected."[18]

2.28 Israel does not consider that the involvement of the Secretariat in this matter to date has been in the best traditions of fairness and impartiality. It adds to the concerns about due process and natural justice in the conduct of these proceedings.

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[18] Letter dated 26 January 2004 from Ambassador Arye Mekel, Charge d'affaires a.i. of Israel to the United Nations in New York, addressed to the Secretary-General. **(Annex 7)**

CHAPTER 3
ESSENTIAL CONTEXTUAL MATERIAL

A. The Relevance of Context

3.1 A limited factual presentation is necessary to enable the Court to undertake a meaningful assessment of Israel's objections to jurisdiction and the propriety or otherwise of a response on the substance of the question. This concerns in particular the on-going attempts to find a settlement to the Israeli-Palestinian conflict, including at the level of the United Nations, and the realities of the Palestinian terrorist threat against Israel and Israelis. These issues go directly to such preliminary questions as the *vires* of the advisory opinion request, the contentious nature of the matter brought before the Court by way of the request, the factual and legal issues not before the Court but which would be essential to any proper assessment of the substance of the request, and the exercise by the Court of its discretion under Article 65(1) of the Statute. Key elements of this factual context are addressed in the following sections of this Chapter.

B. The Israeli-Palestinian Conflict and Attempts to Find a Settlement

(i) Initiatives within the United Nations

3.2 The resolution requesting an advisory opinion locates the request squarely in the context of the wider Arab-Israeli / Israeli-Palestinian dispute. Reference is made, for example, to Security Council resolutions 242 (1967) and 338 (1973) which were respectively adopted following the 1967 and 1973 Middle East wars. These resolutions, which have formed the cornerstone of the search for peace in the Middle East subsequently, and have been accepted by both sides, call for a negotiated settlement of the conflict in which each side has the "right to live in peace within secure and recognised boundaries free from threats or acts of force".[19] Reference is also made to Security Council resolution 1397 (2002) of 12 March 2002 which, in its preambular paragraphs, affirms "a vision of a region where two States, Israel and Palestine, live side by side with secure and recognised borders". That resolution goes on, in operative paragraph 1, to demand an "immediate cessation of all acts of violence, including all acts of terror, provocation, incitement and destruction".[20] Resolution 1397 (2002) is particularly important as it

[19] S/RES/242 (1967), 22 November 1967, at operative paragraph 1(ii). **(Dossier No.24)**
[20] S/RES/1397 (2002), 12 March 2002. **(Dossier No.35)**

sets the agenda for the Quartet initiative which resulted in the Roadmap, itself endorsed by the Security Council in resolution 1515 (2003).

(ii) The Madrid Process

3.3 A concerted initiative to find a comprehensive settlement to the Middle East conflict was launched in October 1991 at the Madrid Conference co-sponsored by the United States and the then Soviet Union. The purpose of the Conference was to establish a framework for the resumption of negotiations in the Middle East that had seen relatively little movement since the Camp David Accords of 1978 and the Egypt-Israel Peace Treaty of 1979. The form of the arrangements agreed upon in Madrid was to encourage separate rounds of bilateral negotiations between Israel and its neighbours. The Israel-Jordan Peace Treaty of 26 October 1994 was the outcome of the Israel-Jordan track of the Madrid negotiations.

3.4 In the immediate aftermath of the Madrid Conference, negotiations between Israel and the Palestinians took the form of negotiations between Israel and a joint Palestinian-Jordanian Committee. These talks were subsequently overtaken by direct, secret talks held in Norway between Israel and representatives of the PLO. These negotiations led in turn to a series of agreements between Israel and the PLO as the recognised representative of the Palestinian people. These agreements are commonly referred to as the Oslo Accords.

(iii) Exchange of Letters Between the Prime Minister of Israel and the Chairman of the PLO, 9 – 10 September 1993

3.5 An important preliminary step to the Israel-PLO agreements was the *Exchange of Letters* between Yasser Arafat, Chairman of the PLO, and Yitzhak Rabin, Prime Minister of Israel, on 9 – 10 September 1993. The letter from Chairman Arafat, in material part, bears setting out at length:

> "The signing of the Declaration of Principles marks a new era in the history of the Middle East. In firm conviction thereof, I would like to confirm the following PLO commitments:
>
> The PLO recognises the right of the State of Israel to exist in peace and security.

> The PLO accepts United Nations Security Council Resolutions 242 and 338.
>
> **The PLO** commits itself to the Middle East peace process, and to a peaceful resolution of the conflict between the two sides and **declares that all outstanding issues relating to permanent status will be resolved through negotiations**.
>
> The PLO considers that the signing of the Declaration of Principles constitutes a historic event, inaugurating a new epoch of peaceful coexistence, free from violence and all other acts which endanger peace and stability. Accordingly, **the PLO renounces the use of terrorism and other acts of violence and will assume responsibility over all PLO elements and personnel in order to assure their compliance, prevent violations and discipline violators.**"[21]

3.6 The salient points for present purposes are the renunciation by the PLO of terrorism and others acts of violence, its commitment to assume responsibility over all PLO elements and personnel in order to ensure their compliance, prevent violations and discipline violators, and its commitment to resolve all outstanding issues regarding permanent status issues through negotiation. These commitments were and remain fundamental to any dialogue between Israel and the Palestinian leadership. They are commitments that have been systematically and consistently honoured only in the breach by the PLO and Palestinian authorities.

(iv) Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993

3.7 The *Exchange of Letters* was followed some days later by the *Declaration of Principles on Interim Self-Government Arrangements* ("DOP") which was signed at the White House in Washington on 13 September 1993 by the two sides and witnessed by the United States and the Russian Federation as the co-sponsors of the Madrid Process. The DOP provided for the establishment of a Palestinian Interim Self-Government Authority in the West Bank and the Gaza Strip leading to a permanent settlement based on Security Council resolutions 242 (1967) and 338 (1973).

3.8 Pursuant to Article V of the DOP, "permanent status negotiations" were to commence as soon as possible. By Article V(2) of the DOP, the permanent status negotiations were to

[21] Letter dated 9 September 1993 from Yasser Arafat, Chairman, The Palestine Liberation Organisation, to Yitzhak Rabin, Prime Minister of Israel (emphasis added). **(Annex 8)**

"cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours, and other issues of common interest."[22]

(v) Israel – PLO Agreements and Undertakings, 1994 - 1999

3.9 Following the DOP, in the period May 1994 to September 1999, Israel and the PLO entered into a series of agreements and undertakings designed to facilitate and ultimately achieve a permanent status agreement. Key elements of these texts have a bearing on the issues of jurisdiction and propriety that the Court is now required to consider.

3.10 The principal agreements of the Israeli-Palestinian negotiations in this period were the following:

(a) *Agreement on the Gaza Strip and Jericho Area*, 4 May 1994. This was a provisional agreement for "an accelerated and scheduled withdrawal of Israeli military forces from the Gaza Strip and from the Jericho Area" in accordance with a detailed arrangement set out in Annex I of the Agreement.[23] Article IX and Annex I of the Agreement addressed issues relevant to security;

(b) *Agreement on Preparatory Transfer of Powers and Responsibilities*, 29 August 1994;[24]

(c) *Protocol on Further Transfer of Powers and Responsibilities*, 27 August 1995;[25]

(d) *Interim Agreement on the West Bank and the Gaza Strip*, 28 September 1995 ("Interim Agreement").[26] This Agreement superseded the Gaza-Jericho Agreement of 4 May 1994 and the earlier agreements on the transfer of powers. Pending the conclusion of a permanent status agreement, the Interim Agreement is the principal agreement governing relations between the two sides. The Interim Agreement addresses various

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[22] *Declaration of Principles on Interim Self-Government Arrangements*, 13 September 1993. **(Dossier No.65)**
[23] *Agreement on the Gaza Strip and the Jericho Area*, 4 May 1994, at Article II. http://www.mfa.gov.il/mfa/go.asp?MFAH00q20
[24] *Agreement on Preparatory Transfer of Powers and Responsibilities*, 29 August 1994. http://www.mfa.gov.il/mfa/go.asp?MFAH00q90
[25] *Protocol on Further Transfer of Powers and Responsibilities*, 27 August 1995. http://www.mfa.gov.il/mfa/go.asp?MFAH00ru0
[26] *Interim Agreement on the West Bank and the Gaza Strip*, 28 September 1995. **(Dossier No.68)**

matters ranging from the redeployment of Israeli forces, the transfer of powers to detailed commitments by the PLO on matters of security, incitement to violence and related issues;

(e) *Protocol Concerning the Redeployment in Hebron*, 17 January 1997.[27]

3.11 As all those involved in the process are acutely aware, a commitment by the PLO or any other party acting for the Palestinians to take effective measures of control to forestall violence is, always has been, and will continue to be, a *sine qua non* for any permanent status agreement between Israel and the Palestinians.

3.12 In the face of on-going violence – including horrific suicide attacks on buses in Tel Aviv and Jerusalem – the United States attempted to bring the two sides together at various points in the process to maintain the momentum of the negotiations. These meetings led to a number of additional undertakings and documents of the two sides, including:

(a) *Note for the Record*, 15 January 1997.[28] In the light of continuing terrorist attacks, the Palestinian side expressly reaffirmed its previously unfulfilled commitments to:

> "2. Fighting terror and preventing violence
> (a) Strengthening security cooperation
> (b) Preventing incitement and hostile propaganda …
> (c) Combat systematically and effectively terrorist organisations and infrastructure
> (d) Apprehension, prosecution and punishment of terrorists
> (e) …
> (f) Confiscation of illegal firearms."

(b) *Wye River Memorandum*, 23 October 1998.[29] This was focused on addressing *inter alia* continuing Israeli concerns regarding the unfulfilled Palestinian security commitments in the earlier agreements. By this Memorandum, the Palestinian side undertook to "make known its policy of zero tolerance for terror and violence" and to take effective measures "to ensure the systematic and effective combat of terrorist organisations and their infrastructure".[30]

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[27] *Protocol Concerning the Redeployment in Hebron*, 17 January 1997. http://www.mfa.gov.il/mfa/go.asp?MFAH00ql0
[28] *Note for the Record*, 15 January 1997. http://www.mfa.gov.il/mfa/go.asp?MFAH00qm0
[29] *The Wye River Memorandum*, 23 October 1998. **(Dossier No.69)**
[30] *The Wye River Memorandum*, 23 October 1998, at Section II.A.1. **(Dossier No.69)**

(c) *Sharm El-Sheikh Memorandum*, 4 September 1999.[31] In the face of continuing concerns about the failure of the Palestinian side to abide by its security commitments, the Sharm El-Sheikh Memorandum witnessed the Palestinian side undertaking yet again "to implement its responsibilities for security, security cooperation and other issues emanating from the prior agreements".[32]

3.13 Notwithstanding the continuing violence and the reluctance of the Palestinian Authority to act decisively to stop such attacks, the two sides entered into extensive and serious negotiations in an attempt to address core issues of the conflict and achieve a permanent status agreement. The efforts culminated in talks held at Camp David in July 2000. Israel went equipped with a genuine desire for a final status agreement, even at the cost of painful concessions. The Palestinian side, however, went with a different attitude. Once it became apparent that the negotiating process was unlikely to see the realisation of all of the Palestinian political goals, the talks stalled. Violence followed, erupting at the end of September 2000. Amidst the violence, attempts were nonetheless made to recover the initiative towards peace in late 2000 and early 2001. These attempts failed. Subsequent attempts to find a path back to the peace process were taken by the international community, led by the United States. These included the establishment of the Sharm El-Sheikh Fact-Finding Committee, chaired by former US Senator George Mitchell. This reported on 30 April 2001.[33] Various attempts were made thereafter to achieve a ceasefire, notably by the Tenet Cease-Fire Plan on 10 June 2001 brokered by CIA Director George Tenet.[34]

3.14 Before turning to address these developments, key elements of the Israeli-PLO agreements of 1993 – 1999 merit recollection.

First, a cessation of terrorism by the PLO and, through them, by associated Palestinian groups, was the cornerstone of the agreements and a *sine qua non* for Israel's participation therein.

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[31] *Sharm El-Sheikh Memorandum*, 4 September 1999. http://www.mfa.gov.il/mfa/go.asp?MFAH0fo30
[32] *Sharm El-Sheikh Memorandum*, 4 September 1999, at paragraph 8(b).
[33] Report of the Sharm Al-Sheikh Fact-Finding Committee, 30 April 2001. http://www.mfa.gov.il/mfa/go.asp?MFAH0jz50
[34] Tenet Cease-Fire Plan, 10 June 2001. http://www.mfa.gov.il/mfa/go.asp?MFAH0khz0

Second, by the express agreement of both sides, questions concerning borders, Jerusalem and settlements, amongst other matters, were to be settled only through the framework of the permanent status negotiations.

Third, the two sides expressly committed themselves to resolving all outstanding issues between them by negotiation. This is the approach consistently adopted in the Israel-PLO agreements and in the Roadmap.

Fourth, one of the key reasons for the breakdown of the arrangements agreed upon by the two sides in this period was the failure by the Palestinian side to abide by its commitments to take effective steps to prevent and counter terrorist violence by Palestinian groups against Israel and Israelis. This was the bargain. The Palestinian leadership, however, now uses violence as a strategic tool in the peace process. It is culpably in breach of its commitments under the earlier agreements.

(vi) The Mitchell Committee Report

3.15 On 17 October 2000, following three weeks of escalating violence, US President Clinton, speaking on behalf of the participants at the Sharm El-Sheikh Summit – Israel, the Palestinian Authority, Egypt, Jordan, the United States, the United Nations, and the European Union – announced the establishment of "a committee of fact-finding on the events of the past several weeks and how to prevent their recurrence".[35] As subsequently established, the Committee was chaired by former US Senator George J. Mitchell. Other Members of the Committee were Suleyman Demirel, formerly President of the Republic of Turkey, Thorbjoern Jagland, Foreign Minister of Norway, Warren B. Rudman, former United States Senator, and Javier Solana, European Union High Representative for the Common Foreign and Security Policy.

3.16 Following detailed written submissions by both sides, the Committee reported on 30 April 2001. The first item in its recommendations was that the violence must end. Under the heading of rebuilding confidence, the Committee recommended:

[35] Statement by US President Clinton, Sharm El-Sheikh Summit, 17 October 2000. http://www.yale.edu/lawweb/avalon/mideast/mid022.htm

> "The PA [Palestinian Authority] should make clear through concrete action to Palestinians and Israelis alike that terrorism is reprehensible and unacceptable, and that the PA will make a 100 percent effort to prevent terrorist operations and to punish perpetrators. This effort should include immediate steps to apprehend and incarcerate terrorists operating within the PA's jurisdiction."[36]

3.17 Both sides accepted the Mitchell Committee Report. Israel has seen no movement at all by the Palestinian side to adopt the recommendation just noted on terrorist violence. On the contrary, the terrorist attacks against Israel and Israeli civilians intensified dramatically in the period since the Mitchell Committee reported. It is the failure by the Palestinian side to take – or even to attempt to take – any meaningful measures to stop such attacks that has led Israel to search for effective means to protect its citizens. The fence now in issue is a temporary, non-violent means of doing so. Whatever the claims of its detractors, it has been effective in achieving this end. Whatever the claims of its detractors, it is not intended to, and does not, either prejudge or prejudice the outcome of permanent status negotiations on such matters as borders, Jerusalem and settlements.

(vii) The Roadmap and Related Developments

(a) Background Issues and the Involvement of the United Nations Security Council

3.18 In the face of escalating violence following the report of the Mitchell Committee and the Tenet Cease-Fire Plan, the Security Council became actively involved in the attempts to find a path back to negotiations. By resolution 1397 (2002) of 12 March 2002, the Security Council affirmed "a vision of a region where two States, Israel and Palestine, live side by side within secure and recognised borders".[37] The resolution went on to welcome and encourage:

> "the diplomatic efforts of the special envoys from the United States of America, the Russian Federation, the European Union and the United Nations Special Coordinator and others, to bring about a comprehensive, just and lasting peace in the Middle East".[38]

3.19 In operative paragraph 1 of the resolution, the Security Council demanded an "immediate cessation of all acts of violence, including all acts of terror, provocation, incitement

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[36] Report of the Sharm Al-Sheikh Fact-Finding Committee, 30 April 2001. http://www.mfa.gov.il/mfa/go.asp?MFAH0jz50

[37] S/RES/1397 (2002), 12 March 2002, at the second preambular paragraph. **(Dossier No.35)**

[38] S/RES/1397 (2002), 12 March 2002, at the sixth preambular paragraph. **(Dossier No.35)**

and destruction". By operative paragraph 2 of the resolution, the Council called upon "the Israeli and Palestinian sides and their leaders to cooperate in the implementation of the Tenet work plan and the Mitchell report recommendations with the aim of resuming negotiations on a political settlement".

3.20 Resolution 1397 (2002) was followed 18 days later by resolution 1402 (2002) of 30 March 2002 which came at the end of a month of the most murderous Palestinian terrorist attacks against Israeli civilians. By operative paragraph 2 of the resolution, the Security Council again reiterated "its demand in resolution 1397 (2002) of 12 March 2002 for an immediate cessation of all acts of violence, including all acts of terror, provocation, incitement and destruction". By operative paragraph 3 of the resolution, the Security Council expressed its "support for the efforts of the Secretary-General and the special envoys to the Middle East to assist the parties to halt the violence and to resume the peace process". By operative paragraph 4, the Security Council decided to remain seised of the matter.

3.21 Resolution 1402 (2002) was followed a few days later by resolution 1403 (2002) of 4 April 2002 by which the Security Council demanded the implementation of resolution 1402 (2002) without delay and welcomed "the mission of the U.S. Secretary of State to the region, as well as efforts by others, in particular the special envoys from the United States, the Russian Federation and the European Union, and the United Nations Special Coordinator". The Council remained seised of the matter.

3.22 There followed, on 10 April 2002, a Statement by the President of the Security Council in which the Council supported a Joint Statement issued in Madrid on the same date by the UN Secretary-General, the Minister of Foreign Affairs of the Russian Federation, the Secretary of State of the United States, the Minister for Foreign Affairs of Spain and the High Representative for European Union Common Foreign and Security Policy.[39] The Joint Statement, which is annexed to the Security Council Presidential Statement, said *inter alia* as follows:

> "We call on Chairman Arafat, as the recognised, elected leader of the Palestinian people, to undertake immediately the maximum possible effort to stop terror attacks against innocent Israelis. We call upon the Palestinian Authority to act decisively and take all possible steps within its capacity to dismantle terrorist infrastructure, including terrorist financing, and to stop

[39] S/PRST/2002/9, 10 April 2002. **(Annex 9)**

incitement to violence. We call upon Chairman Arafat to use the full weight of his political authority to persuade the Palestinian people that any and all terrorist attacks against Israelis should end immediately, and to authorise his representatives to resume immediately security coordination with Israel.

Terrorism, including suicide bombs, is illegal and immoral, has inflicted grave harm to the legitimate aspirations of the Palestinian people and must be condemned as called for in UNSCR 1373.

We call on Israel and the Palestinian Authority to reach agreement on ceasefire proposals put forward by General Zinni without further delay. We commend the efforts of General Zinni to date to achieve this objective.

The Quartet stands ready to assist the parties in implementing their agreements, in particular the Tenet security workplan and the Mitchell recommendations, including through a third party mechanism, as agreed to by the parties."[40]

3.23 On 24 June 2002, US President George W. Bush set out US policy in favour of a two-State solution to the Israeli-Palestinian conflict. On 16 July 2002, the Quartet – the UN, Russian Federation, European Union and United States – issued a joint statement supporting this vision of a two-State solution. In operative part, this statement reads:

"The Quartet deeply deplores today's tragic killing of Israeli civilians and reiterates its strong and unequivocal condemnation of terrorism, including suicide bombing, which is morally repugnant and has caused great harm to the legitimate aspirations of the Palestinian people for a better future. Terrorists must not be allowed to kill the hope of an entire region, and a united international community, for genuine peace and security for both Palestinians and Israelis. The Quartet expresses once again its profound regret at the loss of innocent Israeli and Palestinian lives, and extends its sympathy to all who have suffered loss. The Quartet members express their increasing concern about the mounting humanitarian crisis in Palestinian areas and their determination to address urgent Palestinian needs.

Consistent with President Bush's June 24 statement, the UN, EU and Russia express their strong support for the goal of achieving a final Israeli-Palestinian settlement which, with intensive effort on security and reform by all, could be reached within three years from now. The UN, EU and Russia welcome President Bush's commitment to achieve U.S. leadership toward that goal. The Quartet remains committed to implementing the vision of two States, Israel and independent, viable and democratic Palestine, living side by side in peace and security, as affirmed by Security Council resolution 1397."[41]

[40] Joint Statement of the Quartet, 10 April 2002, annexed to S/PRST/2002/9, 10 April 2002. **(Annex 9)**
[41] Joint Statement of the Quartet, 16 July 2002. **(Annex 10)**

3.24 This Joint Statement by the Quartet was followed, on 18 July 2002, by a Statement by the President of the Security Council indicating the Council's support for the Quartet statement.[42] On 24 September 2002, the Security Council adopted resolution 1435 (2002). By operative paragraph 1 of this resolution, the Council reiterated "its demand for the complete cessation of all acts of violence, including all acts of terror, provocation, incitement and destruction". By operative paragraph 4, the Council called upon "the Palestinian Authority to meet its expressed commitment to ensure that those responsible for terrorist acts are brought to justice by it". By operative paragraph 5, the Security Council expressed "its full support for the efforts of the Quartet". The Council remained seised of the matter.

3.25 On 20 December 2002, the Quartet issued a Joint Statement *inter alia* as follows:

> "Reaffirming their previous statements, the Quartet members reviewed developments since their last meeting, on September 17, 2002. They condemned the brutal terror attacks carried out by Palestinian extremist organisations since the last meeting, which aim to diminish the prospects for peace, and only harm legitimate Palestinian aspirations for statehood.
>
> …
>
> Specifically, the Quartet calls for an immediate, comprehensive, ceasefire. **All Palestinian individuals and groups must end all acts of terror against Israelis, in any location.**"[43]

3.26 This statement was followed by another on 20 February 2003 in which the Quartet *inter alia* "expressed very serious concern at the continuing acts of violence and terror planned and directed against Israelis".[44]

(b) The Roadmap and Security Council Resolution 1515 (2003)

3.27 The Roadmap was presented to the Government of Israel and the Palestinian Authority on 30 April 2003. By a letter dated 7 May 2003 from the UN Secretary-General to the President of the Security Council, the Secretary-General transmitted the Roadmap to the Security Council.[45]

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[42] S/PRST/2002/20, 18 July 2002. **(Annex 11)**
[43] Joint Statement of the Quartet, 20 December 2002 (emphasis added). **(Annex 12)**
[44] Joint Statement of the Quartet, 20 February 2003. **(Annex 13)**
[45] S/2003/529, 7 May 2003. **(Dossier No.70)**

3.28 As its name indicates, the Roadmap is a performance-based initiative aimed at a permanent two-state solution to the Israeli-Palestinian conflict. Its objective is a final and comprehensive settlement of the Israeli-Palestinian conflict within a three-year time frame.

