

STATE-BUILDING AND INT'L ADMINISTRATION

MATERIALS

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Boutros-Ghali, Boutros, Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, UN Doc A/50/60-S/1995/1 (3 January 1995)

Available at <http://www.un.org/Docs/SG/agsupp.html>, paras 8-22.

8. It is indisputable that since the end of the cold war there has been a dramatic increase in the United Nations activities related to the maintenance of peace and security. The figures speak for themselves. The following table gives them for three dates: 31 January 1988 (when the cold war was already coming to an end); 31 January 1992 (the date of the first Security Council Summit); and today, on the eve of the fiftieth anniversary of the United Nations.

9. This increased volume of activity would have strained the Organization even if the nature of the activity had remained unchanged. It has not remained unchanged, however: there have been qualitative changes even more significant than the quantitative ones.

10. One is the fact that so many of today's conflicts are within States rather than between States. The end of the cold war removed constraints that had inhibited conflict in the former Soviet Union and elsewhere. As a result there has been a rash of wars within newly independent States, often of a religious or ethnic character and often involving unusual violence and cruelty. The end of the cold war seems also to have contributed to an outbreak of such wars in Africa. In addition, some of the proxy wars fuelled by the cold war within States remain unresolved. Inter-state wars, by contrast, have become infrequent.

11. Of the five peace-keeping operations that existed in early 1988, four related to inter-state wars and only one (20 per cent of the total) to an intra-state conflict. Of the 21 operations established since then, only 8 have related to inter-state wars, whereas 13 (62 per cent) have related to intra-state conflicts, though some of them, especially those in the former Yugoslavia, have some inter-state dimensions also. Of the 11 operations established since January 1992 all but 2 (82 per cent) relate to intra-state conflicts.

12. The new breed of intra-state conflicts have certain characteristics that present United Nations peace-keepers with challenges not encountered since the Congo operation of the early 1960s. They are usually fought not only by regular armies but also by militias and armed civilians with little discipline and with ill-defined chains of command. They are often guerrilla wars without clear front lines. Civilians are the main victims and often the main targets. Humanitarian emergencies are commonplace and the combatant authorities, in so far as they can be called authorities, lack the capacity to cope with them. The number of refugees registered with the Office of the United Nations High Commissioner for Refugees (UNHCR) has increased from 13 million at the end of 1987 to 26 million at the end of 1994. The number of internally displaced persons has increased even more dramatically.

13. Another feature of such conflicts is the collapse of state institutions, especially the police and judiciary, with resulting paralysis of governance, a breakdown of law and order, and general banditry and chaos. Not only are the functions of government suspended, its assets are destroyed or looted and experienced officials are killed or flee the country. This is rarely the case in inter-state wars. It means that international intervention must extend beyond military and humanitarian tasks and must include the promotion of national reconciliation and the re-establishment of effective government.

14. The latter are tasks that demand time and sensitivity. The United Nations is, for good reasons, reluctant to assume responsibility for maintaining law and order, nor can it impose a new political structure or new state institutions. It can only help the hostile factions to help themselves and begin to live together again. All too often it turns out that they do not yet want to be helped or to resolve their problems quickly.

15. Peace-keeping in such contexts is far more complex and more expensive than when its tasks were mainly to monitor cease-fires and control buffer zones with the consent of the States involved in the conflict. Peace-keeping today can involve constant danger.

16. I cannot praise too highly or adequately express my gratitude and admiration for the courage and sacrifice of United Nations personnel, military and civil, in this new era of challenge to peace and security. The conditions under which they serve are often extremely harsh. Many have given their lives. Many must persevere despite the loss of family members and friends.

17. It must also be recognized that the vast increase in field deployment has to be supported by an overburdened Headquarters staff that resource constraints have held at levels appropriate to an earlier, far less demanding, time.

18. A second qualitative change is the use of United Nations forces to protect humanitarian operations. Humanitarian agencies endeavour to provide succour to civilian victims of war wherever they may be. Too often the warring parties make it difficult or impossible for them to do so. This is sometimes because of the exigencies of war but more often because the relief of a particular population is contrary to the war aims of one or other of the parties. There is also a growing tendency for the combatants to divert relief supplies for their own purposes. Because the wars are intra-state conflicts, the humanitarian agencies often have to undertake their tasks in the chaotic and lawless conditions described above. In some, but not all, such cases the resulting horrors explode on to the world's television screens and create political pressure for the United Nations to deploy troops to facilitate and protect the humanitarian operations. While such images can help build support for humanitarian action, such scenes also may create an emotional environment in which effective decision-making can be far more difficult.

19. This has led, in Bosnia and Herzegovina and in Somalia, to a new kind of United Nations operation. Even though the use of force is authorized under Chapter VII of the Charter, the United Nations remains neutral and impartial between the warring parties, without a mandate to stop the aggressor (if one can be identified) or impose a cessation of hostilities. Nor is this peace-keeping as practised hitherto, because the hostilities continue and there is often no agreement between the warring parties on which a peace-keeping mandate can be based. The "safe areas" concept in Bosnia and Herzegovina is a similar case. It too gives the United Nations a humanitarian mandate under which the use of force is authorized, but for limited and local purposes and not to bring the war to an end.

20. A third change has been in the nature of United Nations operations in the field. During the cold war United Nations peace-keeping operations were largely military in character and were usually deployed after a cease-fire but before a settlement of the conflict in question had been negotiated. Indeed one of their main purposes was to create conditions in which negotiations for a settlement could take place. In the late 1980s a new kind of peace-keeping operation evolved. It was established after negotiations had succeeded, with the mandate of helping the parties implement the comprehensive settlement they had negotiated. Such operations have been deployed in Namibia, Angola, El Salvador, Cambodia and Mozambique. In most cases they have been conspicuously successful.