3.29 The gateway to the resolution of the conflict on the basis of the Roadmap is an end to violence and terrorism. This is made clear in the opening paragraphs of the Roadmap in the following terms:

> "A two state solution to the Israeli-Palestinian conflict will only be achieved through an end to violence and terrorism, when the Palestinian people have a leadership acting decisively against terror and willing and able to build a practising democracy based on tolerance and liberty …"[46]

3.30 The Roadmap proceeds from this opening statement of principle to lay down three phases towards the achievement of its objective. Phase I is headed "Ending Terror and Violence, Normalising Palestinian Life, and Building Palestinian Institutions". Phase II is headed "Transition". Phase III is headed "Permanent Status Agreement and End of Israeli-Palestinian Conflict". The opening sentence of Phase I reads as follows:

> "In Phase I, the Palestinians immediately undertake an unconditional cessation of violence according to the steps outlined below; such action should be accompanied by supportive measures undertaken by Israel."

3.31 Under the heading "Security" in Phase I, the opening point reads as follows:

> "Palestinians declare an unequivocal end to violence and terrorism and undertake visible efforts on the ground to arrest, disrupt, and restrain individuals and groups conducting and planning violent attacks on Israelis anywhere."

3.32 Also under this heading is the requirement that "Arab states cut off public and private funding and all other forms of support for groups supporting and engaging in violence and terror".

3.33 Phase II, "Transition", is focused "on the option of creating an independent Palestinian state with provisional borders and attributes of sovereignty". The "primary goals" of Phase II

[46] **Dossier No.70.**

include "continued comprehensive security performance and effective security cooperation". Included amongst the elements of this Phase is the

> "[c]reation of an independent Palestinian state with provisional borders through a process of Israeli-Palestinian engagement, launched by the international conference. As part of this process, implementation of prior agreements to enhance maximum territorial contiguity, including further action on settlements in conjunction with establishment of a Palestinian state with provisional borders."

3.34 Phase III of the Roadmap is focused on achieving a Permanent Status Agreement. It envisages "a process with the active, sustained, and operational support of the Quartet, leading to a final, permanent status resolution in 2005, including on borders, Jerusalem, refugees, settlements".

3.35 Four elements of the Roadmap warrant emphasis:

First, the immediate demand is for an end to Palestinian terrorist attacks against Israel and Israelis, wherever they are. This would be matched by an end to Israel's military action in response to such attacks.

Second, the Roadmap envisages a phased process with progress being dependent on the effective realisation of the objectives of each phase. Thus, progress from Phase I, which is focused on security and on an end to terror, to Phase II, which will address the creation of an independent Palestinian state with provisional borders, is dependent on effective and comprehensive security performance and cooperation.

Third, the resolution of key issues – including borders, Jerusalem and settlements – is the key element of Phase III of the Roadmap.

Fourth, the Quartet co-sponsors of the Roadmap anticipate a negotiating process between the two sides with the "active, sustained, and operational support of the Quartet".

3.36 Following the presentation of the Roadmap, and continued violence on the ground, the Quartet met again in June 2003. Their Joint Statement of 22 June 2003 reads *inter alia* as follows:

> "The Quartet members deplore and condemn the brutal terror attacks against Israeli citizens carried out by Hamas, Palestinian Islamic Jihad, and the Al-Aqsa Martyrs' Brigade since the roadmap's presentation. The Quartet calls for an immediate, comprehensive end to all violence and welcomes efforts by the Government of Egypt and others to achieve such an immediate and comprehensive halt to armed action by Palestinian groups. All Palestinian individuals and groups must end terror against Israelis, anywhere. The Quartet calls on the Palestinian authorities to take all possible steps to halt immediately the activities of individuals and groups planning and conducting attacks on Israelis."[47]

3.37 Again, on 26 September 2003, the Quartet issued a further statement reading *inter alia* as follows:

> "[The Quartet members] condemn the vicious terror attacks of August and September carried out by Hamas, Islamic Jihad, and the Al-Aqsa Martyrs' Brigade. They again affirm that such actions are morally indefensible and do not serve the interests of the Palestinian people. They call on Palestinians to take immediate, decisive steps against individuals and groups conducting and planning violent attacks. Such steps should be accompanied by Israeli supportive measures, including resumption of full security cooperation. They further call on all states to end harbouring and support, including fund-raising and financial assistance, of any groups and individuals that use terror and violence to advance their goals.
>
> The Quartet members affirm that the Palestinian Authority security services must be consolidated under the clear control of an empowered Prime Minister and Interior Minister and must be the sole armed authority in the West Bank and Gaza. Noting that the first Palestinian Prime Minister has resigned his post, they urge that the new Palestinian Prime Minister form a cabinet as soon as possible, and ask that cabinet to re-commit itself to the pledges made in the roadmap and at Aqaba.[48] The Palestinian Authority must ensure that a 'rebuilt and refocused Palestinian Authority security apparatus begins sustained, targeted, and effective operations aimed at confronting all those engaged in terror and dismantling of terrorist capabilities and infrastructure'.
>
> The Quartet members recognise Israel's legitimate right to self-defence in the face of terrorist attacks against its citizens. In this context and in the context of international humanitarian law, they call on the Government of Israel to exert maximum efforts to avoid civilian casualties."[49]

[47] Joint Statement of the Quartet, 22 June 2003. **(Annex 14)**
[48] The statements of the two sides at the Aqaba Middle East Peace Summit of 4 June 2003 are set out below.
[49] Joint Statement of the Quartet, 26 September 2003. **(Annex 15)**

3.38 The Roadmap, and progress towards it, have been the subject of detailed discussions by the Security Council in private session. On 19 November 2003, following private deliberations, the Security Council convened in open session to vote on a draft resolution co-sponsored by Bulgaria, Chile, China, France, Germany, Guinea, Mexico, the Russian Federation, Spain and the United Kingdom. The draft resolution was adopted by the unanimous vote of all the Members of the Council, becoming resolution 1515 (2003). The resolution is short and merits recitation in full:

> "*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 recognised borders,
>
> *Emphasising* the need to achieve a comprehensive, just and lasting peace in the Middle East, including the Israeli-Syrian and the 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."

(c) Subsequent Developments in the 10th Emergency Special Session

3.39 Nineteen days after the adoption of this resolution by the Security Council endorsing the Roadmap, the 10th Emergency Special Session of the General Assembly, first convened in April 1997 under the Uniting for Peace Resolution to address an entirely separate matter, adopted resolution A/RES/ES-10/14 requesting an advisory opinion from the Court. The resolution,

although adopted by the requisite voting majority, failed to command the support of a majority of members of the United Nations, receiving 90 votes in favour of the resolution, with 8 against and 74 abstentions. It is significant that the members of the Quartet – the United Nations apart – including all the members of the European Union, either voted against the resolution or abstained.

3.40 The Court will no doubt examine closely the record of the meeting at which the advisory opinion request was adopted. It is nonetheless worth extracting four statements – two prior to the vote and two explanations of vote – in illustration of at least a significant segment of sentiment in the room. The statements are those of Uganda and the United States, the United Kingdom and Singapore. They are set out in full.

> **Uganda** *(abstaining on the vote)*
>
> "Our delegation has noted the Secretary-General's report, contained in document A/ES-10/248. Uganda remains a firm supporter of the Palestinian cause and our proposed course of action should be seen in that light. We are looking for ways of bringing both sides back to the negotiating table.
>
> Uganda supports a two-nation policy, whereby the State of Israel and the Palestinian State exist side by side in peace, each State with internationally-recognised and secure borders. It is within this context that conflict in the Middle East should be addressed, and as a way forward, **the on-going Quartet-led road map for peace initiative should continue to be supported. On 19 November 2003 the Security Council adopted Resolution 1515 (2003) supporting the road map. This mechanism should be given a chance.**
>
> The international community, especially the United Nations, should be part of the solution and not be seen as a part of the problem in the search for peace in the Middle East. Adopting resolutions to condemn one side would only harden attitudes, a fact to which the statements by the main protagonists this morning have eminently borne testimony. The United Nations should endeavour to bring the two sides, the Palestinians and the Israelis, together to the negotiating table to arrive at an amicable solution.
>
> Resolutions should not be perceived as solutions per se or solutions in themselves, but as viable means to a solution. Without minimising the importance of resolutions as a way of garnering international pressure for a particular cause, Uganda believes that if adopting resolutions has not produced the desired results to date, an alternative mechanism should be found. **The solution lies in negotiated settlement by both sides. That is why, in our opinion, referring the matter to the International Court of Justice would not serve the cause of peace. We should avoid politicizing the Court, as this would undermine its impartiality and credibility. Furthermore, going to the International Court of Justice would amount to forum**

shopping when there is already a mechanism through the Quartet-led road map to address the issue.

Uganda will continue to support all international efforts aimed at bringing about a just and equitable resolution to the conflict and we believe that this General Assembly, the most representative and most universal of all such assemblies, can play a vital role in bringing the parties back to the negotiating table. We call upon all nations to support that process."[50]

United States of America *(voting against the resolution)*

"This emergency special session which has been ongoing since 1997 does not contribute to the shared goal of implementing the road map. The path to peace is the Quartet performance-based road map to a permanent two-State solution to the Israeli-Palestinian conflict. The road map, endorsed in Security Council resolution 1515 (2003), very clearly outlines the obligations and responsibilities of the parties to achieve President Bush's vision of two-States, Palestine and Israel, living side by side in peace and security.

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

The United States policy on Israeli construction of the fence is clear and consistent. We oppose activities by either party that prejudge final status negotiations. President Bush said on 19 November 2003, 'Israel should freeze settlement construction, dismantle unauthorised outposts and the daily humiliation of the Palestinian people and not prejudice final negotiations with the placements of walls and fences'.

But this meeting today and this draft resolution undermine rather than encourage direct negotiations between the parties to resolve their differences. This is the wrong way and the wrong time to proceed on this issue. Furthermore, the draft resolution itself is one-sided and completely unbalanced. The text itself is clearly not designed to promote a process towards peace. It doesn't even mention the word 'terrorism'. We will vote

[50] Statement by Mr Wagaba, Representative of Uganda to the United Nations to the 10th Emergency Special Session, 8 December 2003. A/ES-10/PV.23, 8 December 2003, at p.18 (emphasis added). **(Dossier No.42)**

against this ill-advised resolution and urge Assembly members not to support it."[51]

United Kingdom *(abstaining on the vote)*

"The United Kingdom remains concerned about the route marked out for the barrier in the occupied West Bank. We regret that Israel has not complied with the General Assembly's demand, in resolution ES-10/13, that it stop and reverse construction of the barrier inside the occupied Palestinian territories. Nevertheless, the United Kingdom abstained on the vote on the draft resolution calling for an advisory opinion of the International Court of Justice on the legal consequences of the wall. We consider it inappropriate, without the consent of both parties, to ask the Court to give an advisory opinion. Moreover, it is unlikely to resolve the problem on the ground. **This is not a case in which the General Assembly genuinely needs legal advice in order to carry out its functions. It has already declared the wall to be illegal. The United Kingdom voted in favour of that resolution. The question of the wall can be settled only through direct negotiations between the two parties and through positive action on the ground in the framework of a comprehensive settlement. To pursue an advisory opinion will in no way help the parties to re-launch the much-needed political dialogue necessary to implement the road map – and implementing the road map should be the priority.**"[52]

Singapore *(abstaining on the vote)*

"Singapore consistently votes in favour of the Palestinian position in the General Assembly. During the Assembly's fifty-seventh session, we voted in support of all 17 resolutions on this issue. And thus far, we have also voted in favour of the Palestinian position on all relevant resolutions at the fifth-eighth session of the General Assembly and at the recent meetings of the emergency special session, including on resolution ES-10/13 concerning the wall.

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

[51] Statement by Mr Cunningham, Representative of the United States of America to the United Nations to the 10th Emergency Special Session, 8 December 2003. A/ES-10/PV.23, 8 December 2003, at p.19 (emphasis added). **(Dossier No.42)**

[52] Statement by Sir Emyr Jones Parry, Ambassador of the United Kingdom to the United Nations, to the 10th Emergency Special Session, 8 December 2003. A/ES-10/PV.23, 8 December 2003, at p.21 (emphasis added). **(Dossier No.42)**

opinion would have no binding effect on the parties to this dispute or on the General Assembly.

The purpose of seeking the advisory opinion of the ICJ must be to assist or facilitate the work of the General Assembly. In operative paragraph 1 of resolution ES-10/13, the General Assembly has itself already made the determination that the construction of the wall by Israel is 'in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law'.

That assessment must necessarily have been made based on considerations of the obligations incumbent on Israel. The ICJ's advisory opinion does not formally bind either party since it is made pursuant to the advisory jurisdiction of the Court. Nor does it enable the General Assembly to take any action more binding than what it has already done in resolution ES-10/13. On the contrary, posing the question might create the impression that the General Assembly is not very sure about the correctness of its early determination on the legality of Israel's actions in resolution ES-10/13. For the above reasons, we have abstained from the vote on this draft resolution."[53]

3.41 Israel acknowledges, as will be plain from the record of the proceedings as well as from other statements made in the Security Council, by the Quartet and elsewhere, that the fence now in issue has raised particular concerns. These concerns are most often made in ignorance of the facts and of the relevant applicable principles of law. The facts relevant to a meaningful appraisal of the issues are not now before the Court. Questions of routing and fabric of life consequences as a result of the fence exercise Israel greatly. It will not have escaped the attention of observers of Israel and readers of the Israeli press that decisions have been taken in recent months to vary the route of the fence, and make other material changes, in the light of fabric of life concerns where this can be done consistently with the dictates of security. Many phases of construction, including some which have attracted particular comment, have yet to be started or authorised. Israel is looking again at these issues. The High Court is currently seised of a number of petitions concerning the fence. Israel is a society based above all on the rule of law and will carefully comply with the decisions of its judiciary.[54]

3.42 The question now in issue, however, is whether it is appropriate for the Court to respond, and whether it is within its jurisdiction to do so, to a request for an advisory opinion by the 10th Emergency Special Session of the General Assembly which cuts across and would risk

[53] Statement by Mr Tan, Representative of Singapore to the United Nations to the 10th Emergency Special Session, 8 December 2003. A/ES-10/PV.23, 8 December 2003, at pp.22 – 23 (emphasis added). **(Dossier No.42)**

[54] See further on this the statement by Prime Minister Sharon at paragraph 3.79 below.

destabilising an initiative expressly endorsed by the Security Council. Israel contends that the Court lacks jurisdiction in this case and that, even were it competent to do so, it should not, in the exercise of its discretion under Article 65(1) of the Statute, respond to the substance of the question referred to it.

3.43 All of these resolutions, agreements and statements point to the fundamental agreement of the two sides, the Quartet, the Security Council and the international community that the appropriate mechanism for resolving disputes between the two sides is negotiation within the context of the Roadmap. Unilateral initiatives that divert from this process, and seek to isolate one issue for attention in an alternative mechanism, are in direct contradiction to this fundamental principle and risk unravelling the framework by which a comprehensive settlement may be reached.

C. Borders, Jerusalem and Settlements Under the Israeli-PLO Agreements and the Roadmap

3.44 The question referred to the Court calls for an examination by the Court of the route of the fence. It implies that the baseline that the Court should use for this purpose is the 1949 Armistice Demarcation Line. The question is whether this is an acceptable approach, particularly in the light of the scheme of the Roadmap. Israel does not here enter into the substance of the debate on these issues. A number of observations are, however, necessary by way of essential background to Israel's submissions on jurisdiction and propriety.

3.45 The so-called "Green Line" is the term commonly used to describe the Armistice Demarcation Line ("ADL") described in the *General Armistice Agreement* signed by Israel and Jordan on 3 April 1949. The language of the "Green Line" has entered the popular lexicon of lay commentators on the Israeli-Palestinian conflict as the presumptive and immutable border between Israel and a putative Palestinian state. This assessment is, however, problematic as a matter of substance and has no basis in law. The point goes to one of the significant risks of this advisory opinion request, namely, that the Court will paint with a broad brush on the landscape of the Israeli-Palestinian conflict in a way that will complicate initiatives to achieve a lasting peace settlement between the two sides.

3.46 On 16 November 1948, the Security Council adopted resolution 62 (1948). In operative paragraph 1 of the resolution, the Security Council decided that, "in order to eliminate the threat to the peace in Palestine and to facilitate the transition from the present truce to a permanent peace in Palestine, an armistice shall be established in all sectors of Palestine". The Council, in operative paragraph 2 of the resolution, went on to call upon the parties involved in the conflict, as a provisional measure under Article 40 of the Charter, to seek agreement on the delineation of an armistice demarcation line beyond which the armed forces of the respective parties would not move during the transition period to permanent peace .[55]

3.47 On 3 April 1949, Israel and Jordan signed a *General Armistice Agreement*. The preambular paragraphs of the Agreement reference resolution 62 (1948) and Article 40 of the Charter.[56] Article II of the Armistice Agreement provides that no provision of the Agreement shall in any way prejudice the rights, claims and positions of either party in the ultimate peaceful settlement of the Palestine question, the provisions of the Agreement having being dictated exclusively by military considerations.[57] Article VI(9) provides expressly that the ADL is "without prejudice to future territorial settlement or boundary lines or to claims of either Party relating thereto." The ADL, which was marked on the map in green, was known as the "Green Line".

3.48 The ADL was never authoritatively demarcated. Moreover, in the period following the *General Armistice Agreement*, and in accordance with its terms, a considerable number of adjustments were made to the route of the line as described in the Agreement. They were made by commanders on both sides, acting jointly, pursuant to Article IX and XII of the Agreement. The adjustments were marked on large scale maps of the parties which were signed and subsequently usually brought before the Mixed Armistice Commission for approval.

3.49 An additional issue which the question posed to the Court might engage relates to the status of the Israeli settlements in the West Bank. This is a subject, the resolution of which the two sides have expressly agreed to leave to the permanent status negotiations. This is the scheme of the Roadmap. The question is whether Israel has a right to take measures to protect the lives of the residents of these settlements in the face of on-going attacks by Palestinian terrorists.

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[55] S/RES/62, 16 November 1948, at operative paragraph 2. **(Annex 16)**
[56] *Hashemite Kingdom of Jordan – Israel: General Armistice Agreement*, 3 April 1949. **(Annex 17)**
[57] *General Armistice Agreement*, at Article II.

3.50 It is often said by Israel's detractors, justifying Palestinian suicide and other attacks in particular against residents of the Israeli settlements in the West Bank and the Gaza Strip that the settlements are illegal and that the attacks are therefore legitimate and somehow morally acceptable. The same reasoning leads also to similar comments in respect of attacks to the east of the so-called Green Line or in parts of Jerusalem that the particular commentator would aggregate to "Palestine".

3.51 As the extracts from the Quartet and other statements given above indicate, it is acknowledged by many close to the detail of this conflict that Palestinian terrorism against Israel and Israelis is illegal wherever it occurs. This includes terrorism directed at the Israeli settlements and the residents thereof in the West Bank and Gaza Strip, to others east of the Green Line, in Jerusalem or elsewhere. Even the harshest of Israel's critics have been constrained to acknowledge that such attacks are a violation of the norms of international humanitarian law and general international law and cannot be justified.

3.52 As already observed, the issue of settlements is to be addressed in the permanent status negotiations. This is the scheme of the Roadmap. It would be enormously problematic for the Court to enter into this complex issue in the context of the present request for an advisory opinion. Moreover, there is a significant risk that any decision of the Court on this issue could be construed as legitimising such attacks with the consequence that a renewed wave of such attacks might occur. The Court should be more than just ordinarily cautious about proceeding down this road. Any opinion on these issues would almost inevitably destabilise still further relations between the two sides and prejudice the Roadmap initiative.

D. The Palestinian Terrorist Threat to Israel

3.53 The request for an opinion does not ask about the legal consequences of unlawful terrorist attacks upon the inherent right to life of Israeli citizens so often carried out by Palestinian terrorists with the support, active or passive, of the authorities of "Palestine". It should have done. Israel has a compelling case and it would not hesitate, in other circumstances, to make it. Neither does the question ask for an opinion on the consequences of the violation of the laws and customs of war and of wider customary principles of international human rights law by Palestinian terrorists and the Palestinian Authority. Here too Israel's case is compelling. As is

addressed in Chapter 8, an appreciation of these issues would be essential to any meaningful assessment by the Court of the question before it. The request for an opinion is not balanced. The procedure adopted by the Court is not conducive to a considered examination of the issues. Israel does not accept that the Court has jurisdiction to examine these issues, or that it would be proper for the Court to do so in the context of its advisory procedure.

3.54 Some factual material on the nature and scale of the Palestinian terrorist threat to Israel will assist the Court properly to exercise its discretion under Article 65(1) of the Statute and decide whether or not to answer the question referred to it. The following paragraphs accordingly set out some basic details on these issues for purposes of Israel's submissions on jurisdiction and propriety only.

(i) The Perpetrators of Terror

3.55 There are four principal Palestinian terrorist organisations that are responsible for the vast majority of the attacks against Israel and Israelis. These are:

(a) Al-Aqsa Martyrs' Brigades – this is also sometimes referred to as the "Tanzim" and is part of the Fatah organisation. It includes amongst its ranks members of the various security forces of the Palestinian Authority;

(b) Popular Front for the Liberation of Palestine ("PFLP") – one of the original factions of the PLO;

(c) Hamas – an Arabic acronym for Harakat al-Muqawamah al-Islamiyya, the Islamic Resistance Movement; and

(d) Palestine Islamic Jihad.

3.56 Between them, these organisations have been responsible for about 20,000 separate incidents against Israel and Israelis since the start of the current violence in October 2000. As has already been noted, these attacks have left 916 Israelis dead and over 5,000 injured, many critically.

3.57 The Al-Aqsa Martyrs' Brigades emerged out of the recent violence. They are based mainly in West Bank cities and towns and are an integral part of Yasser Arafat's Fatah faction of the PLO. They draw considerable support from the 80,000 strong security forces of the Palestinian Authority. Given their power base in Fatah, the Brigades are closely linked to Yasser Arafat personally. Giving an interview to *USA Today* in March 2002, one of the Brigades' leaders, Maslama Thabet, said "[w]e receive our instructions from Fatah. Our commander is Yasir Arafat himself".[58] Palestinian Authority officials have acknowledged that many of the Brigades' members are paid from Palestinian Authority funds in their capacities as members of the PA's various security forces.

3.58 The Brigades have been responsible for – indeed, have claimed responsibility for – a large number of attacks against Israelis including some of the most murderous suicide bomb attacks. They provided assistance to Hamas in the most recent suicide bomb attack on 14 January 2004 in which four Israelis were killed at the Erez crossing-point between Israel and the Gaza Strip. Amongst other attacks for which they are responsible are:

- the 5 January 2003 double suicide bombing near the old central bus station in Tel Aviv which killed 23 people and left around 120 others injured (the bomber having come from Nablus),

- the 19 June 2002 suicide bomb attack at the French Hill intersection in Jerusalem which killed 7 people and left 50 injured at a crowded bus stop (the bomber having come from Nablus),

- the 12 April 2002 suicide bomb attack in a Jerusalem open-air market which killed 6 people and injured 104 (the bomber having come from Beit Fajar), and

- the 2 March 2002 suicide bomb attack in central Jerusalem which killed 11 people and injured 50 at a Barmitzvah celebration (the bomber having come from Dehaishe).

3.59 The PFLP was founded in 1967 by George Habash. It was an original, founding member of the PLO. It is opposed to any negotiation with Israel and Israel's continued existence

[58] *USA Today*, March 14, 2002, at p.A.06. **(Annex 18)**

in any form. It receives logistical support from, and safe haven in, Syria. It was responsible for the 17 October 2001 assassination of Israeli Tourism Minister Rechavam Ze'evi. Amongst other recent attacks for which it is responsible was the 25 December 2003 suicide bomb attack outside Tel Aviv which killed 4 people and injured 24 others.

3.60 Hamas was established in 1987. It is an Islamist movement which is an offshoot of the Muslim Brotherhood. It is opposed to all negotiations with Israel and seeks Israel's destruction. Its military wing – Izz al-Din al-Qassam – is responsible for the principal suicide attacks within Israel. Amongst the attacks for which Hamas is responsible are:

- the 9 September 2003 suicide bomb attack at a café in the German Colony neighbourhood of Jerusalem which killed 7 people and injured over 50 (the bomber having come from Rantis),

- the 19 August 2003 suicide bomb attack on a bus in Jerusalem which killed 23 people and injured over 130 (the bomber having come from Hebron),

- the 11 June 2003 suicide bomb attack on another bus in Jerusalem which killed 17 people and injured over 100 (the bomber having come from Hebron),

- the 5 March 2003 suicide bomb attack on a bus in Haifa which killed 17 people and injured 53 (the bomber having come from Hebron),

- the 21 November 2002 suicide bomb attack on a bus carrying schoolchildren in Jerusalem which left 11 people dead and around 50 injured (the bomber having come from El-Khader),

- the 31 July 2002 bombing of the cafeteria on the campus of the Hebrew University of Jerusalem which killed 9 people and injured 85 (the bomber having come from Silwan),

- the 7 May 2002 suicide bombing of a gaming club in Rishon Lezion, south of Tel Aviv, which killed 15 people and injured 55,

- the 31 March 2002 suicide bomb attack on the Matza restaurant in Haifa which killed 15 people and injured 40 (the bomber having come from Jenin), and

- the 27 March 2002 suicide bombing of the Park Hotel in Netanya which killed 30 people, most in their 70s and 80s, and injured 145 (the bomber having come from Tulkarem).

3.61 Palestine Islamic Jihad was established in 1981. It receives support, sponsorship and safe haven from Syria, Lebanon and Iran (amongst the co-sponsors of the advisory opinion request). It is an Islamist movement which has as its goal the destruction of Israel. Although smaller than Hamas, it is more radical in its ideology. Amongst the attacks for which it is responsible are:

- the 4 October 2003 suicide bomb attack in Maxim's restaurant in Haifa which killed 21 people, including 4 children, and injured 60 (the bomber having come from Jenin),

- the 5 January 2003 double suicide bomb attack at the old central bus station in Tel Aviv (carried out jointly with the Al-Aqsa Martyrs' Bridges) which killed 23 people and injured 120 (the bomber having come from Nablus),

- the 21 October 2002 bombing of a bus *en route* from the north of Israel to Tel Aviv which left 14 people dead and injured around 50 others (the bomber having come from Jenin),

- the 5 June 2002 suicide bomb attack on a bus travelling from Tel Aviv to Tiberias which killed 17 people and injured 38 (the bomber having come from Jenin), and

- the 20 March 2002 suicide bombing of yet another bus *en route* from Tel Aviv which killed 7 people and injured around 30 others (the bomber having come from Jenin).

(ii) The Methods and Means of Terror and its Victims

3.62 Terrorist attacks come in many forms. Over the past 40 months of violence, Israelis have been killed in attacks that range from stabbings to shootings at vehicles from roadside

ambushes to drive-by shootings and suicide and other bombings. Proportionately, suicide bombings represent a small minority of the attacks but account for the majority of Israeli dead and injured. They also pose a very particular difficulty for defence, law enforcement and security forces, as the normal concern of a combatant or other attacker to avoid injury to him or herself cannot be relied upon to prevent an attack. On the contrary, it is often precisely as attempts are made to apprehend an attacker that they detonate the bomb they are carrying killing those who are attempting to apprehend them. Since the start of the present violence, about 70% of all suicide attacks have taken place to the west of the so-called Green Line. These account for less than 10% of overall attacks in this area. Yet they account for around 80% of Israeli deaths from such attacks in this area. The next largest category of attacks by numbers of victims is shootings, including shooting at travelling vehicles from roadside ambushes.

3.63 Less widely known, but nonetheless critical, are a different form of attack, referred to in the press as "mega-terror" attacks, akin to that in New York on 11 September 2001. Fortunately for Israel, most attempts of this kind have been foiled but the threat remains real and the risk of devastation considerable. Details of key incidents of this kind are given in section (iii) below.

3.64 For purposes of the exercise by the Court of its discretion under Article 65(1) of the Statute, it is important that the Court should appreciate the sheer scale of the terrorist onslaught that Israel has faced and continues to face. The opening requirement of the Roadmap is that "the Palestinians immediately undertake an unconditional cessation of violence". The failure of the Palestinian leadership to take adequate steps to this end is a matter of wide public record. Two illustrative periods of terror attacks may be given by way of example of scale and effects – first, March 2002, the bloodiest month of Israeli fatalities, the scale of which led directly both to the military Operation Defensive Shield and to the decision to begin construction of the fence as a non-forcible barrier to the on-going attacks; and, second, the attacks in the past 12 month period from January 2003 culminating in the filing of this statement.

3.65 There were 37 separate terrorist attacks resulting in Israeli fatalities in the 31 days of March 2002. These attacks killed 135 and injured 721 others, many critically. Of the dead, 12 were children; 28 were in their 70s and 80s. The overwhelming majority of those killed and injured were civilians. All were specifically targeted. These were not random acts. Amongst these atrocities in this period were the following:

- 2 March 2002 – 11 people were killed and over 50 injured when a suicide bomber detonated his bomb next to a group of women and infants waiting to attend a Barmitzvah celebration in Jerusalem. The bomber came from Dehaishe. The Al-Aqsa Martyrs' Brigades of Yasser Arafat's Fatah movement claimed responsibility;

- 9 March 2002 – 9 month old Avia Malka of South Africa was killed and around 50 others were injured when two Palestinians opened fire with automatic weapons and threw hand grenades in the tourist hotel area of the coastal city of Netanya. Yasser Arafat's Al-Aqsa Martyrs' Brigades claimed responsibility;

- 9 March 2002 – 11 people were killed and 54 injured in a suicide bomb attack in a crowded café in Jerusalem at 10.30 pm on a Saturday night. Hamas claimed responsibility;

- 27 March 2002 – 30 people were killed and 145 injured in the suicide bomb attack of the Park Hotel in Netanya during the Passover holiday dinner. The bomber came from Tulkarem. Hamas claimed responsibility;

- 31 March 2002 – 15 people were killed and over 40 injured in the suicide bombing of the Matza restaurant in Haifa. Two families suffered multiple fatalities. The bomber came from Jenin. Hamas claimed responsibility.

3.66 In the 12 months from January 2003 to the filing of this statement, 218 people have been killed in terrorist attacks and around 850 people have been injured. These numbers are still unacceptably high but, by comparison with those of March 2002, they have fallen significantly. This drop in the number of Israeli casualties does not reflect a reduction in the number of attempted attacks against Israelis by Palestinian terrorists. The number of attempted attacks has remained broadly the same at around 50 a week. The reduction in casualties reflects the growing number of attacks that are thwarted by the Israeli Defence Forces ("IDF"). The fence has been a significant factor in this respect.

3.67 Amongst the terrorist atrocities committed in the past 12 months are the following:

- 5 January 2003 – 23 people killed, including 8 foreign nationals, and around 120 injured in the double suicide bombing at the old central bus station in Tel Aviv. The bombers came from Nablus. Yasser Arafat's Al-Aqsa Martyrs' Brigades and Islamic Jihad jointly claimed responsibility for the attack;

- 5 March 2003 – 17 people were killed and 53 injured in a suicide bomb attack on a bus in Haifa *en route* to Haifa University. Nine of the 17 killed were under the age of 18. The bomber came from Hebron. Hamas claimed responsibility for the attack;

- 30 April 2003 – 3 people were killed and around 60 injured in a suicide bomb attack at a Tel Aviv beachfront bar. Yasser Arafat's Fatah movement and Hamas both claimed responsibility. The attack was carried out by two British Muslim members of Hamas;

- 11 June 2003 – 17 people were killed and over 100 injured in a suicide bomb attack on a bus in central Jerusalem. The bomber came from Hebron. Hamas claimed responsibility;

- 19 August 2003 – 23 people were killed and over 130 injured in another suicide bomb attack on a bus in central Jerusalem. The bomber came from Hebron. Hamas claimed responsibility;

- 4 October 2003 – 21 people were killed and 60 wounded in a suicide bomb attack by a female terrorist from Jenin in Maxim's restaurant in Haifa. Islamic Jihad claimed responsibility;

- 18 November 2003 – 2 soldiers were killed on a road outside Jerusalem when a member of Yasser Arafat's Al-Aqsa Martyrs' Brigades opened fire with a semi-automatic assault rifle concealed in a prayer rug.

3.68 Statistics like these may seem remote to Members of the Court – mere numbers on a page. They are not remote to Israeli society. Israel is a small country. The casualties that it continues to suffer reach into every home. The Israeli Ministry of Foreign Affairs maintains an *In Memoriam* website with every name and photograph and personal sketch of those who have

been killed in terrorist attacks in the past 40 months of violence.[59] Recalling briefly the identities of some of those who were once living is a salutary exercise. It gives pause for thought against the backdrop of some of the rhetoric that comes too often from the mouths of Israel's detractors. A few brief lines on some of Israel's typical casualties drawn from five "incidents" merit recitation.

3.69 On 1 June 2001, a Friday evening, a suicide bomber from Kalkilya attacked a discothèque at the Tel Aviv Dolphinarium. That evening, girls were allowed in free of charge. Many were teenagers. Twenty-one people died that night when the bomb exploded. Most were young girls. Most were under 18 years of age. One of the victims was Anya Kazachkov. She was a newcomer from Russia, as were many of the others who died that night. She was 16. Her drawings decorate the walls of her school. She is buried in the Yarkon cemetery in Tel Aviv.

3.70 On 27 March 2002, on Passover evening, 250 guests had just sat down to a meal in the Park Hotel in Netanya. A suicide bomber, later identified as a member of Hamas from Tulkarem just 10 kilometres away, entered the room and detonated his bomb. Thirty were killed and a further 140 injured, many critically. Most of the dead were elderly. One was Marianne Myriam Lehmann Zaoui, aged 77. She was a Holocaust survivor from Germany. After the Second World War she taught English in high schools in France where she lived for most of her life. She was celebrating the Passover dinner in the Park Hotel with her husband and daughter and 2 grandchildren. Her husband and 9 year old grandson were injured in the blast. Marianne was killed.

3.71 Revital Ohayon was 34 years old. She was a mother of two small sons, Matan, 5, and Noam, 4. They lived in a kibbutz close to the coastal town of Hadera near to the Green Line. Revital was a school teacher. She was divorced and lived alone with her sons. On the night of 10 November 2002 she had put her small sons to bed and was talking on the telephone with her ex-husband Avi, with whom she maintained good relations. She heard shots outside as a terrorist from Yasser Arafat's Al-Aqsa Martyrs' Brigades entered the kibbutz. She dropped the phone and ran to her sons. They were killed, all three, holding each other in the corner of the room. Avi Ohayon heard the shots over the phone before the line was cut off. Revital and Matan and Noam are buried in the Tsur Shalom Cemetery in Kiryat Bialik. The Al-Aqsa Martyrs' Brigades claimed responsibility for the attack. The terrorist escaped.

[59] http://www.mfa.gov.il/mfa/go.asp?MFAH0iky0

3.72 Noam Leibowitz was 7 years old. She lived with her family in a village close to Haifa. On the night of 17 June 2003, the Leibowitz family was returning to Haifa from a trip to Jerusalem. It was 11.30 pm at night when a terrorist from Kalkilya, 400 meters from the highway on the other side of the Green Line, opened fire with a semi-automatic weapon at the vehicle in which the family were travelling. Noam was killed. Her three year old sister was seriously wounded. Their brother and grandfather were also injured in the attack. At her funeral, Noam was described as "a small girl with a large soul". She is buried in the Moshav Nir Etzion cemetery.

3.73 On 4 October 2003, 8 members of the Almog family, grandparents, parents and grandchildren, went for lunch to Maxim's restaurant in Haifa. In the course of the meal, a young Palestinian woman from Jenin, a 29-year old lawyer named Henadi Jaradat, entered the restaurant. She positioned herself close to the family and set off her bomb. Ze'ev Almog, his wife Ruth, their son Moshe and two grandsons, Tomer and Assaf, were killed in the blast. Their daughter Galit, daughter-in-law Orly, and two other grandchildren were wounded. Islamic Jihad claimed responsibility for the attack.

3.74 There are many stories like those just recounted. Too many. One of the constant features of the terrorist attacks directed against Israelis over the past 40 months is that they have invariably been directed at civilians, specifically and by intent. The civilians have been especially vulnerable – children, the elderly, in discothèques or community halls or hotel dining rooms. This is the nature of the threat that Israel continues to face. This is the reason for the fence, a temporary and non-violent measure to counter a murderous threat directed at the softest of targets.

(iii) The Threat of "Mega-Terror" Attacks

3.75 As noted above, there is a real and ever present threat to Israel from mega-terrorists attacks – attacks on a scale that would dwarf the acts of the individual suicide bomber or man with a gun. As a result of good intelligence and alert security, attempts of this kind have so far been successfully thwarted. The risk, however, remains very great. A number of such incidents are in the public domain, including:

- in late April 2002, Israeli security forces apprehended a Palestinian terrorist cell, based in Kalkilya, which had been planning to detonate a 1,000 kilogram car bomb at the base of the Azrieli twin skyscrapers in Tel Aviv;

- on 23 May 2002, a bomb was detonated by remote control inside the Pi Glilot gas and oil depot on the northern outskirts of Tel Aviv. The resulting fire was quickly extinguished but the risk, and no doubt the intended result, was of a chain reaction of explosions across the depot which, had it occurred, could have killed thousands of people in the vicinity; and

- in January 2003, Israeli police intercepted a bomber who was *en route* to bomb the Teddy Kollek sports stadium in Jerusalem, then packed with people.

(iv) The Responsibility of "Palestine" for Palestinian Terrorism

3.76 The question to the Court does not ask about "Palestine's" responsibility for these acts of terrorism. It ought to have done. The evidence of attribution, of commission and omission, is great. In a different forum with a different procedure on a question that sought fairly to address the reality of the Israeli-Palestinian conflict, Israel would have no hesitation in presenting its case. This is not that forum or that procedure or that question.

3.77 Three points may nonetheless be made. First, it is accepted by all that the cessation of Palestinian terrorism is the threshold issue in the Israeli-Palestinian conflict. Once this is addressed, all else will follow. Yasser Arafat committed the PLO, in the *Exchange of Letters* of September 1993, to the renunciation of terrorism and the taking of all possible steps to ensure that this is combated.

3.78 The Mitchell Committee Report, the Tenet Cease-Fire Plan, the Roadmap, the Joint Statements of the Quartet and resolutions of the Security Council all place a cessation of Palestinian terrorism at the top of the agenda. Every time an attack takes place, the world sends its condolences. Israel has a file full of them. It is little solace in the face of the continuing onslaught. It is only the Government of Israel that can protect its own citizens. It has a responsibility to do so.

3.79 Israel is acutely aware, and regrets, the suffering of innocent Palestinians on the other side of this conflict. It is concerned to alleviate fabric of life constraints that result from the fence or from any other action taken by Israel in the protection of its citizens. On the scales, however, weighing heavily when it comes to address these issues, are the lives of its citizens.

3.80 A recent statement by Prime Minister Sharon, of 18 January 2004, reflects this dilemma:

> "The operative experience that has accumulated over the past few months in which the fence was being built was both good and bad. It was excellent at preventing terror but was not satisfactory in all matters relating to the damage to Palestinians' quality of life. I am personally monitoring the problems arising from the operation of the fence and am familiar with the complaints about it; it is possible that additional thought is needed to allow the possibility of changing the route, in order to reduce the number of mishaps in operating the fence without harming security."[60]

3.81 Second, there is no doubt that the terrorist actions are violations of the laws and customs of war, including some that amount to grave breaches, and other principles of customary international law. They are in breach of the principle of distinction, which requires differentiation between civilians and combatants. They are in breach of the rule against perfidy and the injunction prohibiting the use of booby traps. They amount to crimes against humanity, contrary to principles enshrined first in the Nuremburg Charter. They violate the most fundamental precepts of the international law safeguarding human rights, including the most basic of rights, that of the inherent right to life. They are also in violation of the central principles of the Charter of the United Nations.

3.82 Third, the Palestinian leadership knows its responsibilities. Time and again it expresses itself to be committed to ending the violence. Little, if anything, by way of effective measures have ever been undertaken towards this end. The repeated calls by the Quartet, in the statements set out above, for action to be taken by the Palestinian leadership towards this end attests to the frustration of those in the international community who are closest to these issues at the failure to act on this matter.

[60] Statement by Prime Minister Sharon, 18 January 2004. **(Annex 19)**

3.83 Speaking at the Aqaba Summit on 4 June 2003 in the presence of King Abdullah II of Jordan and US President George W. Bush, the then Palestinian Prime Minister, Mahmoud Abbas, said as follows:

> "As we all realise, this is an important moment. A new opportunity for peace exists, an opportunity based upon President Bush's vision and the Quartet's road map, which we have accepted without any reservations.
>
> Our goal is two states, Israel and Palestine, living side-by-side, in peace and security. The process is one of direct negotiations to end the Israeli-Palestinian conflict, and to resolve all the permanent status issues, and end the occupation that began in 1967, under which the Palestinians have suffered so much.
>
> At the same time, we do not ignore the suffering of the Jews throughout history. It is time to bring this suffering to an end.
>
> Just as Israel must meet its responsibilities, we, the Palestinians, will fulfil our obligations for this endeavour to succeed. We are ready to do our part.
>
> Let me be very clear: There will be no military solution to this conflict, so **we repeat our renunciation, a renunciation of terror against Israelis wherever they may be. Such methods are inconsistent with our religious and moral traditions and are dangerous obstacles to the achievement of an independent, sovereign state we seek. These methods also conflict with the kinds of state we wish to build, based on human rights and the rule of law.**
>
> **We will exert all of our efforts, using all our resources to end the militarization of the intifada, and we will succeed. The armed intifada must end, and we must use and resort to peaceful means in our quest to end the occupation and the suffering of Palestinians and Israelis.** And to establish the Palestinian state, we emphasise our determination to implement our pledges which we have made for our people and the international community. And that is a rule of law, single political authority, weapons only in the hands of those who are in charge with upholding the law and order, and political diversity within the framework of democracy.
>
> **Our goal is clear and we will implement it firmly and without compromise: a complete end to violence and terrorism.** And we will be full partners in the international war against occupation and terrorism. And we will call upon our partners in this war to prevent financial and military assistance to those who oppose this position. We do this as part of our commitment to the interest of the Palestinian people, and the members of the large family of humanity.
>
> We will also act vigorously against incitement and violence and hatred, whatever their form or forum may be. We will take measures to ensure that there is no incitement from Palestinian institutions. We must also reactivate

> and invigorate the U.S.-Palestinian-Israeli Anti-Incitement Committee. We will continue to work to establish the rule of law and to consolidate government authority in accountable Palestinian institutions. We seek to build the kind of democratic state that will be a qualitative addition to the international community.
>
> **All the PA security forces will be part of these efforts**, and will work together toward the achievement of these goals. Our national future is at stake, and no one will be allowed to jeopardise it."[61]

3.84 The killing began again the very next day. Since these words were spoken, 127 Israelis have been killed – in suicide bomb attacks, in roadside shootings, in stabbings. Yasser Arafat's Al-Aqsa Martyrs' Brigades have claimed responsibility for a many of these attacks.

3.85 Responding to Palestinian Prime Minister Abbas at the Aqaba Summit, Israeli Prime Minister Sharon said as follows:

> "As the Prime Minister of Israel, the land which is the cradle of the Jewish people, my paramount responsibility is the security of the people of Israel and of the State of Israel. There can be no compromise with terror and Israel, together with all free nations, will continue to fight terrorism until its final defeat.
>
> Ultimately, permanent security requires peace and permanent security can only be obtained through security, and there is now hope of a new opportunity for peace between Israelis and Palestinians.
>
> Israel, like others, has lent its strong support for President Bush's vision, expressed on June 24, 2002, of two States – Israel and a Palestinian state – living side by side in peace and security. The Government and people of Israel welcome the opportunity to renew direct negotiations according to the steps of the roadmap as adopted by the Israeli government to achieve this vision.
>
> It is in Israel's interests not to govern the Palestinians but for the Palestinians to govern themselves in their own state. A democratic Palestinian state fully at peace with Israel will promote the long-term security and well-being of Israel as a Jewish state.
>
> There can be no peace, however, without the abandonment and elimination of terrorism, violence, and incitement. We will work alongside the Palestinians and other states to fight terrorism, violence and incitement of all kinds. As all parties perform their obligations, we will seek to restore normal Palestinian life, improve the humanitarian situation, rebuild trust, and promote progress

[61] Statement by Palestinian Prime Minster Abbas, Aqaba Summit, 4 June 2003 (emphasis added). **(Annex 20)**

towards the President's vision. We will act in a manner that respects the dignity as well as the human rights of all people.