21. The negotiated settlements involved not only military arrangements but also a wide range of civilian matters. As a result, the United Nations found itself asked to undertake an unprecedented variety of functions: the supervision of cease-fires, the regroupment and demobilization of forces, their reintegration into civilian life and the destruction of their weapons; the design and implementation of de-mining programmes; the return of refugees and displaced persons; the provision of humanitarian assistance; the supervision of existing administrative structures; the establishment of new police forces; the verification of respect for human rights; the design and supervision of constitutional, judicial and electoral reforms; the observation, supervision and even organization and conduct of elections; and the coordination of support for economic rehabilitation and reconstruction.

22. Fourthly, these multifunctional peace-keeping operations have highlighted the role the United Nations can play after a negotiated settlement has been implemented. It is now recognized that implementation of the settlement in the time prescribed may not be enough to guarantee that the conflict will not revive. Coordinated programmes are required, over a number of years and in various fields, to ensure that the original causes of war are eradicated. This involves the building up of national institutions, the promotion of human rights, the creation of civilian police forces and other actions in the political field. As I pointed out in "An Agenda for Development" (A/48/935), only sustained efforts to resolve underlying socio-economic, cultural and humanitarian problems can place an achieved peace on a durable foundation.

DAC

Development Assistance Committee

Shaping the 21st Century: The Contribution of Development Co-operation



May 1996

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INTRODUCTION AND SUMMARY

Values and interests

As we approach the end of the twentieth century, the time is ripe to reflect on the lessons of development co-operation over the last 50 years and to put forward strategies for the first part of the next century. This report sets forth the collective views on these matters of development ministers, heads of aid agencies and other senior officials responsible for development co-operation, meeting as the Development Assistance Committee of the Organisation for Economic Co-operation and Development.¹

In the year 2000, four-fifths of the people of the world will be living in the developing countries, most with improving conditions. But the number in absolute poverty and despair will still be growing. Those of us in the industrialised countries have a strong moral imperative to respond to the extreme poverty and human suffering that still afflict more than one billion people. We also have a strong self-interest in fostering increased prosperity in the developing countries. Our solidarity with the people of all countries causes us to seek to expand the community of interests and values needed to manage the problems that respect no borders— from environmental degradation and migration, to drugs and epidemic diseases. All people are made less secure by the poverty and misery that exist in the world. Development matters.

The record of the last 50 years, from Marshall Plan aid to the network of development partnerships now evolving, shows that the efforts of countries and societies to help themselves have been the main ingredients in their success. But the record also shows

that development assistance has been an essential complementary factor in many achievements: the green revolution, the fall in birth rates, improved basic infrastructure, a diminished prevalence of disease and dramatically reduced poverty. Properly applied in propitious environments, aid works.

Co-operation within the United Nations, the international financial institutions, the OECD and other global and regional fora has greatly enhanced these efforts and shaped an evolving multilateralism in which all countries hold a vital stake.

We have learned that development assistance will only work where there is a shared commitment of all the partners. We have seen the results in countries which have grown, prospered and achieved industrialisation; they no longer depend on aid but stand on their own feet and participate in the global economy. We have seen, on the other hand, the countries in which civil conflict and bad governance have set back development for generations. And we have learned that success takes time and sustained international and local effort

As we look ahead, we see an overwhelming case for making that effort. As a crucial part of this undertaking, the international community needs to sustain and increase the volume of official development assistance in order to reverse the growing marginalisation of the poor and achieve progress toward realistic goals of human development. Domestic preoccupations in Member countries should not jeopardise the international development effort at a critical juncture. Today's investments in development co-operation will yield a very high return over the coming years.

¹ This report was adopted at the Thirty-fourth High Level Meeting of the Development Assistance Committee, held on 6-7 May 1996.

We believe that ways must be found to finance multilateral development co-operation that are adequate, efficient, predictable and sustainable. The full implementation of current agreements to pay arrears and create workable financing systems is an essential part of efforts to ensure that the United Nations and the multilateral development banks avoid severe crisis and continue to play their vital roles.

We also recognise that those responsible for public money are accountable for its effective use. We have a duty to state clearly the results we expect and how we think they can be achieved.

It is time to select, taking account of the many targets discussed and agreed at international fora, a limited number of indicators of success by which our efforts can be judged. We are proposing a global development partnership effort through which we can achieve together the following ambitious but realisable goals:

Economic well-being:

- a reduction by one-half in the proportion of people living in extreme poverty by 2015.

Social development:

- universal primary education in all countries by 2015;
- demonstrated progress toward gender equality and the empowerment of women by eliminating gender disparity in primary and secondary education by 2005;
- a reduction by two-thirds in the mortality rates for infants and children under age 5 and a reduction by three-fourths in maternal mortality, all by 2015;
- access through the primary health-care system to reproductive health services for all individuals of appropriate ages as soon as possible and no later than the year 2015.

Environmental sustainability and regeneration:

- the current implementation of national strategies for sustainable development in all countries by 2005, so as to ensure that current trends in the loss of environmental resources are effectively reversed at both global and national levels by 2015.

While expressed in terms of their global impact, these goals must be pursued country by country through individual approaches that reflect local conditions and locally-owned development strategies. Essential to the attainment of these measurable goals are *qualitative factors* in the evolution of more stable, safe, participatory and just societies. These include capacity development for effective, democratic and accountable governance, the protection of human rights and respect for the rule of law. We will also continue to address these less easily quantified factors of development progress.

Effective international support can make a real difference in achieving these goals. This is far from saying that they can be achieved by aid alone. The most important contributions for development, as in the past, will be made by the people and governments of the developing countries themselves. But where this effort is forthcoming it needs and deserves strong support from the industrialised countries. We commit ourselves to do the utmost to help:

- first, by a willingness to make mutual commitments with our development partners, supported by adequate resources;
- second, by improving the co-ordination of assistance in support of locally-owned development strategies; and
- third, by a determined effort to achieve coherence between aid policies and other policies which impact on developing countries.