We can also reassure our Palestinian partners that we understand the importance of territorial contiguity in the West Bank for a viable Palestinian state. Israeli policy in the territories that are subject to direct negotiations with the Palestinians will reflect this fact.

We accept the principle that no unilateral actions by any party can prejudge the outcome of our negotiations.

In regard to the unauthorised outposts, I want to reiterate that Israel is a society governed by the rule of law. Thus, we will immediately begin to remove unauthorised outposts.

Israel seeks peace with all its Arab neighbours. Israel is prepared to negotiate in good faith wherever there are partners. As normal relations are established, I am confident that they will find in Israel a neighbour and a people committed to a comprehensive peace and prosperity for all the peoples of the region."[62]

* *

3.86 This is the prism through which Israel's objections to jurisdiction and to the propriety of a response by the Court on the substance of the question ought to be seen. The Court has discretion, under Article 65(1) of its Statute, to decide whether to respond to the request for an opinion. Israel urges the Court to exercise its discretion and decline to respond to the substance of the request. It is dangerous for the Roadmap. It cuts across the endorsed initiative of the Security Council. It is dangerous for the integrity of the Court. Legal arguments in support of this contention are developed in detail in the following Chapters of this statement.

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[62] Statement by Israeli Prime Minster Sharon, Aqaba Summit, 4 June 2003. (**Annex 21)**

PART TWO

OBJECTIONS TO JURISDICTION

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CHAPTER 4

THE REQUEST IS *ULTRA VIRES* THE COMPETENCE OF THE 10th EMERGENCY SPECIAL SESSION AND/OR THE GENERAL ASSEMBLY

A. Introduction

4.1 Israel contends that the present request for an advisory opinion is *ultra vires* the competence of the 10th Emergency Special Session of the General Assembly. The Emergency Special Session was convened in April 1997 pursuant to General Assembly resolution 377 A (V) of 3 November 1950 entitled "United for Peace" ("Uniting for Peace Resolution").[63] This provides, in operative part, that the General Assembly may consider a matter with a view to making appropriate recommendations "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 this case, however, there was no failure by the Security Council to act. On the contrary, the Council unanimously adopted resolution 1515 (2003) just 19 days before the 10th Emergency Special Session adopted the resolution requesting an advisory opinion. Resolution 1515 (2003) endorsed a carefully planned diplomatic initiative – the Roadmap – designed to find a path back to negotiations. The request for an advisory opinion is at odds with the Roadmap. It is *ultra vires* the competence of the 10th Emergency Special Session.

4.2 This should be an end of the matter. The Uniting for Peace Resolution was the basis on which the Emergency Special Session was convened and continued to act. It sets the terms of its competence. A violation of its essential conditions is a sufficient basis for impugning the *vires* of the Emergency Special Session as regards its request for an advisory opinion.

4.3 For completeness, however, Israel observes that, given the active engagement of the Security Council with the Israeli-Palestinian conflict, the advisory opinion request would also have been *ultra vires* the competence of the General Assembly even when convened in regular session. Israel does not question the General Assembly's secondary responsibility and competence for the maintenance of international peace and security. Its responsibility and competence in this field are, however, subsidiary to that of the Security Council. Under the scheme of the Charter, in circumstances in which the Security Council has acted in exercise of its primary responsibility, the General Assembly has a duty to exercise restraint. The principle of

[63] A/RES/377 (V), 3 November 1950, "Uniting for Peace". **(Annex 22)**

speciality referred to by the Court in respect of international organisations in general in its advisory opinion on the *Legality of the Use by States of Nuclear Weapons in Armed Conflict* applies equally to the competence and balance of responsibility of organs of the United Nations. These and related issues are addressed in more detail in the sections of this Chapter that follow below.

B. Background

(i) The Convening of the 10th Emergency Special Session of the General Assembly

4.4 On 7 March 1997, the Security Council convened to consider a draft resolution addressing Israeli settlements.[64] The draft did not achieve the requisite majority in consequence of the negative vote of the United States. Speaking after the vote, Mr Al-Kidwa, the Palestinian Observer, stated *inter alia* as follows:

> "… the Council has been unable to assume its responsibilities for the maintenance of international peace and security or to adopt the draft resolution because one permanent member exercised its right of veto. …
>
> Accordingly, despite our deep appreciation for the efforts of all, in view of the Council's failure to fulfil its obligations, we will request the members of the United Nations to agree an emergency meeting of the General Assembly, to be held in response to these developments in order to take appropriate action."[65]

4.5 Two weeks later, a further draft resolution was brought to the Council on the same topic of settlements.[66] It too failed to achieve the requisite majority in consequence of the negative vote of the United States. Speaking after the vote, Mr Al-Kidwa, the Palestinian Observer, stated as follows:

> "… the Security Council has, for the second time, failed to carry out its responsibilities and duties for the maintenance of international peace and security, in accordance with the Charter of the United Nations."[67]

4.6 In a letter dated 31 March 1997 addressed to the Secretary-General, the Permanent Representative of Qatar to the United Nations requested "that an emergency special session of the

[64] S/1997/199, 7 March 1997.
[65] Statement by Mr Al-Kidwa, S/PV.3747, 7 March 1997, at p.6.
[66] S/1997/241, 21 March 1997.
[67] Statement by Mr Al-Kidwa, S/PV.3756, 21 March 1997, at p.8.

General Assembly be convened pursuant to resolution 377 A (V), entitled 'Uniting for Peace'". In relevant part, this letter stated as follows:

> "The Group of States members of the League of Arab States has discussed the dangerous situation resulting from the illegal Israeli actions in the occupied Palestinian territory, including Jerusalem, in particular the commencement of the construction of the Jabal Abu Ghneim settlement to the south of occupied East Jerusalem, and other measures regarding Jerusalem and the building of settlements.
>
> The Arab States have considered the failure of the Security Council to exercise its role in maintaining international peace and security owing to the use of the veto by a permanent member of the Council on two successive occasions in less than two weeks.
>
> Given their belief that the illegal Israeli measures in question represent a threat to international peace and security as undermining the Middle East peace process and are in violation of international law and the relevant General Assembly and Security Council resolutions, and in the light of Israel's persistence in these measures **and of the failure of the Security Council to exercise its primary responsibility under the charter of the United Nations**, the States members of the League of Arab States have decided that it is necessary to convene an emergency special session of the General Assembly, pursuant to its resolution 377 A (V) of 3 November 1950, entitled 'Uniting for Peace', to consider 'Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory'.
>
> Accordingly, and in my capacity as Permanent Representative of the State of Qatar to the United Nations, I request that an emergency special session of the General Assembly be convened pursuant to resolution 377 A (V), entitled 'Uniting for Peace', in order to consider this important matter."[68]

4.7 Pursuant to Rule 9(b) of the Rules of Procedure of the General Assembly as revised by the Uniting for Peace Resolution, the text of this letter was transmitted to UN Member States by the UN Secretary-General on 1 April 1997. In a note dated 22 April 1997, the Secretary-General informed Member States that the majority of Members had concurred in Qatar's request and that, accordingly, the tenth emergency special session would convene on 24 April 1997.[69]

4.8 Opening the first meeting of the 10th Emergency Special Session on 24 April 1997, the President of the Session stated as follows:

[68] A/ES-10/1, 22 April 1997 (emphasis added).
[69] A/ES-10/1, 22 April 1997.

> "This emergency special session of the General Assembly reflects the conviction of the membership that there exists an increasingly grave situation involving peace and security. In the past two months, the Security Council twice held extensive discussions, and the General Assembly once, on the illegal Israeli actions in occupied East Jerusalem and the rest of the occupied Palestinian territories. For the second time, the issue has been placed before the General Assembly. The discussions in the Security Council have proved to be inconclusive, **since it has been unable to take action because of lack of unanimity of its permanent Members**.
>
> The convening of this session, which is being held in accordance with the provisions of General Assembly resolution 377 (V) of 3 November 1950, entitled 'Uniting for Peace', at the request of a Member State and with the concurrence of a large majority of Members, demonstrates clearly their gravest concern and awareness of the implications of the present situation."[70]

4.9 Opening the debate, Mr Al-Kidwa set the agenda in the following terms:

> "Yes, uniting for peace. Uniting against the violation of international law and United Nations resolutions. Uniting to confront the arrogance of power and the mentality of occupation. Uniting to oppose the misuse of the veto and attempts to neutralise the Security Council. Uniting in order to rescue the Middle East peace process. Yes, uniting for a just solution to the question of Palestine and the establishment of a just, lasting and comprehensive peace in the region."[71]

4.10 Following the debate, the Emergency Special Session adopted resolution A/RES/ES-10/2 of 25 April 1997. By operative paragraph 13 of the resolution, the Emergency Special Session decided to adjourn temporarily "to resume its meetings upon request from Member States".[72] The Emergency Special Session has been reconvened, has been temporarily suspended, and has been reconvened again on 11 separate occasions in the 6 ½ year period since April 1997.[73] Its debates and resolutions over this period have ranged very far from the question of the

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[70] Statement by Ambassador Razali Ismail of Malaysia, A/ES-10/PV.1, 24 April 1997, at p.2 (emphasis added).

[71] Statement by Mr Al-Kidwa, A/ES-10/PV.1, 24 April 1997, at p.3.

[72] A/RES/ES-10/2, 25 April 1997. **(Dossier No.3)**

[73] The Emergency Special Session ("ESS") was reconvened on 15 July 1997 following a request of 7 July 1997 by the Permanent Representative of Egypt, and Chairman of the Arab Group, Ambassador Elaraby; A/ES-10/8, 7 July 1997. The Session was again temporarily suspended pursuant to operative paragraph 13 of A/RES/ES-10/3, 15 July 1997 **(Dossier No.4)**. The ESS was again reconvened on 13 November 1997 (A/ES-10/17, 24 October 1997). The Session was again temporarily suspended pursuant to operative paragraph 9 of A/RES/ES-10/4, 13 November 1997 **(Dossier No.5)**. The ESS was again reconvened on 17 March 1998 (A/ES-10/21, 11 March 1998). The Session was again temporarily suspended pursuant to operative paragraph 8 of A/RES/ES-10/5, 17 March 1998 **(Dossier No.6)**. The ESS was again reconvened on 5 February 1999 (A/ES-10/31, 26 January 1999). The Session was again temporarily suspended pursuant to operative paragraph 10 of A/RES/ES-10/6, 9 February 1999 **(Dossier No.7)**. The ESS was

Israeli "settlement activities in the Jabal Abu Ghneim area", the draft resolutions on which were vetoed in the Security Council by the United States, this being relied upon as the basis for the convening of the Emergency Special Session pursuant to the Uniting for Peace Resolution.

(ii) The Uniting for Peace Resolution

4.11 The Uniting for Peace Resolution was adopted by the 302nd plenary meeting of the General Assembly on 3 November 1950. Insofar as is material for present purposes, it provides:

> "*The General Assembly*
>
> *Recognising* that the first stated Purposes of the United Nations are:
>
> 'To maintain international peace and security, and to that end: 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, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace', and
>
> 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace',
>
> *Reaffirming* that it remains the primary duty of all Members of the United Nations, when involved in an international dispute, to seek settlement of such a dispute by peaceful means through the procedures laid down in Chapter VI of the Charter, and recalling the successful achievement of the United Nations in this regard on a number of previous occasions,
>
> *Finding* that international tension exists on a dangerous scale,

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again reconvened on 18 October 2000 (A/ES-10/36, 13 October 2000). The Session was again temporarily suspended pursuant to operative paragraph 12 of A/RES/ES-10/7, 20 October 2000 **(Dossier No.8)**. The ESS was again reconvened on 20 December 2001 (A/ES-10/130, 18 December 2001). Two resolutions were adopted at this reconvened Session, A/RES/ES-10/8, 20 December 2001 **(Dossier No.9)** and A/RES/ES-10/9, 20 December 2001 **(Dossier No.10)**. The Session was again temporarily suspended pursuant to operative paragraph 3 of the latter resolution. The ESS was again reconvened on 7 May 2002 (A/ES-10/170, 3 May 2002). The Session was again temporarily suspended pursuant to operative paragraph 10 of A/RES/ES-10/10, 7 May 2002 **(Dossier No.11)**. The ESS was again reconvened on 5 August 2002 (A/ES-10/187, 1 August 2002). The Session was again temporarily suspended pursuant to operative paragraph 8 of A/RES/ES-10/11, 10 September 2002 **(Dossier No.12)**. The ESS was again reconvened on 19 September 2003 (A/ES-10/237, 17 September 2003). The Session was again temporarily suspended pursuant to operative paragraph 4 of A/RES/ES-10/12, 25 September 2003 **(Dossier No.13)**. The ESS was again reconvened on 20 October 2003 (A/ES-10/242, 15 October 2003). The Session was again temporarily suspended pursuant to operative paragraph 4 of A/RES/ES-10/13, 27 October 2003 **(Dossier No.14)**. Most recently, the ESS was again reconvened on 8 December 2003 (A/ES-10/249, 2 December 2003).

Recalling its resolution 290 (IV) entitled 'Essentials of peace', which states that disregard of the Principles of the Charter of the United Nations is primarily responsible for the continuance of international tension, and desiring to contribute further to the objectives of that resolution,

Reaffirming the importance of the exercise by the Security Council of its primary responsibility for the maintenance of international peace and security, and the duty of the permanent members to seek unanimity and to exercise restraint in the use of the veto,

Reaffirming that the initiative in negotiating the agreements for armed forces provided for in Article 43 of the Charter belongs to the Security Council, and desiring to ensure that, pending the conclusion of such agreements, the United Nations has at its disposal means for maintaining international peace and security,

Conscious that failure of the Security Council to discharge its responsibilities on behalf of all the Member States, particularly those responsibilities referred to in the two preceding paragraphs, does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security,

Recognising in particular that such failure does not deprive the General Assembly of its rights or relieve it of its responsibilities under the Charter in regard to the maintenance of international peace and security,

Recognising that discharge by the General Assembly of its responsibilities in these respects calls for possibilities of observation which would ascertain the facts and expose aggressors; for the existence of armed forces which could be used collectively; and for the possibility of timely recommendation by the General Assembly to Members of the United Nations for collective action which, to be effective, should be prompt,

A

1. ***Resolves*** **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**, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefore. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations;

2. *Adopts* for this purpose the amendments to its rules of procedure set forth in the annex to the present resolution;

B

3. *Establishes* a Peace Observation Commission … which could observe and report on the situation in any area where there exists international tension the continuation of which is likely to endanger the maintenance of international peace and security. Upon the invitation or with the consent of the State into whose territory the Commission would go, the General Assembly, or the Interim Committee when the Assembly is not in session, may utilise the Commission if the Security Council is not exercising the functions assigned to it by the Charter with respect to the matter in question. Decisions to utilise the Commission shall be made on the affirmative vote of two-thirds of the members present and voting. The Security Council may also utilise the Commission in accordance with its authority under the Charter.

…"[74]

4.12 Pursuant to operative paragraph 2 of and the Annex to the Resolution, various amendments were made to the Rules of Procedure of the General Assembly.

4.13 A number of salient features of the resolution warrant emphasis. First, the Uniting for Peace Resolution recognises that the Security Council has primary responsibility for the maintenance of international peace and security. This is expressly stated, for example, in the seventh preambular paragraph of the resolution. Second, the resolution affirms the General Assembly's subsidiary responsibility for the maintenance of international peace and security. This is stated, for example, in the tenth preambular paragraph of the resolution. Third, the resolution expressly affirms a hierarchical relationship between the Security Council and the General Assembly in respect of their overlapping competence and responsibility in this area. Thus, for example, the ninth preambular paragraph contemplates circumstances in which the Security Council fails to discharge its responsibilities. The point is affirmed in operative paragraph 1 of the resolution as regards the circumstances in which the General Assembly will be competent to consider a matter. It is reinforced in operative paragraph 3 of the resolution which provides that the General Assembly may utilise the Peace Observation Commission – a body established by the General Assembly – in respect of a matter only in circumstances in which "the Security Council is not exercising the functions assigned to it by the Charter with respect to the matter in question".

[74] A/RES/377 (V), 3 November 1950, emphasis added. **(Annex 22)**

4.14 Fourth, and most significantly, the resolution lays down a condition precedent to any consideration of a matter by the General Assembly under the framework of the resolution. By operative paragraph 1 of the resolution, the General Assembly shall consider a matter immediately "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". The question in any case in which there may be a request for the General Assembly to convene to consider a matter, or for an Emergency Special Session to act in respect of a matter, is whether the Security Council, in consequence of the lack of unanimity of the permanent members, has failed to exercise its primary responsibility in the case.

4.15 Fifth, the resolution also lays down various procedural rules relevant to the convening of the General Assembly pursuant to the resolution to consider a matter. Operative paragraph 2, together with the annex to the resolution, amends the General Assembly's Rules of Procedure as regards the convening of meetings of the Assembly pursuant to the terms of the resolution. Of some importance, operative paragraph 1 provides that the Assembly may meet in emergency special session to consider a matter pursuant to the terms of the resolution in circumstances in which the General Assembly is not in ordinary session.

4.16 The Uniting for Peace Resolution is part of the fabric of the United Nations. It affirms the competence of the General Assembly under the Charter in circumstances in which the Security Council is unable to act. At the same time, however, it draws the limits on this competence in circumstances in which the Council is able to and has acted. It is a resolution of the General Assembly itself. It reflects the balance of responsibilities and competence between the principal executive organ and the principal deliberative organ of the United Nations. The strictures of its terms cannot be lightly discounted or wished away by the creative intent of some of the Members of the United Nations to achieve some private political purpose.

C. The Exercise by the Security Council of its Primary Responsibility in Respect of the Israeli-Palestinian Conflict Subsequent to the Convening of the 10th Emergency Special Session

4.17 As noted in Chapter 3, the Security Council has been actively engaged in attempts to find a resolution to the Israeli-Palestinian conflict over the past 40 months of violence. Resolution 1322 (2000) of 7 October 2000, adopted some days after the violence first erupted,

reaffirmed the Council's view "that a just and lasting solution to the Arab and Israeli conflict must be based on its resolutions 242 (1967) of 22 November 1967 and 338 (1973) of 22 October 1973, *through an active negotiating process*."[75] Resolution 1397 (2002) of 12 March 2002 again recalled resolutions 242 (1967) and 338 (1973) and, for the first time explicitly, affirmed "a vision of a region where two States, Israel and Palestine, live side by side within secure and recognised borders". Israel has endorsed this vision, as the statement, quoted in Chapter 3, by Prime Minister Sharon at the Aqaba Summit on 4 June 2003 attests. This resolution of the Security Council has become the central pivot of recent attempts to find a path back to negotiations.

4.18 In March-April 2002, the Security Council was again actively engaged, adopting resolutions 1402 (2002), 1403 (2002) and 1405 (2002), as well as issuing a Statement by the President of the Security Council supporting the initiative of the Quartet that was later to become the Roadmap. A further Presidential Statement supporting the Quartet initiative was issued on 18 July 2002 and resolution 1435 (2002) adopted on 24 September 2002. Following its formal presentation to the two sides, the Roadmap was transmitted to the Security Council under cover of a letter from the UN Secretary-General of 7 May 2003.

4.19 In early October 2003, a number of elements of the Israeli-Palestinian and wider Arab-Israeli conflict came again before the Security Council. On Saturday, 4 October 2003, a Palestinian suicide bomber from Jenin, acting in the name of Islamic Jihad, killed 19 people and injured a further 60, some critically, in Maxim's restaurant in Haifa. This was the attack, noted in Chapter 3, which killed 5 members of the Almog family. Islamic Jihad receives active support from Syria. Israel accordingly took action against terrorist facilities in Syria in response to the attack. No one was killed or injured in the Israeli action.

4.20 In response to Israel's action, 17 States from the Arab League proposed a draft resolution to the Security Council on 5 October 2003 condemnatory of Israel's conduct.[76] No reference was made in the draft resolution to Syria's active support for the terrorist group that the preceding day had killed so many. The Council, on the eve of Yom Kippur, met to consider the

[75] S/RES/1322 (2000), 7 October 2000, at the third preambular paragraph (emphasis added).
[76] S/2003/340, 5 October 2003.

draft resolution the same day.[77] Absent support for the draft resolution, it was not pressed to a vote.

4.21 It is worth noting extracts from some of the statements made by Members of the Security Council in the course of the debate. Taken together, they point to a widely held view amongst Members of the Council that the Roadmap is the only option for finding a resolution to the Israeli-Palestinian conflict.