These approaches were set out in broad terms in the statement of policy that we adopted in 1995 entitled *Development Partnerships in the New Global Context*.² The report that follows builds on this statement and proposes specific new practical measures to achieve the vision of partnership for development.

We intend our report to be a contribution to the broad contemporary effort to improve the effectiveness of development co-operation. A rich process of dialogue and decisions is underway—within the OECD, in the Interim and Development Committees of the World Bank and IMF, in the regional development banks, in the G7, and in the United Nations system. This heightened international focus on development co-operation reinforces our conviction that development matters.

The success or failure of poor people and poor countries in making their way in an interdependent world will have a profound influence in shaping the 21st century. We offer our proposals in this report with confidence that international co-operation can be effective in supporting development, and that the results will be well worth the effort they will demand of our societies. The stakes in a stable, sustainable future for this planet and all who will inhabit it are far too high for us to forego that effort.

² The text of the statement is an annex to this report. It is analyzed and discussed in the 1995 DAC report *Development Co-operation: Efforts and Policies of the Members of the Development Assistance Committee* (OECD, 1996).

I.

A VISION OF PROGRESS

A. New Challenges and Opportunities in a Time of Global Change

The management of global issues in the 21st century will require the active participation of all members of the international community. The developing countries, with 80 per cent of the world's population, must be part of a shared vision for this new century. Their future will be ever more tightly linked to that of our own societies. Their role in preserving peace and stability, expanding the global economy, combating poverty, increasing choices and opportunities and respect for human rights, and achieving sustainable environmental and population balances will be more significant than ever before.

The new opportunities and challenges are coming into clearer focus:

- Globalisation is helping certain developing countries achieve the highest rates of economic growth in the world. Well before mid-century the present developing countries will account for half of global economic output.
- Population growth in the developing countries will account for virtually all the increase in the world's population, from 5 billion in 1990 to about 7.5 billion in 2015. This increase over 25 years is roughly equal to the total size of the human population in 1950.
- With growing economic interdependence, global competition and vigorous private sector activity are encouraging greater similarity in the policies of industrialised and developing countries.

- On the other hand, there is growing diversity within countries and among countries. Some developing countries are achieving considerable rates of growth and impressive reductions in poverty, although significant concentrations of poverty remain. Other countries, especially in Sub-Saharan Africa, have been increasingly marginalised from the global system and suffer continuing deterioration in already deplorable living standards.
- Growing strains on the quality of water, soil and air, loss of biodiversity, depletion of fish stocks, current patterns of production and consumption and global climate change all raise questions about the continued capacity of the Earth's natural resource base to feed and sustain a growing and increasingly urbanised population.
- It is now clear that not only environmental, but also social, cultural and political sustainability of development efforts are essential for the security and well-being of people and the functioning of the complex, interdependent global system now emerging.

There is a compelling need for development co-operation strategies that will help the international community to manage these emerging challenges and opportunities into the next century. The choices before us involve far more than just the relevance and effectiveness of aid programmes. Decisions about international support for development will play a part in defining our societies' overall vision for the future. What can development do to help create a stable global order in which people can live secure and productive lives? How can it help to avoid a future of conflict and chaos, of poverty and environmental

devastation? How will development co-operation adapt to the changing global context?

B. The Vital Interests at Stake

The Member countries of the Development Assistance Committee spend about \$60 billion dollars each year for official development assistance. There are three principal motivations for their efforts.

The first motive is fundamentally humanitarian. Support for development is a compassionate response to the extreme poverty and human suffering that still afflict one-fifth of the world's population. The people who live in extreme poverty, for the most part, lack access to clean water and adequate health facilities; many do not receive sufficient nourishment to live a productive life; the majority do not possess basic literacy or numeracy skills.³ Their deprivation is unnecessary and its continuation is intolerable. The moral imperative of support for development is self-evident.

The second reason for supporting development is enlightened self-interest. Development benefits people not only in poor countries, but also in the industrialised donor countries. Increased prosperity in the developing countries demonstrably expands markets for the goods and services of the industrialised countries. Increased human security reduces pressures for migration and accompanying social and environmental stresses. Political stability and social cohesion diminish the risks of war, terrorism and crime that inevitably spill over into other countries.

³ The situation was described as follows in *Our Global Neighborhood: The Report of the Commission on Global Governance* (Oxford University Press, 1995, p.139): "The number of absolute poor, the truly destitute, was estimated by the World Bank at 1.3 billion in 1993, and is probably still growing. One fifth of the world lives in countries, mainly in Africa and Latin America, where living standards actually fell in the 1980s. Several indicators of aggregate poverty—1.5 billion lack access to safe water and 2 billion lack safe sanitation; more than 1 billion are illiterate, including half of the rural women—are no less chilling than a quarter-century ago. The conditions of this 20 per cent of humanity—and of millions of others close to this perilous state—should be a matter of overriding priority."

The third reason for international support for development is the solidarity of all people with one another. Development co-operation is one way that people from all nations can work together to address common problems and pursue common aspirations. Sustainable development expands the community of interests and values necessary to manage a host of global issues that respect no borders—environmental protection, limiting population growth, nuclear non-proliferation, control of illicit drugs, combating epidemic diseases.

In a changing world, old distinctions between "North" and "South", as well as between "East" and "West", are becoming blurred. Issues can no longer be divided into "domestic" and "international". Risks of social disintegration and exclusion affect all countries, as do opportunities to benefit from participation in a growing global economic system. As underlined in the DAC's 1995 *Development Partnerships* policy statement, the basic notion of security is being redefined, placing much more weight on the needs and concerns of human beings and the quality of their environment. Everyone is made less secure by the poverty and misery that exist in this world.

C. Achievements and Lessons Learned

Development progress over recent decades has been unprecedented in human history. In the early 1950s, when large-scale development assistance began, most people outside the developed countries lived as they had always lived, scraping by on the edge of subsistence, with little knowledge of and no voice in global or national affairs, and little expectation of more than a short life of hard work with slight reward. Since then, many countries have achieved truly dramatic improvement in overall indicators of human welfare:

- Life expectancy in the developing countries has risen by more than twenty years (from 41 to 62 years).

- The percentage of the population with access to clean water has doubled (from 35 per cent to 70 per cent).
- Adult literacy has risen from less than half the population to about two-thirds.
- Food production and consumption have increased at a rate about 20 per cent faster than population growth.

These impressive strides have not been uniform. In some countries poverty is increasing, and in many countries the poor have not shared in the positive global trends described above. Millions of people still die each year from preventable and treatable diseases; 130 million primary school-age children do not attend school; more than one-third of the children in developing countries are malnourished and one in ten dies before reaching the age of five years. Respect for human dignity, and in particular acceptance of the equality of women, remains an unfulfilled dream for too many.

While the distance that remains is less than the road already travelled, the journey is far from over. The striking progress that we have seen in recent decades gives us confidence that poverty can be overcome and development achieved. But history has shown us that progress is not inevitable. There is no room for complacency. Special attention by the international community is needed to build on the economic, social and political improvements underway in Sub-Saharan Africa, and to help counter further marginalisation of the continent.

It is clear that success has been achieved only where the people and the institutions of developing countries have made sustained efforts to help themselves. At the same time, the record demonstrates that international co-operation has also contributed greatly, and increasingly, to the development results we have witnessed over the past 50 years.

In this review we have considered where development co-operation has made the greatest difference. This can be examined at two levels. First, at the *global level*, some of the basic features of the human condition have been re-shaped over the past half-century, as is documented below. Second, there is much to be learned from the *performance of individual*

countries, where the complex factors contributing to success or failure have produced such starkly different outcomes.

At the global level:

- The dramatic fall in infant and child mortality has been supported by a major international campaign to increase child survival, led by the World Health Organisation and the United Nations Children's Fund and supported by many bilateral donors.
- Almost 1.4 billion people gained access to clean water during the 1980s, the United Nations International Drinking Water Supply and Sanitation Decade. This impressive result is an example of developing country efforts backed by effective aid.
- International development agencies have sponsored research, education and immunisation programmes to control smallpox (now eliminated), polio (eliminated in almost all countries), diphtheria and measles, and have introduced simple and effective ways to combat infant diarrhoea, river blindness and guinea worm disease. The success of these efforts can be measured in millions of lives saved and billions of dollars of economic benefits.
- The "green revolution" that has contributed so much to the 20 per cent increase in calorie consumption (and an accompanying decline in malnutrition) was given substantial impetus from international support for agricultural research, development of new crop varieties, extension services, irrigation and assistance to production and marketing, in addition to development co-operation in support of sound agricultural and other economic policies.
- Development co-operation has helped expand access to family planning and related education that have resulted in sharp falls in fertility rates and in desired family size in many developing countries. Contraceptive use in

developing countries has risen from 10 per cent of couples in 1960 to 50 per cent in the 1990s.

- Development assistance has financed numerous projects to extend and improve energy, transportation and communications infrastructure as well as to strengthen capacity for the management of these systems. That physical investment and institutional capacity have been important to bring more people and more nations into the modern economy.
- Development co-operation can now also claim significant contributions to a broad range of less quantifiable factors of importance to sustainable development. These range from improved capacity for managing economic and social policies to heightened attention to issues of accountability, the rule of law and human rights, expanded participation and the accumulation of social capital, and appreciation for environmental sustainability. These aspects of development, more complex than some earlier challenges, are basic to international co-operation today.

At the country level, we see even more clearly that development co-operation is one factor among many affecting development results. In the course of this review, DAC Members contributed more than 60 country-specific examples, together with many regional and generic lessons. In recent years, we have examined the overall experience of countries to try to assess the impacts of aid. Academics have also attempted to make statistical associations between the volume and types of aid and total economic and social progress achieved by countries. While the sceptical analyses have usually received more attention, some new work has pointed to more positive associations.⁴

Isolating any single factor as *the* cause of development success or failure is usually impossible. When aid works best, it is as a catalyst or reinforcement

⁴ See *Aid Effectiveness: A Study of the Effectiveness of Overseas Aid in the Main Countries Receiving ODA Assistance* (Mosley and Hudson, ODA, 1996) and *Private Investment Recovery and Sustainable Growth after Adjustment: A study for the Overseas Development Administration*, ESCOR, No. RS914 (Fitzgerald and Mavrotas, Queen Elizabeth House, Oxford, February 1996).

of other factors. At the same time, the record shows that it has indeed contributed, in just these ways, to a wide range of development successes in a great many countries facing radically different circumstances. Independent evaluations and our own re-examination in this exercise show a solid and rising score of successful contributions in the economic and social performance of many individual countries, as well as at the global level.

Development and development co-operation reflect human experience. They never provide neat and simple stories of progress. Set-backs have occurred, resources have been wasted, and ill-conceived or poorly-managed aid has even been counter-productive. Some countries have become excessively dependent on aid. Both the successes and the failures have taught us a lot about how best to achieve results. In particular, we have learned that successful development strategies must integrate a number of key elements. They require a sound and stable policy framework; an emphasis on social development; enhanced participation by the local population, and notably by women; good governance, in the widest sense; policies and practices that are environmentally sustainable; and better means of preventing and resolving conflict and fostering reconciliation.

These basic lessons inform our overall conclusion that development co-operation is only a complement, albeit often a vital one, to the efforts of the people, the institutions and the governments of the developing countries.