> **Mr Wang Guangya** (China)
>
> "China is gravely concerned about the latest developments in the Middle East situation. We strongly condemn the suicide bombing of 4 October, which resulted in many innocent civilian casualties. We oppose any measures that may threaten the peace process between Israel and Palestine. We strongly urge both sides to cease acts of violence and any other acts that may exacerbate tensions. **We hope that they will return to the proper track of settling disputes through negotiation as soon as possible**."[78]
>
> **Sir Emyr Jones Parry** (United Kingdom)
>
> "Let me be clear that Israel's action today is unacceptable and represents an escalation. Israel should not allow its justified anger at continuing terrorism to lead to actions that undermine both the peace process and, we believe, Israel's own interests. **But we have to recognise that terrorists are continuing to attack Israel and that they are being permitted to do so.** There is a heavy responsibility on all those who are in a position to act against terrorism to do so. That has been affirmed by the Security Council many times, and perhaps most clearly in resolution 1373 (2001).
>
> Allowing impunity to those committed to using terror as a political instrument serves only to undermine peace and prevent progress in the Middle East peace process. The United Kingdom believes that lasting security can only be assured by a successful peace process, as was stressed at the conclusion of the Quartet meeting held in New York on 25 September. We believe that all sides should exercise restraint and now reinforce their efforts to implement the road map. In the next day, the Security Council should do all that it can to help bring that about. **We will all have to reflect carefully on the best message we can now send in order that we reinforce the prospects of the road map, and do so at a precarious moment in the Middle East**."[79]

[77] S/PV.4836, 5 October 2003. **(Annex 23)**
[78] S/PV.4836, 5 October 2003, at p.9 (emphasis added). **(Annex 23)**
[79] S/PV.4836, 5 October 2003, at p.9 (emphasis added). **(Annex 23)**

Mr Gatilov (Russian Federation)

"The ongoing escalation of violence in the Middle East requires more energetic action on the part of the international community in order to prevent an even more dangerous aggravation of the situation. It is important now to press the parties to the conflict to halt the confrontation as soon as possible and to restore the political process, the final goal of which is a comprehensive settlement in the region. To that end, **what we need above all is to unblock the way forward on the road map, to which there is no alternative in finding a solution to the Israeli-Palestinian conflict. The Palestinians and Israelis alike must resume their dialogue and begin to carry out their obligations under the roadmap**."[80]

Mr Pleuger (Germany)

"We are very concerned about the deteriorating situation in the Middle East. We feel that we have to break the vicious cycle of violence and counter-violence. **De-escalation, we feel, is possible only by a return to implementing the road map as proposed by the Quartet. There is no alternative to the road map for finding a resolution to the Israeli-Palestinian conflict and for creating peace and stability in the Middle East**."[81]

Mr De La Sablière (France)

"I stress once again that the situation in the Middle East is most alarming. In such difficult circumstances, we appeal to all parties – particularly the Israelis, Palestinians and Syrians – to allow reason to prevail over the threat of escalation. There can be no lasting security without peace. Peace can prevail only through negotiation, not by the force of arms. It is essential that the opportunity for a comprehensive, just and lasting settlement be sought in accordance with the relevant Security Council resolutions. **The road map, which contains Syrian and Lebanese tracks, must be given a chance**."[82]

Mr Tafrov (Bulgaria)

"Bulgaria categorically condemns the terrorist act carried out yesterday in Haifa, as we always do on such occasions. It is important for all those who make such acts possible to do their utmost to end them by ceasing all material and moral support to them. The murder of an innocent child is particularly repugnant.

Bulgaria believes that Israel's armed action against the Syrian Arab Republic is not in accordance with the Charter of the United Nations or with international law. Like other delegations, we consider it to have been an unacceptable act. **The only resolution of the Middle East crisis – which has of late grown more serious – lies in the implementation of the road map**

[80] S/PV.4836, 5 October 2003, at pp.9 – 10 (emphasis added). **(Annex 23)**
[81] S/PV.4836, 5 October 2003, at p.10 (emphasis added). **(Annex 23)**
[82] S/PV.4836, 5 October 2003, at pp.10 – 11 (emphasis added). **(Annex 23)**

devised by the Quartet, as the Quartet itself noted in its statement following its most recent meeting in New York."[83]

Mr Muñoz (Chile)

"**The international community views with alarm these developments and their impact on the peace process and the road map on which the Quartet is seeking to make progress** for the benefit of the majority, who, we believe, seek peace and coexistence among Israel, Palestine, Syria and all other neighbours in the region."[84]

Mr Gaspar Martins (Angola)

"We need to see a real commitment by the parties to the conflict to put a stop to the logic of violence. Violence is not stopped with violence. **We reiterate our appeal to the States in the region to create a climate conducive to progress in the implementation of the road map, which, alone, will bring a stop to the building of walls, or to acts that took place over the weekend in Haifa and Damascus**. My delegation unequivocally condemns such acts. A clear commitment to peace and moderation in the Middle East is long overdue."[85]

Mr Belinga-Eboutou (Cameroon)

"We urgently appeal to the international negotiators, in particular the Quartet, immediately to take actions aimed at the containment of the situation and to accelerate the taking of bold steps, which the Secretary-General referred to on 26 September. **Such bold steps, in keeping with the roadmap, should deal simultaneously with the fundamental needs of the two parties, namely, security for Israel and an end to occupation for Palestine**."[86]

4.22 On 9 October 2003, refusing to heed the call of Members of the Security Council just 5 days earlier for moderation in an attempt to get back to the Roadmap, the Permanent Representative of Syria, as Chairman of the Arab Group, wrote to the President of the Security Council.[87] The letter referred to "the decision by Israel to proceed with the construction of its expansionist conquest wall in the Occupied Palestinian Territory". Annexed to the letter was a draft resolution for consideration by the Council which, in operative paragraph 1, would have had the Council decide that the "wall in the Occupied Palestinian Territories departing from the armistice line of 1949 is illegal under relevant provisions of international law". This draft resolution was subsequently superseded by a further draft resolution proposed by Syria, Guinea,

[83] S/PV.4836, 5 October 2003, at p.11 (emphasis added). **(Annex 23)**
[84] S/PV.4836, 5 October 2003, at p.11 (emphasis added). **(Annex 23)**
[85] S/PV.4836, 5 October 2003, at p.12 (emphasis added). **(Annex 23)**
[86] S/PV.4836, 5 October 2003, at p.13 (emphasis added). **(Annex 23)**
[87] S/2003/973, 9 October 2003. **(Dossier No.73)**

Malaysia and Pakistan of 14 October 2003 which, with some additional preambular paragraphs, repeated operative paragraph 1 of the earlier draft resolution.[88]

4.23 The Security Council met to debate the issues on 14 October 2003.[89] A vote on the proposed draft resolution was defeated by the negative vote of the United States. Bulgaria, Cameroon, Germany and the United Kingdom abstained from supporting the draft resolution. Extracts of a number of the statements made in the course of the debate warrant citation:

> **Sir Emyr Jones Parry** (United Kingdom – abstaining)
>
> "The United Kingdom is gravely concerned about the prospects for peace in the Middle East. It is vital that both sides realise exactly how much is now at stake. **The United Kingdom is committed to the Quartet's road map as the best way ahead to implement the vision of the two States, living side by side in peace and security. It is essential that the two sides implement the obligations contained in the road map.**
>
> …
>
> That is why the United Kingdom believes that the international community has a direct stake in the peace process. A continuing, strong international commitment to the road map-based process is imperative. A strong and determined Quartet can play a vital role, closely following road map implementation through reports of monitors and making an extra effort where it detects problems or deficiencies.
>
> But, ultimately, Israel's security can only be achieved through a just and lasting settlement negotiated between the two parties. A Palestinian State will not be created by acts of terrorism. The road map offers the region the best opportunity for peace. In that context, we look to both the Israelis and the Palestinians to move forward in implementing their obligations under the first phase."[90]
>
> **Mr Tafrov** (Bulgaria – abstaining)
>
> "**Bulgaria is convinced that the road map alone is the answer to the problems of the Middle East.** Both parties must do their utmost to overcome their differences, to resume their contacts and to continue joint efforts to create two States living within internationally recognised boundaries, as provided for by Security Council resolutions.
>
> …

[88] S/2003/980, 14 October 2003. **(Dossier No.84)**
[89] S/PV.4841, 14 October 2003 **(Dossier No.44)** and S/PV.4842, 14 October 2003 **(Dossier No.45)**.
[90] S/PV.4841, 14 October 2003, at pp.13 – 14 (emphasis added). **(Dossier No.44)**

> **Bulgaria believes that it is necessary for the entire international community, and in particular the members of the Quartet, to convince both parties to implement the road map. At that point, there would no longer be any reason to build the wall, and prospects for a peaceful resolution would increase.**"[91]
>
> **Mr Lavrov** (Russian Federation – in favour)
>
> "We believe that if the roadmap is not made binding in nature, it may remain on paper and the region will ultimately be swept up in a wave of violence. This is why, during the meeting of the Quartet in New York this September, **the Minister for Foreign Affairs of Russia, Igor Ivanov, put forward an initiative for the adoption of a special Security Council resolution that would approve the road map**. This proposal not only remains valid, it is becoming ever more urgent."[92]
>
> **Mr Pleuger** (Germany – abstaining)
>
> "The members of the Quartet continue to back the road map for peace as accepted by both sides at the Aqaba Summit, held on 4 June 2003. **We call upon both the Israeli and Palestinian Governments to continue to implement the road map in good faith, because we feel there is no alternative to the road map as the way to peace**."[93]

4.24 It is important to note what the draft resolution did not propose. It did not propose that the Security Council request an advisory opinion from the Court on the question of the legality of the fence, its legal consequences or anything else.

4.25 Immediately following the vote in the Security Council, Syria, acting as Chair of the Arab Group, requested a reconvening of the 10th Emergency Special Session of the General Assembly.[94] The Emergency Special Session was reconvened on 20 October 2003. The meeting had before it two draft resolutions, the first requesting an advisory opinion from the Court, the second purporting to declare the illegality of the fence. In the light of discussions, it was evident that there was strong opposition to an advisory opinion request. The draft resolution on the subject was not, therefore, pressed to a vote. On 27 October 2003, the Emergency Special Session adopted resolution ES-10/13.[95] Operative paragraph 1 of the resolution demanded that "Israel stop and reverse the construction of the wall" and declared it to be in "contradiction to

[91] S/PV.4841, 14 October 2003, at pp.14 – 15 (emphasis added). **(Dossier No.44)**
[92] S/PV.4841, 14 October 2003, at p.15 (emphasis added). **(Dossier No.44)**
[93] S/PV.4841, 14 October 2003, at p.19 (emphasis added). **(Dossier No.44)**
[94] A/ES-10/242, 15 October 2003. **(Dossier No.74)**
[95] A/RES/ES-10/13, 27 October 2003. **(Dossier No.14)**

relevant provisions of international law". Operative paragraph 2 of the resolution called upon both parties to "fulfil their obligations under relevant provisions of the roadmap".

4.26 On 30 October 2003, three days after this vote, in keeping with the earlier initiative of the Russian Foreign Minister referred to in the Security Council debate on 14 October 2003, Russia proposed a draft resolution in the Security Council on the Roadmap. The text of this draft, which was the subject of extended private deliberations amongst Members of the Security Council, was adopted unanimously by the Security Council on 19 November 2003 as resolution 1515 (2003).[96] On the same day, the Security Council held another meeting also to consider issues relating to the Israeli-Palestinian conflict.[97]

4.27 Nineteen days after the adoption of Security Council resolution 1515 (2003), the 10th Emergency Special Session adopted the resolution currently in issue requesting an advisory opinion. Extracts from a number of the statements made during the debate on this resolution were set out in Chapter 3. It is evident from the statements that there was a widely held view amongst Council Members that, in the words of Representative of Germany in the Security Council, "[t]here is no alternative to the road map for finding a resolution to the Israeli-Palestinian conflict and for creating peace and stability in the Middle East."[98]

D. The Advisory Opinion Request is *Ultra Vires* the Competence of the 10th Emergency Special Session and/or the General Assembly

4.28 As will be clear from the preceding, the Security Council has been intimately taken up with the Israeli-Palestinian conflict over the past two years (and more) in an attempt to bring the two sides back to negotiations. This involvement has ranged from the affirmation of the vision of a two-State solution to the conflict in resolution 1397 (2002), to active support for the Quartet initiative throughout the preparatory process of the Roadmap, to the unanimous endorsement of the Roadmap in resolution 1515 (2003). The principal protagonists of the Roadmap within the Security Council, as well as others, have repeatedly emphasised the importance of the Roadmap and expressly sought to discourage, as destabilising to attempts to bring the two sides together,

[96] S/PV.4862, 19 November 2003. **(Annex 24)**
[97] S/PV.4861, 19 November 2003. **(Annex 24)**
[98] See paragraph 4.21 above.

precisely the kinds of initiatives that were brought to the 10th Emergency Special Session in its October and December 2003 meetings.

4.29 As will be evident from the discussion in Chapter 3, virtually any response by the Court on the substance of the request for an opinion would cut across and risk destabilising the Roadmap. This issue is addressed further in Chapter 9. The question at this point is different. It is whether, given the active engagement by the Security Council with the Israeli-Palestinian conflict, and its unanimous endorsement of a particular initiative just 19 days before the advisory opinion request, it was open to the 10th Emergency Special Session, acting under the Uniting for Peace Resolution, to set in train a process different to that being pursued by the Security Council. Israel contends that it was not open to the Emergency Special Session to proceed in this manner. Moreover, the General Assembly convened in regular session would have been similarly precluded from so acting.

(i) The Advisory Opinion Request is **Ultra Vires** *the Competence of the Emergency Special Session Under the Uniting for Peace Resolution*

4.30 As already noted, the 10th Emergency Special Session was convened in April 1997 following the US veto in the Security Council of two draft resolutions concerning "settlement activities in the Jabal Abu Ghneim area" in Jerusalem. It has been a rolling session ever since, ranging far from the subject matter of the original issue it was convened to address.

4.31 By reference to the Uniting for Peace Resolution, there are a number of highly problematical questions relevant to the conduct of the 10th Emergency Special Session. For example, is the rolling character of the Emergency Special Session – having been convened and reconvened on 12 separate occasions since April 1997 – consistent with the Uniting for Peace Resolution and the revised Rules of Procedure of the General Assembly adopted pursuant thereto? Israel contends that it is not. The Uniting for Peace Resolution contemplates the convening of emergency special sessions in accordance with a specific procedure to address a specific issue of immediate concern. The Rules of Procedure of the General Assembly were revised to meet this objective. Rolling emergency special sessions which are reconvened at a time and on a subject that is detached from the original session are at odds with the very intent of the Uniting for Peace Resolution and the Assembly's Rules of Procedure.

4.32 This practice, indeed, has been the subject of long-standing concern and criticism by a number of Members of the United Nations over many years. For example, addressing the resumption of the 7th Emergency Special Session in 1982 some 21 months after its temporary adjournment, US Ambassador Jeane Kirkpatrick, in a letter addressed to the President of the General Assembly, stated as follows:

> "It seems plain that the purpose of this 'temporary' adjournment was to allow for a resumption in the same time frame if events warranted. We do not believe that Members contemplated that the session could be maintained in its state of adjournment indefinitely with the possibility of being 'resumed' on request. Indeed, two regular sessions, two emergency sessions and one special session of the General Assembly have been held since that time. What is now proposed is that, at the request of a group of Members, and notwithstanding the passage of a substantial period of time, an emergency special session should be reconvened without regard to the views of the majority of the membership of the United Nations or to developments that may have taken place. This dubious procedure of a 'resumption' has the effect of undermining the provisions of the rules of procedure of the General Assembly for the convening of an emergency special session. In the opinion of the United States, it is not possible some 21 months after adjournments to 'resume' the old session. We cannot understand how the word 'temporary' can be stretched to cover a gap of this duration."[99]

4.33 This view was supported at the time by others, including Israel.[100] The point remains unresolved today. For example, while not explicitly challenging its rolling character, US Ambassador John Negroponte nevertheless expressed the doubts of the United States about the reconvening of the 10th Emergency Special Session in May 2002 in the following terms:

> "The United States is fully committed to a settlement of the conflict in the Middle East. …
>
> We believe that the best way forward is to advance the comprehensive strategy that the 'quartet' reaffirmed at its meeting last week. …
>
> The Security Council met 32 times on the Middle East last month, sidelining all other matters. Frankly, we are puzzled by the Palestinian decision to resort to a resumption of the emergency special session at this time of Security Council activism and new diplomatic initiative."[101]

[99] A/ES-7/16, 19 April 1982.
[100] See, for example, A/ES-7/18, 22 April 1982.
[101] A/ES-10/PV.16, 7 May 2002, at p.12.

4.34 An additional problematical aspect of the 10th Emergency Special Session is the convening of its meeting on the advisory opinion request at the same time as the General Assembly was meeting in regular session. Indeed, the propriety of holding an emergency special session simultaneously with a regular session was expressly rejected by the President of the General Assembly at the time of the 1st Emergency Special Session in 1956 in the following terms:

> "Holding simultaneous sessions would be contrary to the provisions for convening emergency special sessions, which are held solely because the General Assembly is not in regular session at the time. The drafters of the rules relating to emergency meetings had not intended such meetings to be held when the Assembly was in regular session and thus fully capable of dealing with the items before it."[102]

4.35 The propriety of this view was formally confirmed by resolution 1003 (ES-I) of the 1st Emergency Special Session on 10 November 1956 which transferred the items on the agenda of the Emergency Special Session to the provisional agenda of the 11th regular session of the General Assembly for consideration in that forum.[103] The express terms of operative paragraph 1 of the Uniting for Peace Resolution also confirm the correctness of this approach.[104]

4.36 The prohibition on convening an emergency special session while the General Assembly is in regular session was also emphasised in a Memorandum prepared by the Office of Legal Affairs of the United Nations Secretariat on 25 August 1967. Supporting the statement, quoted above, of the President of the General Assembly at the time of the 1st Emergency Special Session, the Memorandum concluded:

> "… there would seem to be considerable merit in the argument advanced by the President of the first emergency special session … that holding simultaneous sessions would be contrary to the purpose of emergency special sessions, as a device for speedily convening the Assembly when it is not already in session."[105]

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[102] UN GAOR, 1st Emergency Special Session, 572nd Plenary Meeting, at paragraph 28.
[103] Resolution 1003 (ES-I), 10 November 1956.
[104] Operative paragraph 1 states *inter alia*: "If not in session at the time, the General Assembly may meet in emergency special session …"
[105] United Nations Juridical Yearbook, 1967, p.321, at p. 324. The same point is made in Simma (ed.), *The United Nations Charter: A Commentary* (2001), at pp.387 – 389.

4.37 There are other questions, too, which go to the essential propriety of the conduct of the 10th Emergency Special Session. It is not Israel's intention, however, in the context of these proceedings, to engage in detailed debates on every aspect of the procedural conduct of the Emergency Special Session. What is of more fundamental concern as regards these proceedings is the evident disregard by the 10th Emergency Special Session of the condition precedent in the Uniting for Peace Resolution to any consideration of a matter by the General Assembly.

4.38 Operative paragraph 1 of the Uniting for Peace Resolution provides that the General Assembly

> "*Resolves* 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 …"[106]

4.39 This is the declared basis on which the 10th Emergency Special Session was convened and is said to have been acting. The fundamental question is thus whether, in this case, the Security Council, because of lack of unanimity of the permanent members, has indeed failed to exercise its primary responsibility for the maintenance of international peace and security. It goes without saying that, while, in the first instance, this will be a matter for the appreciation of the General Assembly itself, the question engages the interpretation of a central pillar of Charter architecture designed to clarify and elaborate on the competence of and division of responsibility between two of the Organisation's principal organs. It is thus a matter which comes properly within the purview of the Court in proceedings such as this.

4.40 One observation needs immediately to be made. 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. It may be that the co-sponsors of the resolution in the Emergency Special Session calculated that such a draft would not have attracted sufficient support in the Council to have had any chance of adoption. The point at this stage is simple. It is that there has been no lack of unanimity of the permanent members or failure by the Council to

[106] Emphasis added.

act on the matter which the co-sponsors of the advisory opinion request brought before the Emergency Special Session. The matter was simply never brought before the Security Council.

4.41 The relevance of the point is cogently made by a number of commentators. Thus, for example, Wolfrum has observed:

> "… there is an indispensable precondition for any action taken by the General Assembly that the Security Council has discussed the topic first, because only this can have resulted in a lack of unanimity between its members."[107]

4.42 Similarly, Reicher has commented:

> "… the Security Council must have dealt with the issue before the General Assembly may take any action whatsoever. It cannot be said that the Council has failed to exercise its primary peacekeeping function by virtue of a lack of unanimity among permanent members unless the matter has at the very least been discussed in the Council. In fact, one may go further and suggest that for the pre-condition in Part A to be fulfilled, the deliberations in the Council must be brought to a vote. How else can a lack of unanimity be established?"[108]

4.43 The co-sponsors of the advisory opinion request will no doubt point to the lack of unanimity of the permanent members on 14 October 2003 when the Council failed to adopt a draft resolution proposing the illegality of the fence. This, of course, is accurate but it leaves out of account a critical factor. Under the Uniting for Peace Resolution, the competence of the General Assembly is engaged not simply by a lack of unanimity of the permanent members, but by a lack of unanimity which results in the Security Council's failure to exercise its primary responsibility for the maintenance of international peace and security.

4.44 It is evident from the extracts from the statements of the Members of the Security Council, quoted above, on both sides of the issue in their 14 October 2003 meeting on the fence that, notwithstanding their differences of view on the question then before them, it was common ground that the only way forward on the Israeli-Palestinian conflict was through negotiations between the two sides under the framework of the Roadmap.

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[107] Rudiger Wolfrum (ed.), *United Nations: Law, Policies and Practice* (1995), Volume 2, at p.1343.
[108] Harry Reicher, "The Uniting for Peace Resolution on the Thirtieth Anniversary of its Passage" (1981) 20 *Columbia Journal of Transnational Law*, at p.40.

4.45 Significantly, this appreciation translated almost immediately into a Russian led initiative for the Security Council to endorse the Roadmap. This was a matter of active deliberation by the Security Council in late October and November 2003, culminating in the unanimous adoption of resolution 1515 (2003) on 19 November 2003, before the 12th reconvened session of the 10th Emergency Special Session was even requested. There was no lack of unanimity of the permanent members of the Security Council here. There was no failure by the Council to exercise its primary responsibility for the maintenance of international peace and security. On the contrary, in this case the Charter was working just as it was conceived to work. The Security Council, after full and considered deliberation over an extended period of time, endorsed a course of action on the Israeli-Palestinian conflict. There was no basis under the Uniting for Peace Resolution for the 10th Emergency Special Session to proceed on an initiative of its own. The advisory opinion request was thus *ultra vires* the competence of the 10th Emergency Special Session under the Uniting for Peace Resolution.

(ii) The Advisory Opinion Request Would Have Been Ultra Vires *the Competence of the General Assembly Convened in Regular Session*

4.46 That the advisory opinion request by the 10th Emergency Special Session was *ultra vires* the Uniting for Peace Resolution should be an end of the matter. For completeness, however, lest Israel's interlocutors suggest that this is purely a formal objection, two further observations are required. First, Israel's objections concerning the *vires* of the 10th Emergency Special Session cannot be lightly dismissed as formal. The Emergency Special Session, conducting itself in a highly dubious and questionable fashion, purported to act under the Uniting for Peace Resolution. The resolution is part of the essential fabric of the Charter, addressing the competence of and balance of responsibility between the Security Council and the General Assembly on matters going to the maintenance of international peace and security. A violation of its essential precepts and preconditions for action cannot by any stretch of the imagination be properly characterised as formal.