D. Goals to Help Define the Vision

We agree with the 1995 G7 Summit at Halifax that a higher quality of life for all people is the goal of sustainable development. A higher quality of life means that people will attain increased power over their own future. The pursuit of that broad vision will put the focus on many unfinished tasks, some of which have already been identified in the preceding discussion. They include overcoming extreme poverty, achieving food security, increasing the effectiveness of market economies and the efficiency of government, fostering regional co-

operation, enhancing the participation of all people, and notably women, and reducing the dependency of the poorest people and poorest countries by increasing their capacity for self reliance. This daunting array of tasks needs a defining structure.

We believe that a few specific goals will help to clarify the vision of a higher quality of life for all people, and will provide guideposts against which progress toward that vision can be measured.

Many goals have been formulated through the series of recent United Nations conferences addressing subjects important to development—education (Jomtien, 1990), children (New York, 1990), the environment (Rio de Janeiro, 1992), human rights (Vienna, 1993), population (Cairo, 1994), social development (Copenhagen, 1995), and women (Beijing, 1995).⁵ These conferences have identified a number of targets to measure the progress of development in particular fields. They reflect broad agreement in the international community, arrived at with the active participation of the developing countries.

The selection of an integrated set of goals, based on these agreed targets, could provide valuable indicators of progress. We are suggesting several such indicators in the fields of economic well-being, social development and environmental sustainability. The particular indicators we have chosen reflect our judgement of their importance in their own right and as meaningful proxies for broader development goals. Our selection does not indicate any diminished commitment to other goals accepted by the international community, at international conferences or elsewhere.

These targets are aspirations for the entire development process, not just for co-operation efforts. They represent only a proposal of what we as donors consider to be helpful measures of progress to inspire effective development co-operation. Their achievement will require agreement and commitment from developing country partners, through their own national goals and locally-owned strategies. They can be realised only through concerted actions developed through a process of dialogue and agreement in a true spirit of partnership.

⁵ Additional major conferences on the important issues of human settlements and food security are scheduled to take place in 1996.

Success will depend upon the broad acceptance of a comprehensive approach, drawing on the resources, energies and commitment of institutions and individuals in government at all levels, in the private sector, in non-governmental organisations—in developing and industrialised countries and in international organisations. It will depend equally upon an individual approach that recognises diversity among countries and societies and that respects local ownership of the development process. We will need to change how we think and how we operate, in a far more co-ordinated effort than we have known until now.

1. Economic well-being: The proportion of people living in extreme poverty in developing countries should be reduced by at least one-half by 2015. The 1995 Copenhagen Declaration and Programme of Action set forth the goal of eradicating poverty in the world, through decisive national actions and international co-operation “as an ethical, social, political and economic imperative of humankind”. The World Bank has used the standard of \$370 per capita in annual income, or about \$1 per day, as the threshold of extreme poverty. Based on that standard, it has estimated that 30 per cent of the population in developing countries—or some 1.3 billion people—live in extreme poverty, and that their numbers are increasing.

This goal obviously goes only part of the way toward meeting the global poverty eradication target identified at Copenhagen. But it seeks to give that target a concrete, attainable focus for the medium term. Reductions of poverty on this order of magnitude have been achieved in individual countries; we are proposing a generalisation of those individual successes. Even if the incidence of extreme poverty can be reduced by one-half, there will still remain a human tragedy of enormous proportions. But success in achieving the 50 per cent reduction will demonstrate both the need and the ability to continue the effort.

Obviously, this target will be much harder to reach in some countries than in others. But global averages are not enough. The objective must be pursued country by country, and substantial progress must be sought in all countries. This target implies significantly increased rates of per capita economic growth. However, growth rates will vary greatly among countries and we have concluded that a global growth target would be neither feasible nor useful to the formulation of country strategies.

2. Social development: There should be substantial progress in primary education, gender equality, basic health care and family planning, as follows:

a) There should be universal primary education in all countries by 2015. This goal, building on the ground laid at the Jomtien Conference on Education for All in 1990, was endorsed by the 1995 Copenhagen Summit on Social Development and also by the 1995 Beijing Conference on Women as a goal for 2015. The attainment of basic literacy and numeracy skills has been identified repeatedly as the most significant factor in reducing poverty and increasing participation by individuals in the economic, political and cultural life of their societies.

b) Progress toward gender equality and the empowerment of women should be demonstrated by eliminating gender disparity in primary and secondary education by 2005. The Cairo and Beijing Conferences, as well as the Copenhagen Summit, recommended that the gender gap in primary and secondary education be closed by 2005. Investment in education for girls has been shown repeatedly to be one of the most important determinants of development, with positive implications for all other measures of progress. Achieving gender equality in education will be a measure of both fairness and efficiency.

c) The death rate for infants and children under the age of five years should be reduced in each developing country by two-thirds the 1990 level by 2015. The rate of maternal mortality should be reduced by three-fourths during this same period. The 1994 Cairo Conference on

Population and Development established the goals of reducing the infant mortality rate to below 35 per thousand live births, and reducing under-five mortality to below 45 per thousand, by 2015. This target endorses those goals. Child mortality, as a measure of the availability of health and nutrition for the most vulnerable members of society, is a key indicator of the overall state of health in a society.

Maternal mortality is an area of one of the greatest disparities between developing and industrialised countries, although there is great divergence among countries. The Cairo Conference adopted targets of reducing the rate in every developing country by one-half from the 1990 level by 2000 and by a further one-half by 2015. These targets were confirmed at the Beijing Conference. The 1995 World Development Report estimates the maternal mortality rate per 100 000 live births in developing countries overall at about 350 during the 1980s.

d) Access should be available through the primary health-care system to reproductive health services for all individuals of appropriate ages, including safe and reliable family planning methods, as soon as possible and no later than the year 2015. This objective, agreed to at the 1994 Cairo Conference on Population and Development, is key to enabling people to make active choices on their reproductive behaviour and thus to contribute to stabilising the world population and assuring the sustainability of development.