4.47 More fundamentally, Israel contends that, given the active engagement of the Security Council with the Israeli-Palestinian conflict, it would not have been open to the General Assembly in regular session to adopt the advisory opinion request.

4.48 Kelsen, writing in his seminal 1950 work *The Law of the United Nations*, observed as follows about the competence of the General Assembly and Security Council to request advisory opinions under Article 96(1) of the Charter:

> "The competence of requesting advisory opinions as established by Article 96, paragraph 2, in contradistinction to that established by Article 96, paragraph 1, is restricted in so far as the organs authorised by the General Assembly are permitted to request advisory opinions only on legal questions 'arising within the scope of their activities'. No such restriction is imposed upon the analogous competence of the General Assembly and the Security Council in paragraph 1 of Article 96. Nevertheless, these organs, too, are competent to request advisory opinions on legal questions only if such questions arise within the scope of their activities, that is to say, within their jurisdiction. The determination of any organ's jurisdiction implies the norm not to act beyond the scope of its activity as determined by the legal instrument instituting the organ. It is not very likely that it was so intended to enlarge, by Article 96, paragraph 1, the scope of the activity of the General Assembly and the Security Council determined by other Articles of the Charter. Hence the words 'arising within the scope of their activities' in paragraph 2 of Article 96 are redundant."[109]

4.49 Judge Schwebel appeared to find this analysis persuasive,[110] although Judge Higgins observes that an advisory opinion request entails no substantive enlargement of the scope of the activity of the requesting organ.[111] As a general observation, this latter assessment may indeed be correct. The question in the present case, however, is whether, given the scheme of the Charter and the competence of and balance of responsibility between the Security Council and the General Assembly thereunder, it would be open to the General Assembly to request an advisory opinion of the Court on a matter which overlaps with action taken by the Security Council in the context of its exercise of its primary responsibility under the Charter and which would have the effect of hindering the work of the Council.

4.50 Israel does not question that the General Assembly is also concerned with international peace and security under the scheme of the Charter. The point is so well established – including by the jurisprudence of the Court in the *Expenses* case[112] – as not even to warrant comment.

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[109] Hans Kelsen, *The Law of the United Nations*, 1950, at p.546.
[110] Schwebel, S.M., "Authorising the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice", (1984) 78 AJIL 869, at 874 – 875.
[111] Higgins, R., "A comment on the health of Advisory Opinions", in Lowe and Fitzmaurice (eds.), *Fifty years of the International Court of Justice*, 1996, p.567, at p.577.
[112] *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.151, at p.163.

Israel contends, however, that, when the Security Council is acting in exercise of its primary responsibility, the General Assembly is under a duty to exercise restraint. Indeed, this very appreciation is the central pivot of the Uniting for Peace Resolution itself.

4.51 It is well known that Article 24(1) of the Charter gives the Security Council primary responsibility for the maintenance of international peace and security. It is also well known that it is the Security Council, and the Security Council alone, which is competent to take action under Chapter VII of the Charter. In addition, the Security Council is also virtually exclusively competent to act under Chapter VI of the Charter in respect of the pacific settlement of disputes. Thus, while Article 35 of the Charter establishes a limited competence to bring certain matters to the attention of the General Assembly, Article 35(3) provides expressly that any proceedings of the General Assembly on such matters are subject to the constraints of Articles 11 and 12 of the Charter, the latter of which restricts the competence of the General Assembly in circumstances where the Security Council is exercising in respect of any dispute or situation the functions assigned to it under the Charter.

4.52 More significantly, Articles 33, 34, 36, 37 and 38 of Chapter VI accord special responsibilities in respect of the pacific settlement of disputes only to the Security Council. Thus, under Article 33, it is the Security Council that is competent to call upon parties to a dispute to settle the dispute by peaceful means. Under Article 34, it is the Security Council that may investigate any dispute or situation which might lead to international friction. Under Article 36(1), it is the Security Council that may recommend appropriate methods of adjustment. Significantly, under Article 36(3), it is the Security Council that is enjoined to "take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice". It follows, by implication, that any request for an advisory opinion on such matters falls presumptively within the competence of the Security Council, not the General Assembly, especially when the Security Council has acted in exercise of its primary responsibility under the Charter. This, indeed, was the approach adopted in the *Namibia* case, in which it was the Security Council that requested an opinion from the Court.

4.53 Under Article 37, it is again the Security Council that is competent to recommend terms for the settlement of a dispute. The Security Council is again competent under Article 38.

4.54 The upshot of this is that, while the General Assembly is undoubtedly concerned with the maintenance of international peace and security, its competence in respect of the pacific settlement of disputes is secondary, based on its general powers under Chapter IV of the Charter rather than on any special powers derived from Chapter VI of the Charter. Special powers to act in this area are accorded exclusively to the Security Council. The Uniting for Peace Resolution accurately reflects this balance of competence and responsibility between the Security Council and the General Assembly.

4.55 Other provisions of the Charter, too, affirm the competence and responsibility of the Security Council to act in respect of international peace and security to the evident exclusion of the General Assembly. Thus, for example, Articles 52 to 54 of the Charter, concerned with regional arrangements, accord a role to the Security Council alone in respect of such matters. Similarly, under Article 99 of the Charter, the Secretary-General may bring matters which he considers may threaten the maintenance of international peace and security to the attention of the Security Council. The General Assembly is not referred to in these provisions.

4.56 There has undoubtedly been some evolution in the practice of the United Nations on such matters over the past almost 60 years of its existence. It is evident from this that the General Assembly is able to undertake a more active involvement in issues concerning international peace and security than the bare bones of the Charter might suggest. The scheme of the Charter, however, remains. It is the Security Council that has primary responsibility in the field of peace and security and the role of the General Assembly is subordinate to that.

4.57 The competence of, and balance of responsibilities between, the General Assembly and the Security Council under the Charter cannot be lightly side-stepped. The issues in question are bigger than the case now before the Court. They go to the constitutional arrangements of the United Nations itself just at a point at which the Organisation is struggling to find its voice in the face of wider challenges to its ability to act. The scheme of the Charter is by no means perfect. The balance between the Security Council and the General Assembly under the Charter cannot, however, be ignored.

4.58 In the light of the foregoing, Israel contends that, given the active engagement of the Security Council with the Israeli-Palestinian conflict, in exercise of its primary responsibility, including under Chapter VI of the Charter, it would have been *ultra vires* the competence of the

General Assembly even in regular session to request the advisory opinion now before the Court by resolution of the 10th Emergency Special Session.

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CHAPTER 5
THE REQUEST DOES NOT RAISE A LEGAL QUESTION WITHIN THE SCOPE OF ARTICLE 96(1) OF THE CHARTER AND ARTICLE 65(1) OF THE STATUTE

A. The Requirement That the Request Should Raise a Legal Question

5.1 It is well-established that, in order for the Court to be able to exercise its advisory opinion jurisdiction, a request must have been referred to the Court on a "legal question". This follows from Article 96(1) of the Charter and Article 65(1) of the Statute, the interpretation of which has been addressed in many of the advisory opinions given by the Court to date.[113]

5.2 The question referred to the Court in this case is not a "legal question" within the scope of Article 96(1) of the Charter and Article 65(1) of the Statute. Israel's objection, so far as jurisdiction is concerned, is not that the question is "political", although it will be abundantly clear from the discussion in Chapter 3 that the request is highly political and partisan in character and goes to one aspects of a wider political dispute. Rather, it is that the question referred to the Court is uncertain in its terms with the result that it is not amenable to a response by the Court.

5.3 For a question to constitute a legal question for the purposes of Article 96(1) of the Charter and Article 65(1) of the Statute it must be reasonably specific. This follows in part from the language of Article 65(2) of the Statute, which expressly requires "an exact statement of the question upon which an opinion is required", and in part from basic principles. The Court has also been guided by the imperative of reaching conclusions which are legally certain.[114] The requirement that decisions be made by reference to and within the confines of legal certainty amounts to a general principle that falls to be applied as a matter of international law.[115] The

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[113] See, for example, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, ICJ Reports 1962*, p.151, at p.155: "Therefore, in accordance with Article 65 of its Statute, the Court can give an advisory opinion only on a legal question. If a question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested."

[114] See, for example, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p.226, at para.95; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980*, p.29, para.58. See also *Fisheries Jurisdiction Case (Spain v. Canada), Separate Opinion of Judge Oda, I.C.J. Reports 1998*, at para.9.

[115] Dailler and Pellet, *Droit International Public* (6th ed.), p.349. See also Sir Hersch Lauterpacht referring to the "paramount postulate of security and stability" in the context of the administration of justice. Lauterpacht, H., *The Function of Law* (1933), p.253. The principle of legal certainty is also an important

issue of legal certainty is not to be confused with the issue that has arisen in previous advisory opinions as to whether a question is unduly abstract, ie, where the meaning of the question is certain but where it is said that it fails to relate to a specific factual situation.[116] The issue here is that it is not possible to decipher with reasonable certainty the legal meaning of the question. This is addressed further below.

5.4 In addition, while Israel accepts that it is part of the Court's judicial function to seek to interpret the question put to it, in doing so the Court must not exceed its own competence. As the Permanent Court stated:

> "The Court would exceed its own competency should it essay to consider controversial cases, actual or hypothetical, on which its opinion is not asked, and to intimate what, in its judgment, the decision upon them should be."[117]

5.5 The Court's task is to answer the question as put to it, not to seek to reformulate the question.[118] In the absence of a reasonably certain legal question for it to answer, the Court cannot establish its jurisdiction by augmenting the question before it.[119]

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concept in European Community law: see e.g. *Portelange v. Marchant, Case 10/69* [1969] E.C.R., p.309, at p. 316.

[116] See, for example, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p.226, at para.15.

[117] *Competence of the International Labour Organization to regulate, incidentally, the personal work of the Employer (1926)*, *P.C.I.J. Series B, No. 13*, p. 24.

[118] See, for example, *Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p.62, at para.37; also, *Competence of the General Assembly*, *Advisory Opinion,* ICJ Reports 1950, p.4 at p.7.

[119] Given that the Court's jurisdiction is limited to answering the question put to it, and is in part defined by that question, the position is analogous to where a dispute resolution provision and in particular an arbitration agreement fails for uncertainty because it is not possible to ascertain how the parties wished their disputes to be resolved. See e.g. Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (3rd ed.), pp.172-173, on "Uncertainty", addressing the issue of so-called "pathological arbitration clauses". Another useful analogy is the Court's approach to the interpretation of treaty provisions at the jurisdictional phase e.g. in *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), 1996, I.C.J. Reports*, p.803, at p.810, para.16. The Court interpreted each provision relied on by the claimant so as to establish whether the facts alleged were capable of leading to a breach. The question whether the parties had consented to the Court's jurisdiction could not be answered on the basis merely of an "arguable" interpretation of the treaty. Greater certainty was required to establish the Court's jurisdiction.

B. The Question is Uncertain and Incapable of Response Within Its Terms

(i) The Underlying Assumption of Illegality

5.6 The question referred to the Court has three elements. It asks:

- what are the legal consequences arising from
- a given factual situation, ie, 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.

5.7 The question goes to "legal consequences", not to underlying issues of legality. Although the question put to the Court appears to assume that the construction of the fence is unlawful, there has in fact been no legally binding assessment or determination of the illegality of the fence.[120] This leaves two possibilities:

(a) that the Court is being asked (i) to find that the construction of the fence is unlawful, and then (ii) to give its opinion on the legal consequences of that illegality,

or

(b) that the Court is being asked (i) to assume that the construction of the fence is unlawful, and then (ii) to give its opinion on the legal consequences of that assumed illegality.

5.8 The first of these possibilities is unworkable. The second is unworkable and would also lead the Court to give an opinion that was devoid of object or purpose.

5.9 So far as the first possibility is concerned, the question as to whether the construction of the fence is unlawful is a complex question of mixed fact and law. This is discussed further in Chapter 8. It is also a question of acute political sensitivity, as has been shown in Chapter 3, not

[120] Cf. General Assembly resolution A/RES/ES-10/13 of 27 October 2003, operative para.1. **(Dossier No.14)**

least given the Security Council endorsed initiative to bring the two sides back to negotiations. It may be supposed that if the General Assembly had wanted the Court's opinion on this highly complex and sensitive question, it would expressly have sought such an opinion. In an analogous situation, the Permanent Court found:

> "The Council, if it had wished also to obtain the Court's opinion on this point … would not have failed explicitly to say so. In these circumstances the Court does not consider that it has cognisance of this question."[121]

5.10 It is submitted that the Court should similarly decline to reformulate and respond to a question going to the issue of whether or not construction of the fence is unlawful. Further, the issue of legality is one that is inherently ill-suited for determination by way of an advisory opinion. This is because of the complex underlying questions of fact that would have to be resolved, which would of necessity involve consideration by the Court of abundant documentary, witness and expert witness evidence. As developed further in Chapter 8, the factual enquiry necessary to address the question of legality is one that cannot properly be shoehorned into the scope of the current advisory opinion request.

5.11 As to the second possibility, if the Court were to proceed on the basis of an assumption of illegality, the resulting opinion could have no practical value. As follows from the *Western Sahara* case, the function of the Court is to give an opinion once it has come to the conclusion that the question put is relevant and has a practical and contemporary effect, and is not devoid of object or purpose.[122] These requirements cannot be considered satisfied if the question is simply asking the Court to give its opinion on the basis of an assumption, ie, the assumed illegality of the construction of the fence. The resulting opinion could not assist the General Assembly in the

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[121] *Exchange of Greek and Turkish Populations* (1925), *P.C.I.J. Series B, No.10*, at p.17.

[122] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p.12, at p.37, para.73. See also at p.20, para.20 and p.27, para.39. See also *Northern Cameroons*, *I.C.J. Reports 1963*, p.15, at p.33: "If the Court were to proceed and were to hold that the Applicant's contentions were all sound on the merits, it would still be impossible for the Court to render a judgment capable of effective application …". This was obviously in the context of a contentious matter, but in the same judgment the Court stressed that all the considerations of judicial propriety applied equally to the exercise of the advisory jurisdiction. *Ibid*., pp.30-31. Cf. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p.226, at para.16. It is arguable that the Court's jurisprudence pulls in different directions on the appropriateness of considering the object and purpose of an advisory opinion request. However, the question in truth goes to immediacy of application. An opinion going to a general question of international law, as in the *Nuclear Weapons* case, has an immediate application regardless of whether or not there is a specific situation to which it may be applied. An opinion going to the legal consequences of a specific act, where that act may or may not be unlawful, can have no immediate application.

proper exercise of its functions.[123] It would also be a source of wider confusion. Further, any legal consequences would depend on the precise nature of the illegality. Is the Court then to proceed on the basis of an extended series of differing assumptions, giving its assessment of the legal consequences in each case?

5.12 Thus, what is being asked of the Court is quite uncertain. It is uncertain which of the two options referred to above the Court is intended to adopt. It is uncertain, in terms of option (a), what the precise scope of the enquiry would be, and, in terms of option (b), precisely what assumptions could or should be made.

5.13 The position was quite different in the *Namibia* case, where the Court was being asked to give its opinion on the legal consequences for States in circumstances in which the illegality of the continued presence of South Africa in Namibia had already been definitively established by Security Council resolution 276 (1970). Thus, the starting point for the Court's consideration of the legal consequences for States in that case was precisely the fact that there had been a "binding determination made by a competent organ of the United Nations to the effect that a situation is illegal".[124]

(ii) Legal Consequences for Whom?

5.14 The use of the formula "legal consequences" leads immediately to a further area of uncertainty. 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",
- some combination of the above, or some different entity.

[123] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p.12, at p.20, para.39.
[124] *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.16, at p.54, para.117, and pp. 54-56, paras.118-126.

5.15 Legal consequences do not exist in the abstract. They must have a defined object. In the absence of a defined object, there is an absence of legal certainty. The qualification of "consequences" by the adjective "legal" in no sense alters this. Moreover, the gap cannot be filled by reference to the record of the meeting at which the advisory opinion request was adopted. There is a notable lack of explanation on the record as to who was intended to be the beneficiary of any opinion of the Court – or, indeed, as to how the General Assembly would be assisted in the performance of its functions by the giving of an opinion.

5.16 The uncertainty in this respect is relevant for two reasons. First, the Court must know the scope of the exercise on which it is being asked to embark. It cannot be for the Court to double-guess the General Assembly. Second, and no less importantly, States or other interested parties must also know the scope of the exercise on which the Court is being asked to embark. Failing this, they are not in a position to consider how to respond. In this respect, it may again be noted that, in the *Namibia* case, the Court was asked to give its opinion on the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970). The Court was not left to fill in the blanks, and the Court did not go beyond the specific task set by the question before it.

C. Conclusions

5.17 The failings outlined above render the question put to the Court uncertain. It follows from this that the question cannot be a legal question as required by Article 65(1) of the Statute. As the Court has frequently affirmed, where the question referred for an opinion is not a legal question, the Court has no discretion in the matter. It must decline to give the opinion requested.

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PART THREE

PROPRIETY AND THE EXERCISE OF DISCRETION

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CHAPTER 6
PRINCIPLES RELEVANT TO THE QUESTION OF PROPRIETY AND THE EXERCISE BY THE COURT OF ITS DISCRETION UNDER ARTICLE 65(1) OF THE STATUTE

A. The Court's Discretion to Decline to Answer the Question

6.1 The Court has a discretion to decline to respond to a request for an advisory opinion. Israel submits that the request now before the Court is one to which it should not respond. Article 65(1) of the Statute is cast in permissive terms. It provides that the Court "may give an advisory opinion" (emphasis added). The Court has on numerous occasions affirmed that this leaves it with "a large amount of discretion" to examine "whether the circumstances of the case are of such a character as should lead it to answer the Request".[125] For example, in the *Western Sahara* case, the Court addressed the matter in the following terms:

> "Article 65, paragraph 1, of the Statute, which establishes the power of the Court to give an advisory opinion, is permissive and, under it, that power is discretionary in character. In exercising this discretion, the International Court of Justice, like the Permanent Court of International Justice, has always been guided by the principle that, as a judicial body, it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions. If the question is a legal one which the Court is undoubtedly competent to answer, it may nonetheless decline to do so. As the Court has said in previous Opinions, the permissive character of Article 65, paragraph 1, gives it the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the request."[126]

6.2 Similarly, in its Opinion in the *Certain Expenses* case, the Court, recalling the Opinion of the Permanent Court of International Justice in the *Status of Eastern Carelia* Advisory Opinion, observed as follows:

> "The power of the Court to give an advisory opinion is derived from Article 65 of the Statute. The power granted is of a discretionary character. In exercising its discretion, the International Court of Justice, like the Permanent Court of International Justice, has always been guided by the principle which the Permanent Court stated in the case concerning the *Status of Eastern Carelia* on 23 July 1923: 'The Court, being a Court of Justice, cannot, even in

[125] *Interpretation of Peace Treaties, Advisory Opinion of 30 March 1950, I.C.J. Reports 1950*, p.65, at pp.71-72.
[126] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p.12, at paragraph 23.

> advisory opinions, depart from the essential rules governing their activity as a Court' (PCIJ, Series B, No.5, p.29). Therefore, in accordance with Article 65 of its Statute, the Court can give an advisory opinion only on a legal question. If a question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested. But, even if the question is a legal one, which the Court is undoubtedly competent to answer, it may nonetheless decline to do so."[127]

6.3 The Court has nonetheless also made clear both that a reply to a request for an advisory opinion, in principle, should not be refused and that only "compelling reasons" should lead it to refuse to give a requested advisory opinion.[128]

6.4 The recent jurisprudence of the Court shows that the Court is particularly mindful to ensure that questions of jurisdiction and propriety are properly addressed before any question of merits is considered. So, for example, in the case of the General Assembly's request for an advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court first resolved questions of jurisdiction and propriety before turning to consider the merits of the question referred for an opinion.[129] An examination of the Court's jurisprudence, and that of the Permanent Court before it, indicate a number of elements that are germane to the question of what would constitute "compelling reasons" that should lead the Court to refuse to give a requested opinion.

(i) The Requirement that the Court Remain Faithful to its Judicial Character

6.5 In the *Northern Cameroons* case, the Court, referring to the exercise of a judicial function, equally applicable to advisory opinions and contested cases, observed that "[t]hat function is circumscribed by inherent limitations which are none the less imperative because they may be difficult to catalogue, and may not frequently present themselves as a conclusive bar to adjudication in a concrete case."[130] This awareness of the "inherent limitations" evident in the "judicial function" has received a particular focus in the exercise of the Court's advisory jurisdiction, in which the Court has placed great emphasis on the dominant requirement that it

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[127] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: ICJ Reports 1962*, p.151 at p.155.
[128] See *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: ICJ Reports 1962*, p.151 at p.155.
[129] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p.226, at paragraphs 10 *et seq* and 14 *et seq* respectively.
[130] *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963, I.C.J. Reports 1963*, p.15, at p.30.

remain faithful to its judicial character. This imperative draws on the Opinion of the Permanent Court in the *Eastern Carelia* case. Given its pertinence to the matter now before the Court, the principal conclusions of the Permanent Court warrant setting out in detail. Concluding that it would not give an Opinion on the question referred to it, the Permanent Court stated as follows:

> "It follows from the above that the opinion which the Court has been requested to give bears on an actual dispute between Finland and Russia. … It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement. … Such consent, however, has never been given by Russia. On the contrary, Russia has, on several occasions, clearly declared that it accepts no intervention by the League of Nations in the dispute with Finland. The refusals which Russia has already opposed to the steps suggested by the Council have been renewed upon the receipt by it of the notification of the request for an advisory opinion. The Court therefore finds it impossible to give its opinion on a dispute of this kind.
>
> It appears to the Court that there are other cogent reasons which render it very inexpedient that the Court should attempt to deal with the present question. The question whether Finland and Russia contracted on the terms of the Declaration as to the nature of the autonomy of Eastern Carelia is really one of fact. To answer it would involve the duty of ascertaining what evidence might throw light upon the contentions which have been put forward on this subject by Finland and Russia respectively, and of securing the attendance of such witnesses as might be necessary. The Court would, of course, be at a very great disadvantage in such an enquiry, owing to the fact that Russia refuses to take part in it. It appears now to be very doubtful whether there would be available to the Court materials sufficient to enable it to arrive at any judicial conclusion upon the question of fact: What did the parties agree to? The Court does not say that there is an absolute rule that the request for an advisory opinion may not involve some enquiry as to facts, but, under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are.
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> The Court is aware of the fact that it is not requested to decide a dispute, but to give an advisory opinion. This circumstance, however, does not essentially modify the above considerations. The question put to the Court is not one of abstract law, but concerns directly the main point of controversy between Finland and Russia, and can only be decided by an investigation into the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court."[131]

[131] *Status of Eastern Carelia, Advisory Opinion (1923), P.C.I.J., Series B, No.5*, at pp.27-29.