3. Environmental sustainability and regeneration: There should be a current national strategy for sustainable development, in the process of implementation, in every country by 2005, so as to ensure that current trends in the loss of environmental resources—forests, fisheries, fresh water, climate, soils, biodiversity, stratospheric ozone, the accumulation of hazardous substances and other major indicators—are effectively reversed at both global and

national levels by 2015. This objective is derived from the 1992 Rio Conference on the Environment and Development. It is intended to supplement the global targets established under international environmental conventions. The national strategy for sustainable development, called for at Rio, is foreseen as a highly participatory instrument intended “to ensure socially responsible economic development while protecting the resource base and the environment for the benefit of future generations”.

This goal implies that all countries will have acquired by 2015 the capacity to address environmental issues and respond to environmental problems. The Rio Conference emphasised that progress in economic and social development, including progress toward all the goals outlined in this report, depends critically on the preservation of the natural resource base and limitation of environmental degradation. Rio and other international fora have also reinforced the message that these goals can only be met if developing countries themselves drive the action, with full participation by all of their societies’ stakeholders.

Sustainable development needs to integrate a number of additional key elements, not all of which lend themselves to indicators along the lines suggested here. The Copenhagen Declaration, for example, included a commitment to promote social integration by fostering societies that are stable, safe and just and based on the promotion and protection of all human rights. In the same vein, the 1995 DAC *Development Partnerships* policy statement identified democratic accountability, the protection of human rights and the rule of law as among the key elements of integrated development strategies. Investment of development resources in democratic governance will contribute to more accountable, transparent and participatory societies conducive to development progress. *While not themselves the subject of suggested numerical indicators, we reaffirm our conviction that these qualitative aspects of development are essential to the attainment of the more measurable goals we have suggested. Accordingly, we will continue to address them in our dialogues with partners and in our policies and programmes.*

II. NEW STRATEGIES FOR THE CHALLENGES AHEAD

A. A Changing Development Co-operation

We made a clear statement last year on our view of the roles of partners in development co-operation. Sustainable development, based on integrated strategies that incorporate key economic, social, environmental and political elements, must be locally owned. The role of external partners is to help strengthen capacities in developing partner countries “to meet those demanding, integrated requirements for sustainable development, guided by the conditions and commitments in each country”.⁶

To give substance to our belief in local ownership and partnership we must use channels and methods of co-operation that do not undermine those values. Acceptance of the partnership model, with greater clarity in the roles of partners, is one of the most positive changes we are proposing in the framework for development co-operation. In a partnership, development co-operation does not try to do things for developing countries and their people, but with them. It must be seen as a collaborative effort to help them increase their capacities to do things for themselves. Paternalistic approaches have no place in this framework. In a true partnership, local actors should progressively take the lead while external partners back their efforts to assume greater responsibility for their own development.

Partnerships are becoming more complex. Earlier aid efforts involved working almost always with central governments. Today, we are working with many more

partners to meet demands for greater efficiency, respond to more pluralistic and decentralised political systems, and recognise the importance of a dynamic private sector, local ownership and participation by civil society.

Our understanding of development and development co-operation has undergone fundamental change. It has expanded to take more fully into account how societies operate and how the international system functions. We now see a much broader range of aims for a more people-centred, participatory and sustainable development process:

- reducing poverty while achieving broadly-based economic growth;
- strengthening human and institutional capacities within nations to meet internal challenges and help avert further tragic cases of social disintegration and “failed states”;
- improving the capacity of developing countries to contribute to the management and solution of global problems; and
- reinforcing the transformation of institutions and enabling environments to facilitate the emergence of developing countries and transition economies as growing trade and investment partners in the global economy.

We are confident that development co-operation can make a crucial contribution toward these aims. At the same time, our expectations are

⁶ See the annexed *Development Partnerships in the New Global Context*.

now more modest about what can be achieved by development co-operation alone. We are convinced that a partnership approach is the way to meet the varied and complex challenges that we face, many of which are still quite new. Development co-operation experience is still at an early stage in working with issues such as good governance, private sector development, capacity to manage environmental issues and gender equality, which have attained their current prominence only in recent years.

When development is viewed in this broad context of societal transformation it is evident that development co-operation and other policies must work together. Our crucial interests in the broad goals of peace, economic growth, social justice, environmental sustainability and democracy obviously go far wider than aid programmes.

The resources devoted to development co-operation and the expertise in the development agencies need to be integrated into coherent policy frameworks in which development objectives are given their full weight. Within our governments, development is important not only to aid agencies, but also to ministries of foreign affairs, finance, trade, environment, agriculture, and defence. More broadly, our citizens have much at stake in how national policies interact to complement—or to frustrate—development.

B. A Stronger Compact for Effective Partnerships

We have stressed throughout this paper that each developing country and its people are ultimately responsible for their own development. Thus, the developing country is the necessary starting point for organising co-operation efforts, through relationships and mechanisms that reflect the particular local circumstances. Some developing countries will need special help in building the necessary capacities. Development co-operation at the regional level, and on sectoral lines, is also important. However, these approaches should complement and enrich efforts to strengthen national capacities for sustainable development.

As a basic principle, locally-owned country development strategies and targets should emerge from an open and collaborative dialogue by local authorities

with civil society and with external partners, about their shared objectives and their respective contributions to the common enterprise. Each donor's programmes and activities should then operate within the framework of that locally-owned strategy in ways that respect and encourage strong local commitment, participation, capacity development and ownership.

While the particular elements of partnerships will vary considerably, it is possible to suggest areas in which undertakings might be considered by the partners as their commitments to shared objectives.

Joint responsibilities:

- create the conditions conducive to generating adequate resources for development;
- pursue policies that minimise the risks of violent conflict;
- strengthen protections at the domestic and international levels against corruption and illicit practices;
- open up wide scope for effective development contributions from throughout civil society;
- enlist the support of rapidly-developing countries and regional development mechanisms.