6.6 The Permanent Court was concerned by two factors of particular relevance in these proceedings: (a) the absence of consent to the adjudication of a legal dispute, and (b) the necessary bar against making determinations on underlying facts where the Court does not have sufficient evidence before it.

(a) The Limitation on Giving an Advisory Opinion Where There is a Legal Dispute

6.7 The opinion in the *Eastern Carelia* case was in part predicated on the fact that Russia was not a member of the League of Nations. It follows that it could not be said that Russia had consented generally to the Permanent Court's exercise of the advisory jurisdiction.[132] However, the jurisprudence of the International Court has focussed not on the jurisdictional element of the Permanent Court's finding, but rather on the issue of whether the consideration of a question that related to a pending dispute between States was consistent with judicial propriety.[133] This has led the Court to consider with care the issue of whether a given question put to it relates to an existing dispute between States.

6.8 Thus, in the *Interpretation of Peace Treaties* case, the Court considered the nature of the question before it, which concerned the applicability to certain disputes of the settlement procedures instituted by the Peace Treaties, and found that this "in no way touches the merits of those disputes".[134] It followed that the *Eastern Carelia* case could be distinguished. It could not be said that the question "related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties."[135] The Court found that "the legal position of the parties to these disputes cannot be in any way compromised by the answers that the Court may give to the Questions put

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[132] Cf. *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.16, at p.23, para.31; also *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p.12, at pp.23-24, para.30.

[133] See for example Simma (ed.), *The Charter of the United Nations* (2nd ed.), Vol. II, p. 1185: "A decision to entertain a request would be inappropriate if a legal dispute relating to States which have not recognized the jurisdiction of the ICJ on the basis of Art. 36 of the Statute, were brought before the Court, in the absence of the States concerned, by a request for advisory proceedings." See also at p. 1187: "The ICJ has recognized, on the other hand, that the lack of consent of an interested State may render the giving of an Advisory Opinion incompatible with its judicial character."

[134] *Interpretation of Peace Treaties, Advisory Opinion of 30 March 1950, I.C.J. Reports 1950*, p.65, at p.72.

[135] *Interpretation of Peace Treaties, Advisory Opinion of 30 March 1950, I.C.J. Reports 1950*, p.65, at pp.71-72. See, Rosenne, *The Law and Practice of the International Court*, 1920-1996, Vol. II, noting that the views of the present Court as expounded in the *Interpretation of Peace Treaties* Advisory Opinion "are today the guiding statement".

to it".[136] In other words, the Court formulated a basic principle – that it should decline to answer a question where this "would be substantially equivalent to deciding the dispute between the parties" – and sought to establish whether that principle was applicable on the facts before it.

6.9 Similarly, in the *Namibia* case the Court addressed itself to the question of whether the request related to a legal dispute actually pending between two States (and/or between South Africa and the United Nations), but found that it did not.[137] A further important factor in terms of consent was South Africa's appearance before the Court for purposes of setting out its case on the merits of the question put to the Court.[138]

6.10 In the *Western Sahara* case, the Court expressly addressed the continuing relevance of the *Eastern Carelia* case (building on the earlier consideration of this same question in the *Interpretation of Peace Treaties* case), and concluded that: "the consent of an interested State continues to be relevant, not for the Court's competence, but for the appreciation of the propriety of giving an opinion".[139] It continued:

> "In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent."[140]

6.11 The principle that the Court must remain "faithful to the requirements of its judicial character", highlighted in the *Western Sahara* case, goes to the proposition that the Court must not permit the advisory mechanism to become an abuse of process by which the scheme of the Statute on consensual jurisdiction is circumvented.[141] It is not simply a question of whether there is an actual dispute between States that might otherwise come before the Court through its

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[136] *Ibid*.
[137] *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.16, at p.24, para.32. It found: "It is not the purpose of the request to obtain the assistance of the Court in the exercise of the Security Council's functions relating to the pacific settlement of a dispute pending before it between two or more States. 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."
[138] *Ibid*, pp.23-24, para.31.
[139] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p.12, at p.25, para.32.
[140] *Ibid*, p.25, para.33.
[141] See also the *IMCO Advisory Opinion,, I.C.J. Reports 1960,* p.50, at p.153.

contentious procedure. It is whether engagement with the question by the Court would in effect involve the Court in an adjudication of issues – whether binding or not – in a manner that would evade the constraints of the Statute. The Court examined the situation before it in the *Western Sahara* case and found that the legal controversy before it had not arisen in bilateral relations between two States.[142] It also placed emphasis on the fact that, in the proceedings in the General Assembly, Spain had not opposed the reference of the question as such to the Court's advisory jurisdiction.[143]

(b) The Limitation on Giving an Advisory Opinion Where There is Insufficient Evidence Before the Court to Enable it to Make Findings of Fact

6.12 Notwithstanding the discretion that the Court enjoys in terms of the application of the rules applicable in contentious cases (pursuant to Article 68 of the Statute), the advisory jurisdiction does not readily allow for a procedure well-suited to the determination of complex issues of fact.[144] This has not been a major problem so far as the Court's exercise of its advisory jurisdiction is concerned – prior to the present proceedings – as the Court has not been faced with the problem of establishing complex facts on which there has been disagreement.[145]

6.13 In the *Eastern Carelia* case, the Permanent Court was faced with the difficulty of determining facts and found that, in the absence of a concerned party, it could not do so without departing from the essential rules guiding its activity as a Court. The weight and propriety of this principle has been consistently affirmed in the jurisprudence of the International Court.[146] Thus,

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[142] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p.12, at p.25, para.34. Cf. the instant case, where Israel did of course vote against resolution A/RES/ES-10/14. The dicta in the *Western Sahara* case were considered and applied in *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989,* p. 177 at p. 191, para. 38. Again the Court considered whether the effect of the advisory opinion was to submit an existing dispute to judicial settlement without one State's consent. It found that this was not the case.

[143] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p.12 at p.24, para.30.

[144] See, for example, Rosenne, *The Law and Practice of the International Court*, 1920-1996 (3rd ed.), Vol. II, p. 992: "… unless there is agreement on the facts as the point of departure for the determination of the law applicable to those facts, non-contentious and non-adversarial procedures are not likely to be appropriate machineries for the establishment of facts."

[145] Rosenne, *The Law and Practice of the International Court*, 1920-1996 (3rd ed.), Vol. II, p.993: "Both Courts have regularly made relatively simple findings of fact, established on the basis of the documentation submitted to the Court. Those instances are not conclusive, since the Court has not in the course of rendering an advisory opinion been faced with the problem of establishing facts on which there was disagreement."

[146] See with respect to the Permanent Court's decision in the *Eastern Carelia* case, Bin Cheng, *General Principles of Law* (1953), p.298: "The decision of the Court not to give its opinion demonstrates the

for example, in the *Interpretation of Peace Treaties* advisory opinion, the Court affirmed that amongst the imperative inherent limitations of the judicial function in respect of advisory proceedings was the principle that the Court cannot give an opinion on questions which raise "a question of fact which [cannot] be elucidated without hearing both parties".[147]

6.14 This limitation was not problematic at the practical level in the *Interpretation of Peace Treaties* case because the Court was looking simply at the application of a dispute settlement mechanism, not at the underlying dispute. The issue was also raised by Spain in the *Western Sahara* case. The Court defined the question as follows:

> "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."[148]

6.15 In the event, the Court found that it had the necessary information and evidence. It found that it had received from Mauritania, Morocco and Spain "very extensive documentary evidence of the facts which they considered relevant to the Court's examination of the questions posed in the request" and that each of those States, as well as Algeria and Zaire, had presented their views on these facts and on the observations of the others.[149] In the present case, the Court has received no evidence from Israel bearing on the substantive question, and evidence received from others, including the United Nations Secretariat, cannot be regarded as authoritative or reliable.

(ii) Other "Circumstances of the Case"[150] that May Lead the Court to Decline to Answer the Request

6.16 The two elements, outlined above, going to the judicial character of the Court are directly relevant to the present case and have featured extensively in the jurisprudence of the

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fundamental nature of the principle *audiatur et altera pars*. Exceptions should not be allowed save where a party, which is under an obligation to present itself and has been afforded the opportunity to do so, fails to comply with such obligation without valid reason and neglects to exercise the right and privilege of being heard." That, of course, is not the situation in the present case. Israel is under no obligation to present its case in the current proceedings.

[147] *Interpretation of Peace Treaties, Advisory Opinion of 30 March 1950, I.C.J. Reports 1950*, p.65, at p.72.

[148] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p.12, at pp. 28-29, para.46.

[149] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p.12, at p.29, para.47.

[150] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p.12, at para.23.

Court. They are not the only factors, however, which are relevant to the exercise of the Court's discretion. The requirement that the Court remain faithful to its judicial character suggests additional "compelling reasons" that require consideration in this case, notably, that the Court should not allow its advisory procedure to be used by the General Assembly to obtain an opinion, the mere fact of which would undermine a delicate process of political negotiation nurtured endorsed by the Security Council in exercise of its primary responsibilities under the Charter.

(iii) Judicial Propriety in the Circumstances of this Case

6.17 The following chapters in this Part address a number of specific elements of propriety and the exercise by the Court of its discretion in this case. These are:

(a) the propriety of an opinion of the Court since the request concerns a contentious matter in respect of which Israel has not given consent to the jurisdiction of the Court (**Chapter 7**);

(b) the propriety of an opinion of the Court since that the question requires the Court to speculate about essential facts and make assumptions about arguments of law (**Chapter 8**);

(c) other compelling reasons in the circumstances of this case why the Court, in the exercise of its discretion, should decline to give an Opinion (**Chapter 9**).

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CHAPTER 7
THE REQUEST CONCERNS A CONTENTIOUS MATTER IN RESPECT OF WHICH ISRAEL HAS NOT GIVEN CONSENT TO THE JURISDICTION OF THE COURT

A. The Applicable Legal Principles

7.1 The present chapter develops Israel's submission that the Court should not exercise its jurisdiction in the present case because the request concerns a contentious matter in respect of which Israel has not given its consent to the exercise of jurisdiction by the Court. The applicable legal principles have already been outlined in Chapter 6. Absence of consent is an important factor to be taken into account when the Court considers whether to exercise its discretion. The following issues of principle can be derived from the analysis contained in Chapter 6:

(a) does the question in the advisory opinion request relate to the main point of a dispute actually pending so that answering the question would be substantially equivalent to deciding the dispute between the parties?[151]

(b) do 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?[152]

7.2 In order to be able to address these issues, the Court must consider (i) the nature of the Israeli-Palestinian dispute, and whether the effect of the advisory opinion request is to bring the substance of that dispute or an element of that dispute before the Court (Section B below), and (ii) whether Israel has consented to the settlement of the dispute by the Court (Section C below).

B. The Pending Dispute

7.3 The issue now before the Court is an integral part of the wider Israeli-Palestinian dispute concerning questions of terrorism, security, borders, settlements, Jerusalem and other related matters. Elements of that dispute, and in particular steps taken by the international

[151] *Interpretation of Peace Treaties, Advisory Opinion of 30 March 1950, I.C.J. Reports 1950*, p.65, at pp.71-72.
[152] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p.12, at p.25, para.33.

community, including the Security Council, to achieve its resolution, have already been identified in Chapter 3. That the advisory opinion request brings before the Court a "dispute" between Israel and "Palestine" can most easily be seen from a review of the documents sent by the Secretary-General to the President of the Court on 8 December 2003, principally General Assembly resolution A/RES/ES-10/14 and the report of the Secretary-General of 24 November 2003 (A/ES-10/248).

7.4 First, resolution A/RES/ES-10/14 firmly places the advisory opinion request in the context of the ongoing Israeli-Palestinian dispute.[153] This is evident from:

(a) the Agenda item, which is described as "Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory";

(b) the reference back to previous United Nations resolutions concerning actions of Israel such as settlement of its citizens in territory to the east of the so-called "Green line";

(c) the characterisation of Israel as "the Occupying Power";

(d) the reference to the construction of the "wall" in departure from the so-called "Green line";

(e) the affirmation of "the necessity of ending the conflict" between Israel and "Palestine".

7.5 Second, and even more telling, the Secretary-General's report contains two annexes. Annex I is entitled "Summary legal position of the Government of Israel". Annex II is entitled "Summary legal position of the Palestine Liberation Organization". The existence of a dispute between Israel and "Palestine" could not be illustrated more clearly.

7.6 Third, the "Summary legal position of the Palestine Liberation Organization" which forms Annex II to the Secretary-General's report is apparently based on a legal opinion provided by the PLO for the purposes of the report. The "Summary legal position of the Palestine Liberation Organization":

[153] No point is taken here as to the bias and inaccuracy in the description of and approach to the dispute manifested in resolution A/RES/ES-10/14.

- makes reference to certain rights of Israel;
- makes reference to certain violations by Israel of Palestinian rights;
- makes reference to the criminal liability of Israel;
- claims that the "construction of the Barrier is an attempt to annex the territory [in the West Bank] 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".

7.7 Two points immediately follow. First, the language clearly predicates the existence of a dispute. Second, the dispute is unambiguously a key part of the wider Israeli-Palestinian dispute. If it were necessary, further confirmation of this last factor is provided by the language of the preamble to General Assembly resolution A/RES/ES-10/13, pursuant to which the Secretary-General's report of 24 November 2003 was prepared.[154]

7.8 The existence of the pending dispute behind the advisory opinion request cannot be doubted. This is not a case, such as *Namibia*, where the Court could find that it was concerned with mere differences of views on legal issues which have existed in practically every advisory opinion.[155] The dispute between Israel and "Palestine" is the *fons et origo* of the advisory opinion request. This is also evident from a review of the record of the meeting at which the resolution requesting the advisory opinion was adopted. It is not merely that there is no hint in that record (or in the resolution itself) of how an advisory opinion might assist the General Assembly in the exercise of its functions.[156] On the contrary. The record abounds with statements going to the position of "Palestine", and of Israel, and the intent on the part of the co-sponsors of the resolution to "send a powerful message to Israel" that "justice be done".[157]

7.9 The issue then is whether responding to the question put to the Court would be substantially equivalent to deciding that dispute. This issue can be answered very simply. If the

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[154] See the ninth preambular paragraph, referring, for example, to "the need to end the occupation that began in 1967".
[155] *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.16, at p.24, para.34.
[156] Cf. *Western Sahara Advisory Opinion*, I.C.J. Reports 1975, at pp.26 – 27, para.39. The point was made expressly by the Representative from Singapore (see paragraph 3.40 above).
[157] See, for example, the statement by the Representative of Malaysia on behalf of the Non-Aligned Movement (A/ES-10/PV.23, 8 December 2003). **(Dossier No.42)**

Court interprets the question as requiring it to pronounce on the legality of Israel's construction of the fence, this would be substantially equivalent to deciding the pending dispute as to the legality of the fence. In fact, it would not just be a question of substantial equivalence. The Court would be making findings regarding the legality of the fence. The fact that it would be doing so in the exercise of its advisory capacity makes no difference. At the same time, the Court could not avoid deciding significant elements of the broader ongoing dispute between Israel and "Palestine". If the Court were merely to assume the illegality of the construction of the fence, the impact would be the same. Even if the Court were to construe the question as narrowly as possible, it would still inevitably have to address a dispute between the two sides in breach of the requirement of consent in contentious proceedings.

7.10 This leaves the further issue of whether the reply to the question 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, i.e. regardless of the fact that Israel has not consented to the Court dealing with any aspect of its dispute with "Palestine".

C. The Absence of Consent

7.11 As is its undoubted right, Israel has not consented to the Court's jurisdiction in respect of its dispute with "Palestine", or any element thereof, or with any other associated party. That Israel has so chosen is evident from:

(a) the absence of any optional clause declaration;

(b) reservations made by Israel to compromissory clauses in multilateral treaties;

(c) the different mechanisms of dispute settlement that have been accepted by Israel, including in particular the dispute settlement arrangements in the Israel – PLO agreements.

Each of these is briefly considered below.

7.12 So far as concerns the absence of any optional clause declaration, on 19 November 1985, Israel informed the Secretary-General that it was withdrawing the declaration of acceptance

of the compulsory jurisdiction of the Court that it had deposited on 17 October 1956 and modified on 28 February 1984.[158] In response, the Legal Counsel of the United Nations informed Israel that the Secretary-General had received the letter on 21 November 1985 and that the notification would take effect from that date. Even had Israel not withdrawn its declaration in 1985, the dispute with "Palestine", including the dispute put to the Court in the advisory opinion request, would not have been covered by Israel's optional clause declaration. This contained reservations *inter alia* as follows:

> "This Declaration does not apply to:
> …
> (c) any dispute between the State of Israel and any other State whether or not a member of the United Nations which does not recognize Israel or which refuses to establish or to maintain normal diplomatic relations with Israel and the absence or breach of normal relations precedes the dispute and exists independently of that dispute;
>
> (d) disputes arising out of events occurring between 15 May 1948 and 20 July 1949;
>
> (e) without prejudice to the operation of sub-paragraph (d) above, disputes arising out of, or having reference to, any hostilities, war, state of war, breach of the peace, breach of armistice agreement or belligerent or military occupation (whether such war shall have been declared or not, and whether any state of belligerency shall have been recognized or not) in which the Government of Israel are or have been or may be involved at any time. …"[159]

7.13 So far as concerns multilateral treaties to which Israel is a party, Israel has not accepted the compulsory jurisdiction of the Court in any multilateral treaty since 1975.[160] Although, since that date, Israel has become party to a number of treaties that include the possibility of dispute settlement by the Court, such settlement is optional only. In other cases, Israel has attached reservations that expressly withhold consent to dispute settlement by the Court.

7.14 So far as concerns different mechanisms of dispute settlement that have been accepted by Israel, it is stressed that none of the treaties and agreements concluded by Israel as part of the

[158] See 40 *ICJ Yearbook* (1985-1986), p.60.
[159] See 39 *ICJ Yearbook* (1984-1985), p.79.
[160] Israel has, in its nearly 56 years of existence, been party to only two bilateral treaties submitting to dispute resolution by the Court. Of these, only the 1951 *Treaty of Friendship, Commerce and Navigation* with the United States remains in force.

peace process contain references to dispute resolution by the Court.[161] In the context of the consideration of this aspect of judicial propriety, it is important to bear in mind that no agreement with the PLO, and no unilateral declaration by either Israel or the PLO provides for a compulsory settlement of the dispute whether by the Court or otherwise. Thus:

(a) The letter from Chairman Arafat to Prime Minister Rabin of 9 September 1993 provides:

> "… The PLO commits itself to the Middle East peace process, and to a peaceful resolution of the conflict between the two sides and declares that all outstanding issues relating to permanent status will be resolved through negotiations."

(b) Article XV of the Declaration of Principles of 13 September 1993 provides:

> "1. Disputes arising out of the application or interpretation of this Declaration of Principles or any subsequent agreements pertaining to the interim period, shall be resolved by negotiations through the Joint Liaison Committee to be established pursuant to Article X above.
>
> 2. Disputes which cannot be settled by negotiations may be resolved by a mechanism of conciliation to be agreed upon by the parties.
>
> 3. The parties may agree to submit to arbitration disputes relating to the interim period, which cannot be settled through conciliation. To this end, upon the agreement of both parties, the parties will establish an Arbitration Committee."

(c) Article XVII of the Gaza-Jericho Agreement of 4 May 1994 (superseded by the Interim Agreement of 28 September 1995) provides:

> "Any difference relating to the application of this Agreement shall be referred to the appropriate coordination and cooperation mechanism established under this Agreement. The provisions of Article XV of the Declaration of Principles shall apply to any such difference which is not settled through the appropriate coordination and cooperation mechanism, namely:

[161] Article VII of the *Treaty of Peace between Israel and Egypt* provides that disputes will be resolved by negotiations, conciliation or submitted to arbitration. Article 29 of the *Treaty of Peace between Israel and the Hashemite Kingdom of Jordan* also provides that disputes will be resolved by negotiations, conciliation or submitted to arbitration.

1. Disputes arising out of the application or interpretation of this Agreement or any subsequent agreements pertaining to the interim period shall be settled by negotiations through the Liaison Committee.

2. Disputes which cannot be settled by negotiations may be settled by a mechanism of conciliation to be agreed between the Parties.

3. The Parties may agree to submit to arbitration disputes relating to the interim period, which cannot be settled through conciliation. To this end, upon the agreement of both Parties, the Parties will establish an Arbitration Committee."

(d) Article XXI of the Interim Agreement of 28 September 1995 provides:

> "Any difference relating to the application of this Agreement shall be referred to the appropriate coordination and cooperation mechanism established under this Agreement. The provisions of Article XV of the DOP shall apply to any such difference which is not settled through the appropriate coordination and cooperation mechanism, namely:
>
> 1. Disputes arising out of the application or interpretation of this Agreement or any related agreements pertaining to the interim period shall be settled through the Liaison Committee.
>
> 2. Disputes which cannot be settled by negotiations may be settled by a mechanism of conciliation to be agreed between the Parties.
>
> 3. The Parties may agree to submit to arbitration disputes relating to the interim period, which cannot be settled through conciliation. To this end, upon the agreement of both Parties, the Parties will establish an Arbitration Committee."

7.15 The position could not be clearer. Israel and the PLO have repeatedly agreed that their disputes should be settled by negotiation, with the possibility of an agreement that disputes be solved by arbitration. It is not just that Israel has not consented to the Court resolving its disputes with "Palestine", or any part of that dispute. It is that other mechanisms of dispute settlement more appropriate to the circumstances have been expressly preferred.

D. Conclusions

7.16 It follows from the above that in the instant case, if the Court has jurisdiction, which Israel submits it has not, the Court should exercise its discretion by refusing to respond to the

advisory opinion request. This is an exceptional case. Answering the question would be equivalent to the Court to deciding a significant element in the dispute between Israel and "Palestine", and this is precisely what the co-sponsors of resolution A/RES/ES-10/13 appear to have been seeking.[162] Answering the request 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. These factors apply *a fortiori* where a State has, in respect of a particular dispute, acted expressly to exclude the jurisdiction of the Court in favour of other forms of settlement.