Developing country responsibilities:

- adhere to appropriate macroeconomic policies;
- commit to basic objectives of social development and increased participation, including gender equality;
- foster accountable government and the rule of law;
- strengthen human and institutional capacity;
- create a climate favourable to enterprise and the mobilisation of local savings for investment;

- carry out sound financial management, including efficient tax systems and productive public expenditure;
- maintain stable and co-operative relations with neighbours.

External partner responsibilities:

- provide reliable and appropriate assistance both to meet priority needs and to facilitate the mobilisation of additional resources to help achieve agreed performance targets;
- contribute to international trade and investment systems in ways that permit full opportunities to developing countries;
- adhere to agreed international guidelines for effective aid, and monitoring for continuous improvement;
- support strengthened capacities and increased participation in the developing country, avoiding the creation of aid-dependency;
- support access to information, technology and know-how;
- support coherent policies in other aspects of relations, including consistency in policies affecting human rights and the risks of violent conflict;
- work for better co-ordination of the international aid system among external partners, in support of developing countries' own strategies.

C. Making Aid Work Better

In the final part of this paper we propose some specific measures to help to achieve more effective development co-operation. The following suggestions reflect our collective experience; they seek to build on our strengths and correct identified weaknesses. However, one of the key lessons about development co-operation is that donor-driven initiatives rarely take root and that developing countries and their people must be at the centre of any effective system. The ideas presented here, therefore, will require broader discussion,

especially with our developing country partners, and will need to be tested in practice and adapted as necessary.

Support for locally-owned strategies

One of the most frequent weaknesses of past aid efforts was excessive proliferation of aid projects. Most donors have been moving beyond the project-by-project approach to reliance on explicit country strategies in working with the countries of their major concentration. These countries tend to be those that are the most aid-dependent. There are often a number of donors working in them. While each donor's strategy seeks to respond to national priorities, the number and diversity of donor strategies raise questions about the burden they create for local institutions and the degree to which they foster or impair local ownership and participation.

DAC Members, working with multilateral agencies and other donors, will help developing country partners to strengthen their own development strategies, and will encourage co-ordinated support from the donor community. One way to reinforce locally-owned strategies may be for donors increasingly to finance those aspects of the strategy calling for public expenditure through the budget of the developing country. This approach is being tested in a number of pilot efforts with a view to assuring both effectiveness and accountability by the developing country.

Commitment of adequate resources

Development finance is becoming more diversified. In the mid-1980s official development finance was the major part of resource flows to developing countries. In the mid-1990s private flows far exceed those from official sources. Experience has demonstrated the fundamental importance of high rates of domestic savings, efficient local financial systems and sound economic policies in the developing countries. In all the fast-growing developing economies, domestic savings are one of the main engines of growth, often supported by private foreign investment. Development co-operation needs to address these essential factors so that more developing countries will be able to compete for capital and technology.

Our vision of development is one that fosters self-reliance in which countries and people are less in need of aid. However, many poorer countries simply do not yet have access to other resources sufficient to achieve the outcomes that serve everyone's interests. Private flows are highly concentrated in a limited number of countries and sectors. The smaller and least developed countries still attract little of this potential source of development finance. Moreover, private resources generally do not flow directly to some key sectors of priority need, such as health and education. Development will depend upon the continued availability of concessional resources, while countries build the capacity to create and mobilise domestic resources and attract private capital flows. For a number of highly indebted poor countries, development will also depend upon concerted international action to alleviate an unsustainable burden of debt.

In our 1995 *Development Partnerships* policy statement we reaffirmed our commitment to generating substantial resources for development co-operation to back the efforts of countries and people to help themselves. In endorsing that statement, the OECD Council at Ministerial Level expressed its continuing commitment "to mobilise as many public resources as possible and to encourage private flows to back the self-help efforts of developing countries".

Only four of the DAC's 21 Member countries consistently meet the widely accepted volume target of 0.7 per cent of GNP established by the United Nations in 1970 as an appropriate level for official development assistance.⁷ For the DAC as a whole, ODA disbursements are now only 0.3 per cent of GNP. Moreover, a growing portion of available ODA resources has been devoted to humanitarian needs and debt relief in recent years, placing an even greater strain on aid budgets. Among other things, these strains have created unprecedented shortfalls in financing of the United Nations system and the multilateral development banks. These multilateral institutions remain a cornerstone in global efforts to foster development. Their difficult financial situation is a cause for concern.

As recently as 1992, in the programme of action agreed at the United Nations Conference on the

Environment and Development in Rio, developed countries reaffirmed their commitments "to reach the accepted United Nations target of 0.7 per cent of GNP for ODA, and to the extent that they have not yet achieved that target, agree to augment their aid programmes in order to reach that target as soon as possible...". Other developed countries agreed at Rio "to make their best efforts to increase their level of ODA".

In this report we have focused on indicators of development progress—on outcomes rather than the volume of inputs. Nevertheless, as we have pointed out, ODA is an essential investment to complement other development resources. Clearly, we need to sustain and increase official development assistance if we expect to see a reversal of the growing marginalisation of the poor and achieve progress toward realistic goals of human development. It is equally clear that an effort to build stronger compacts with developing countries on a foundation of shrinking resources and declining commitment will lack credibility. Therefore, it is necessary to express, once again, our deep concern that domestic preoccupations and budgetary pressures in some Member countries seriously jeopardise the international co-operation effort at a critical juncture.

⁷ The four are Norway, Denmark, Sweden and the Netherlands. See the DAC 1995 Development Co-operation Report, Chapter IV, for analysis and detailed information concerning ODA performance of DAC Members.