7.17 To this must be added the further consideration, namely, that "Palestine" is not a State. It has no standing before the Court. The Court's advisory jurisdiction cannot be employed to circumvent the scheme of the Statute in circumstances in which the Court would not in any circumstance be open to the would-be litigant most directly involved in the recourse to the advisory procedure.

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[162] See, for example, the statement of the Palestinian Representative, Mr Al-Kidwa, in the debate in the Emergency Special Session on 8 December 2003. A/ES-10/PV.23, 8 December 2003. **(Dossier No.42)**

CHAPTER 8
THE QUESTION REQUIRES THE COURT TO SPECULATE ABOUT ESSENTIAL FACTS AND MAKE ASSUMPTIONS ABOUT ARGUMENTS OF LAW

8.1 In this Chapter, Israel will develop its contention that the question requires the Court to speculate about essential facts and make assumptions about arguments of law. The applicable legal principles have already been outlined in Chapter 6, from which the following questions can be derived:

(a) does the advisory opinion request raise questions of fact which could not be elucidated without hearing the parties?[163]

(b) does the Court have 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 a manner compatible with its judicial character?[164]

A. A Response to the Question Would Require the Court to Speculate About Essential and Highly Complex Facts Which Are Not Before It

8.2 If the Court were seised of the issue of whether the construction of the fence were lawful or not and, if not, what the legal consequences of such illegality might be for certain specified parties, it would inevitably have to address and resolve a series of complex factual issues.

8.3 The extent of the factual issues would, in a contentious case, appear from the pleadings of the parties. In the absence of such pleadings, and in circumstances where Israel does not know what issues "Palestine" is going to put before the Court, the likely ambit of the factual issues can most conveniently be derived from the allegations contained in Annex II to the Secretary-General's report of 24 November 2003, "Summary legal position of the Palestine Liberation Organization". On the basis of this document, it would be for the Court to consider:

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[163] *Interpretation of Peace Treaties, Advisory Opinion of 30 March 1950, I.C.J. Reports 1950*, p.65, at p.72.
[164] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p.12, at pp.28-29, para.46.

(a) factual issues going to the military necessity of the fence;

(b) factual issues going to the proportionality of the construction of the fence, including factual issues going to the question of whether the requirements of proportionality can more likely be met by different means including different routing of the fence.

8.4 Any assessment of the military necessity of the fence would necessarily have to entail, including in respect of parts of the fence where the routing has not been finally determined:

(a) an assessment of the security threat faced by Israel, which would in turn require an assessment of the nature and scale of terrorist attacks, the continuing nature of the threat, and the likely nature and scale of future attacks;

(b) an assessment of the effectiveness of the fence to address the security threat relative to other available means;

(c) an assessment of the motives behind the construction of the fence;

(d) an assessment of the routing of the fence, including an assessment of whether the routing was justified by military necessity so far as concerns individual sections of the fence;

(e) an assessment of the specific nature and extent of the construction, including an assessment of whether these aspects were justified by military necessity so far as concerns individual sections of the fence, to cover, for example, the issue of whether there was a justification on grounds of military necessity for those short sections of wall;

(f) an assessment of the specific nature of the threat to the Israeli population at different sections of the fence;

(g) in the light of the claim that the requirements of proportionality can better be met by different routing of the fence, an assessment of the relative threat arising as a result of

such different routing and of whether the requirements of military necessity could thus be satisfied.

8.5 In order to begin to answer such questions, any tribunal seised with the determination of such contested facts would require extensive documentary, witness and expert evidence from all the parties involved.[165] It would be entirely inappropriate for the Court to rely simply on "evidence" supplied by "Palestine". Evidence must be tested. And the Court would have to be willing to embark on a time-consuming determination of facts.

8.6 The Court would also have to consider and rule upon countervailing factors relied upon by "Palestine" with respect to the contention that the construction of the fence is not proportionate. On the basis of the contentions made in the "Summary legal position of the Palestine Liberation Organization", the Court would have to assess:

(a) the extent and nature of the claimed "Extensive destruction of Palestinian homes and other property";

(b) the extent and nature of the claimed "Infringements of freedom of movement";

(c) the extent and nature of the claimed "Infringements on the rights to education, work, an adequate standard of living and health care";

(d) the extent and nature of the claimed "arbitrary interference of home";

(e) the extent and nature of the claimed "facilitation of the entry of Israeli citizens into the Closed Area while restricting Palestinian access to and residence in the Closed Area";

(f) the extent to which similar factors also affect non-Palestinians.

8.7 The Court cannot possibly make any such factual determinations. Even if the case were a contentious one, the operational constraints under which the Court works do not permit thorough scrutiny of highly detailed or complex issues of fact. Indeed, it may be asked whether

[165] Of course, strictly there are no parties in advisory opinion proceedings. This highlights the inappropriate nature of such proceedings for the resolution of disputes involving complex sets of facts.

the Court has ever decided facts of such a complex and highly politicised character, and that are so central to a conflict of this nature. These factors weigh all the more heavily where the Court is exercising its advisory jurisdiction, the point having already been made that non-contentious and non-adversarial procedures are not likely to be appropriate machineries for the establishment of facts.[166] This is all the more so in a case where "Palestine" has asserted the criminal liability of Israel.

8.8 In the event, the Court has allowed a mere six weeks for the presentation of written statements. The Court could not possibly have the necessary material before it and will be in no position to make any findings of fact at all. For one thing, Israel contests the jurisdiction of the Court and is not putting forward a case on the substance. Further, in the light of recent decisions regarding changes to the routing of the fence in certain sensitive areas, and other developments, it is highly unlikely that even the basic factual material available to the Court from Palestinian and other non-Israeli sources will be accurate. The Court cannot replace the proper judicial determination of facts by assumptions or speculation. This is not a case like *Interpretation of Peace Treaties*, where the Court is in no sense looking at the underlying dispute; or the *Namibia* case, where a binding finding of illegality had already been made. This is not a case like *Western Sahara*, where the main protagonists had all submitted extensive documentary evidence of the facts which they considered relevant to the Court's examination of the questions posed in the request, and had submitted their observations on that evidence.

8.9 It follows that the Court will not have before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon disputed questions of fact the determination of which is necessary for it to give an opinion compatible with its judicial character.

B. A Response to the Question Would Require the Court to Make Assumptions About Arguments of Law Which Are Not Before It

8.10 In the absence of participation by Israel on the substance of the request, a response to the question would also require the Court to make assumptions about arguments of law which are not before it. This issue has already been touched upon in Chapter 5 above so far as assuming the illegality of the construction of the fence is concerned. The further point here is that, in order to make the findings that "Palestine" apparently seeks in the "Summary legal position of the

[166] See the passage from the *Eastern Carelia* case set out in Chapter 6 above.

Palestine Liberation Organization", the Court would have to not merely make the series of factual determinations referred to above, but it would also have to apply the relevant legal principles to those facts. To do so, the Court would have to make assumptions arguments of law which are not before it including as to:

(a) the component elements of such legal concepts as military necessity and proportionality;

(b) the interpretation and application of the broad series of other instruments that might be relied upon by "Palestine";

(c) questions concerning allegations of annexation;

(d) other issues arising in the context of an enquiry as to legal consequences.

8.11 These legal issues are varied and complex – as cannot be surprising given that they form part of a dispute that is many decades old.

C. Conclusions

8.12 This is an exceptional case. The issues arising in respect of the construction of the fence – whether confined to the question of legal consequences or whether expanded to include the underlying question of legality – do not lend themselves to hasty determination in a procedurally questionable manner. This is not simply a consequence of the Court's Order of 19 December 2003. It is inherent in the advisory opinion procedure. To make findings on a complex legal and factual dispute, in the absence of one of the two most directly concerned parties, would constitute a departure from the essential rules guiding the Court's juridical activity.[167]

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[167] *Status of Eastern Carelia, Advisory Opinion (1923), P.C.I.J., Series B, No.5*, at pp.27-29.

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CHAPTER 9
OTHER COMPELLING REASONS WHY THE COURT, IN THE EXERCISE OF ITS DISCRETION, SHOULD DECLINE TO ANSWER THE QUESTION

9.1 The preceding Chapters of this Part have addressed established reasons of law which go to the exercise by the Court of its discretion under Article 65(1) of the Statute to decline to answer the request for an advisory opinion. These draw on the principles in the *Eastern Carelia* case, largely affirmed as of continued relevance in the jurisprudence of the present Court. The circumstances of the present case, however, raise for the Court's consideration other "compelling reasons" which should lead the Court to decline to give the opinion requested. In Chapters 4 and 5 of this statement, Israel advanced two objections of jurisdiction which, in its contention, operate to preclude the Court – as a matter of law – from giving an opinion in this case. In the alternative, in the event that the Court takes the view that these elements do not preclude its consideration of the matter, Israel contends that the circumstances of the request and the competence of and balance of responsibility between the General Assembly and the Security Council are also relevant to the exercise by the Court of its discretion to decline to answer the opinion requested. Likewise, Israel contends that the inherent uncertainty of the question also goes to issues of discretion and propriety.

9.2 There are two additional aspects relevant to propriety that require further brief comment. They have already been addressed at some length at various points throughout this statement and only require brief concluding remarks.

A. Equity Requires that the Court Decline to Give an Opinion

9.3 Equitable principles of good faith and "clean hands" are widely acknowledged in the Court's jurisprudence, as also are their corollaries of bad faith and abuse of rights.[168] Citing the

[168] See, for example, *Factory at Chorzow, P.C.I.J., 1927 Series A, No.9*, at p.31; *Free Zones Case, P.C.I.J., 1932 Series A/B No.46*, at p.167; *Legal Status of Eastern Greenland, P.C.I.J., 1933 Series A/B No.53*, as per Judge Anzilloti, at p.95; *Diversion of Water from the Meuse, P.C.I.J., 1937 Series A/B, No.70,* as per Judge Anzilloti, at p.50, and Judge Hudson, at p.77; *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980,* p.3, as per Judge Morozov, at pp.53-55, and Judge Tarazi, at pp.62-63; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p.14, as per Judge Schwebel, at paragraphs 240 and 268-272.

equitable maxim that "a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper", Judge Hudson, in his Separate Opinion in *Diversion of Water from the Meuse*, observed:

> "The general principle is one of which the international tribunal should make a very sparing application. … Yet, in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness."[169]

9.4 Although this is a request for an advisory opinion, it is difficult to conceive of a case to which Judge Hudson's injunction to the Court to act is more appropriately suited. As the material in Chapter 3 attests, "Palestine" is responsible for the terrorism which the fence is aimed at addressing. This cannot be ignored. It cannot be open to a party to seek a remedy from a court in circumstances in which it has committed the wrong that has brought about the very situation which is under examination. This follows from the principle *nullus commodum capere de sua injura proprio* – no one can be allowed to reap advantage from his own wrong – a principle which is just as pertinent in advisory proceedings which seek to raise for assessment questions which are essentially contentious. The reality of this case is that "Palestine" will be seeking from the Court certain findings of law. Yet it is the very suicide and other attacks against Israel and Israelis for which it is responsible that have led to the situation of which it complains. This is quite obviously a material factor, amounting to a "compelling reason", which the Court must weigh in the balance when exercising its discretion under Article 65(1) of the Statute.

B. An Opinion Would Cut Across the Scheme of the Roadmap

9.5 The implications of an opinion of the Court on the substance of the request for the scheme of the Roadmap have already been addressed in detail in earlier Chapters. There are two reasons why an advisory opinion on the substance would be at odds with the Roadmap. The first is that the Roadmap commits the two sides to negotiations within an agreed framework. Acceding to the request for an advisory opinion which raises one aspect of a conflict that the two sides have agreed to address by other means would signal to "Palestine" that it is acceptable for it to pursue its objectives outside of the framework agreed. In practical terms, this is likely to act as

[169] *Diversion of Water from the Meuse, P.C.I.J., 1937 Series A/B, No.70,* as per Judge Hudson, at p.77.

a factor detracting from the Roadmap modalities and, even more ominously as a green light for additional terror activities.

9.6 The second and more important reason why an opinion on the substance would undermine the Roadmap is that almost any conceivable answer on the substance of the question would go directly to issues that the two sides have deferred for later discussion. The Roadmap advances a comprehensive approach to resolution of the Israeli-Palestinian conflict comprised of a number of phases. The scheme of these phases is not happenstance but a recognition of the foundation that needs to be established if there is to be any hope of success. It follows that, under the Roadmap, progress towards a permanent status agreement in Phase III of the initiative is dependent on the effective performance by the two sides of the commitments under Phases I and II. Critical amongst these is the requirement that the Palestinian side take effective measures to bring the terrorism to an end. This cannot be sidestepped by way of a procedure which seeks to engage the Court on issues that fall to be determined through negotiations in due course once "Palestine" has fulfilled its own threshold commitments.

9.7 The dispute over the fence is only one aspect of the wider Israeli-Palestinian conflict. The fence is a response by Israel to the failure by the Palestinians to fulfil their commitments to bring an end to the terror. One element of the dispute cannot properly be addressed in the absence of the other. And neither can be properly addressed by the Court, especially in the context of its advisory jurisdiction, without running a considerable risk that such balance as the Roadmap attempts to achieve, and to advance in due course through negotiations by the two sides, will be immediately upset.

9.8 It does not require a particularly creative imagination to consider what an opinion of the Court might conceivably address – assuming *arguendo* that it would not simply endorse Israel's right to construct the fence and all of its conduct in relation thereto. As one undertakes such an exercise, as the Court will no doubt do, it becomes immediately apparent that any opinion on the substance of the question would cut across the Roadmap. The point has been made in Chapter 3 by reference simply to some of the issues surrounding the Armistice Demarcation Line and the question of settlements. To these can be added others, such as the status of Jerusalem. Virtually anything that the Court might say would risk undermining the proposed scheme of the negotiations as well as their substance.

9.9 The most evident difficulty concerns the question of legality. The point was made in Chapter 5 that this is not even explicitly part of the question. Yet some assessment of legality might be expected to be a prerequisite to anything that the Court might choose to say on the subject of legal consequences. There are, however, significant pitfalls in every direction of this question. Resolution ES-10/13, which purports to determine illegality, cannot properly be relied upon as an authoritative determination of legality. It is not binding. The assessment of illegality was not arrived at after any consideration of substantive issues of law. The resolution does not state what provisions of law the fence is supposed to be in contradiction of. An opinion of the Court based on this assessment of legality would not be credible and would be likely to embroil the Court, the two sides and the United Nations more generally in a longer-term dispute as to the weight of the Court's opinion.

9.10 Other avenues to which the Court might turn to in order to assess legality would be equally problematic. Other resolutions of the Security Council and General Assembly do not address the legality of the fence and are subject to their own significant limitations of assessment. These resolutions, even of the Security Council, are not akin to resolution 276 (1970), in issue in the *Namibia* case, which, under the scheme of the Charter, was dispositive of a matter essentially internal to the United Nations itself. A much more considered review of legality would properly be required.

9.11 Assuming, however, simple reliance on such resolutions, the Court would still be faced with the need to extrapolate from these resolutions to address the legality of the fence. And it does not follow that a resolution on the legality of some or other question can of itself form an adequate and proper basis for an assessment of the legality of the fence. Even assuming that the Court, in its advisory function and absent relevant facts and arguments on the matter from Israel, could properly undertake a considered assessment of legality, the outcome would be an opinion which would undoubtedly trespass into the essential domain of the Roadmap on questions of borders, Jerusalem and settlements. Whatever the Court might say on these topics would be thrust into the balance of the intended negotiations with every chance of destabilising that process. Issues that the Quartet has proposed should be addressed in Phase III of the Roadmap would be catapulted up front with the opinion of the Court, given in ignorance of the wider political dynamic, undermining the negotiations.

9.12 Other approaches do not suggest simpler solutions. "Legal consequences" do not subsist in a vacuum. An opinion addressing legal consequences for Israel, for "Palestine", for other States, for the United Nations, which had no anchor in the reality of the events on the ground and a considered assessment of the balance of rights, would be counterproductive.

9.13 Against this background, the statement of the United States, as the principal architect of the Roadmap, in the debate in the Emergency Special Session at which the advisory opinion request was adopted, bears recollection. The full statement is set out in Chapter 3. The salient element is as follows:

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

9.14 As will have been evident from the other extracts of statements set out in Chapters 3 and 4 above, the United States was not alone in this assessment.

9.15 An advisory opinion, conducted on an accelerated procedure, which cuts across a concerted diplomatic initiative, endorsed by the Security Council, to bring the two sides back to negotiations, cannot but harm attempts to achieve a resolution of the conflict. Israel submits that, by any standard, this amounts to a "compelling reason" why the Court, in the exercise of its discretion under Article 65(1) of the Statute, should decline to respond on the merits of the requested opinion.

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CHAPTER 10
SUMMARY AND CONCLUSIONS

10.1 As required by the Court's Practice Direction No.II, this Chapter contains a short summary of Israel's reasoning as set forth in the preceding Chapters. It also contains brief conclusions.

10.2 Israel's contentions are twofold. First, the Court lacks jurisdiction to consider the advisory opinion request contained in resolution A/RES/ES-10/14. Second, if the Court finds that it has jurisdiction, as a matter of judicial propriety it should decline to answer the request. There is, however, a common theme that runs through both of these contentions, namely, that the advisory opinion request would see the Court trespass into the complex Israeli-Palestinian conflict notwithstanding that the Security Council unanimously endorsed the Roadmap in resolution 1515 (2003), just nineteen days before the advisory opinion request.

10.3 The Court lacks jurisdiction for two reasons. First, the request for an advisory opinion is *ultra vires* the competence of the 10th Emergency Special Session of the General Assembly and would also have been *ultra vires* the competence of the General Assembly convened in regular session (see Chapter 4). The 10th Emergency Special Session was convened pursuant to the Uniting for Peace Resolution of 3 November 1950, which provides in relevant part 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". In the instant case, there has been no failure by the Security Council to exercise its primary responsibility for the maintenance of international peace and security. On the contrary, just nineteen days before the passing of resolution A/RES/ES-10/14, the Security Council exercised its primary responsibility for the maintenance of international peace and security in endorsing the Roadmap. In any event, under the scheme of the Charter, the General Assembly's responsibility and competence for the maintenance of international peace and security is subsidiary to that of the Security Council. In circumstances such as the instant case, where the Security Council has acted in exercise of its primary responsibility, the General Assembly has a duty to exercise restraint.

10.4 Second, in order for the Court to be able to exercise its advisory jurisdiction, a request must have been referred to the Court on a "legal question" (see Chapter 5). The question referred to the Court in this case is not a "legal question" within the scope of Article 96(1) of the Charter and Article 65(1) of the Statute because it is not sufficiently certain. This is so for two reasons. First, it is unclear whether the Court is being asked to find that the construction of the fence is unlawful, or merely to assume illegality. Second, although the concept of "legal consequences" does not exist in the abstract, the question does not state for whom the "legal consequences" are to be specified.

10.5 Were the Court to conclude that it does have jurisdiction, there are significant reasons why it should decline to answer the request as a matter of judicial propriety. The relevant principles of law are set out in Chapter 6. The reasons why the Court should decline to respond to the requested opinion are as follows. First, the advisory opinion request relates to key aspects of the ongoing dispute between Israel and "Palestine" and would be substantially equivalent to deciding that dispute (see Chapter 7). In circumstances where Israel has expressly acted to exclude the Court's jurisdiction in respect of that dispute, answering the request would have the effect of circumventing the principle that a State is not obliged to allow its dispute to be submitted to judicial settlement without its consent.

10.6 Second, answering the question would require the Court to speculate about essential and complex facts which are not before it, and also to make assumptions about arguments of law (see Chapter 8). The Court is not in a position to make the factual determinations necessary to a response to the advisory opinion request, and the Court cannot replace the judicial determination of facts by assumptions or by speculation. Nor can the Court make assumptions as to what legal arguments would be raised by Israel had it made submissions on the substance of the question raised in the advisory opinion request.

10.7 Third, there are other compelling reasons why the Court should decline to exercise its advisory jurisdiction in this case (see Chapter 9). These go both to the general fairness of the proceedings and to judicial propriety. The Court should take full account of the fact that the prime motivator and co-sponsor of the advisory opinion request, "Palestine", bears responsibility for the very attacks that the fence has been designed to prevent. In addition, any response to the advisory opinion request would cut across the Security Council endorsed Roadmap initiative.

10.8 In view of the considerations set out in this statement, Israel submits that the Court should find that it has no jurisdiction to consider the advisory opinion request. In the alternative, Israel submits that there are compelling reasons why the Court should exercise its discretion to decline to answer the requested opinion.

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LIST OF ANNEXES

Annex No.	Document
1.	Letter from H.E. Eitan Margalit, Ambassador of Israel, The Hague, to H.E. Philippe Couvreur, Registrar, International Court of Justice, 11 December 2003
2.	Letter from H.E. Eitan Margalit, Ambassador of Israel, The Hague, to H.E. Philippe Couvreur, Registrar, International Court of Justice, 31 December 2003
3.	A/RES/3237 (XXIX), 22 November 1974
4.	A/RES/43/160 A, 9 December 1988
5.	A/RES/43/177, 15 December 1988
6.	A/RES/52/250, 7 July 1998
7.	Letter dated 26 January 2004 from Ambassador Arye Mekel, Chargé d'affaires a.i. of Israel to the United Nations in New York, addressed to the Secretary-General
8.	Letter dated 9 September 1993 from Yasser Arafat, Chairman, The Palestine Liberation Organisation, to Yitzhak Rabin, Prime Minister of Israel
9.	S/PRST/2002/9, 10 April 2002
10.	Joint Statement of the Quartet, 16 July 2002
11.	S/PRST/2002/20, 18 July 2002
12.	Joint Statement of the Quartet, 20 December 2002
13.	Joint Statement of the Quartet, 20 February 2002
14.	Joint Statement of the Quartet, 22 June 2003
15.	Joint Statement of the Quartet, 26 September 2003
16.	S/RES/62, 16 November 1948
17.	Hashemite Kingdom of Jordan – Israel: General Armistice Agreement, 3 April 1949
18.	*USA Today*, March 14, 2002, p.A.06
19.	Statement by Prime Minister Sharon, 18 January 2004

20. Statement by Palestinian Prime Minster Abbas, Aqaba Summit, 4 June 2003

21. Statement by Israeli Prime Minster Sharon, Aqaba Summit, 4 June 2003

22. A/RES/377 (V), 3 November 1950, "Uniting for Peace"

23. S/PV.4836, 5 October 2003

24. S/PV.4862, 19 November 2003

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