Enhanced co-ordination in international fora and on the ground

We are committed to better co-ordinate our aid efforts in line with the strategies of our partner countries. General and sectoral co-ordination among donors varies greatly from country to country. Given the variety of country situations, there is no single model that can be recommended. But methods of proven effectiveness could be given stronger encouragement. For example, the developing country should be the co-ordinator of development co-operation wherever possible. However, in cases where local interest or capability is weak, it remains for donors to encourage regular fora for co-ordination, and to assure that their own local representatives participate. Lead agencies from within the donor community (bilateral or multilateral) could be identified for particular themes or sectors, and developing country partners should be an integral part of the process. The in-country co-ordination could then be monitored in international Consultative Groups and Round Tables, as well as in DAC Aid Reviews. The objective would be to create incentives for effective co-ordination and to strengthen local capacity to lead the co-ordination process.

Monitoring and evaluation

We need to check continuously that planned improvements in aid co-ordination and delivery actually take place, with full feedback from the intended beneficiaries. The Development Assistance Committee already serves part of this role as a standard-keeper and co-ordination body without operational programmes of its own. More can be done in future, building on the many evaluation exercises underway (including those of the multilateral development banks), on the DAC's peer reviews of bilateral donor programmes, and new developing country-based aid reviews, now in a pilot stage. Many specific and hard-won lessons learned are identified in the *DAC Principles for Effective Aid* and other policy guidance, as well as in the growing body of work on results-oriented programming, evaluations and follow-up. Guidelines for effective aid need to be continuously disseminated and tested at the field level, and the results fed back into new programmes. We shall continue to monitor the application of all these lessons to future development co-operation efforts.

Expanding the base for co-operation

Aid is a scarce resource and, as we have stressed throughout this report, it must be targeted to meet priority needs and help generate other development investments. One of the most encouraging indications of progress over recent decades is that many countries have reduced or eliminated their need for aid, and some have become donors themselves.

The DAC has now established a regular system for review of its *List of Developing Countries and Territories* with a view to identifying those that should progress from that list. Members already direct a substantial majority (some 63 per cent) of their aid flows to low-income and least-developed countries, and they are committed to continuing that concentration as countries progress. As countries move toward a pattern of sustained growth and development, co-ordinated efforts should be made to assure that continued aid investments are directed to the sustainability of their own strategies, and that a conscious path toward a phase-out of aid is identified.

Countries, institutions and individuals with recent experience in successful development can be especially effective in sharing their experience and insights with others. They also provide concrete examples of the shared international benefits of development. We need to strengthen and encourage the participation of those who can bring the experience of their own development into an expanding base of international co-operation. Such efforts are now part of our joint work in the DAC.

D. Bringing Our Policies Together

This report has described how the linkages between industrialised and developing countries extend far beyond development assistance. There are many areas where policies of the industrialised countries can complement or frustrate development efforts. Fiscal deficits of industrialised countries can influence both the cost and the availability of capital for developing countries. Environmental, sanitary and other restrictions on imports can sometimes operate as non-tariff barriers. The promotion of military exports can drain limited resources away from development priorities. On the other hand, industrialised country policies can foster trade and investment flows, can facilitate the sharing of technology, and can in many other ways advance development objectives.

The ramifications and opportunities of policy coherence for development now need to be much more carefully traced and followed through than in the past. We should aim for nothing less than to assure that the entire range of relevant industrialised country policies are consistent with and do not undermine development objectives. We will work with our colleagues in the broad collaborative effort now underway within the OECD to examine linkages between OECD Members and the developing countries, building on the promising work on this theme completed in 1994.⁸ We are confident that we can do more than just avoid policy conflict. We will work to assure that development co-operation and other linkages between industrialised and developing countries are mutually reinforcing.

The 21st century can be one of increased co-operation, of hope and of opportunity. We put forward these ideas to show the importance of development for the security and well-being of all who will inhabit this planet in the coming century. We are confident that development co-operation, together with other modes of international co-operation, can work to produce results that will be well worth the effort they will demand of our societies.

⁸ The 1994 study concentrated on linkages with 15 “major” developing economies. *Linkages: OECD and Major Developing Economies* (OECD, 1995). In January 1996 the OECD Council authorised the initiation of a broader effort, with a planned completion date of May 1997, to be entitled “Globalisation and Linkages to 2020: Challenges and Opportunities for OECD Countries”.

ANNEX

Development Partnerships in the New Global Context

Members of the Development Assistance Committee (DAC) of the OECD met on 3-4 May 1995 at the level of Development Co-operation Ministers and Heads of Aid Agencies.

They agreed on shared orientations for their development co-operation efforts and preparing for key challenges of sustainable economic and social development into the 21st century.

Members also expressed deep concern that domestic preoccupations and budgetary pressures in some Member countries could seriously jeopardise the international development co-operation effort at a critical juncture.

For three decades, the highest rates of economic growth in the world have been achieved among developing countries, notably in Asia and Latin America. Many formerly poor countries have made rapid advances in standards of living, fuelled by expanded trade, capital and technology flows. Development co-operation has helped, and must continue to help, lay the foundations for their success.

Yet many countries and people have not yet shared in this progress, or have even lost ground. At the same time, numerous countries, including countries in Africa, are adopting far-reaching economic and political reforms. They seek to increase opportunities for their people, and to integrate successfully into a highly competitive, interdependent world.

Development and greater interdependence require high levels of domestic effort, high standards of accountability, and a strong civil society. Open, participatory economic and political systems are increasingly important factors. Meanwhile, the basic notion of security is being redefined, placing much more weight on the needs and concerns of human beings and the quality of their environment.

More widespread and sustainable progress now depends on building strong capacities to achieve good governance, reduce poverty, and protect the environment. Civil conflict, terrorism, population and migration pressures, epidemic disease, environmental degradation, and international crime and corruption hinder the efforts of developing countries and concern us all.

Within this new context, thriving developing country partners will contribute to greater prosperity and greater security in their own regions and globally. We therefore endorse the following strategic orientations, and commend them for active support in our own countries and throughout the international community.

1. Development co-operation is an investment

Support for development has contributed to extraordinary achievements in economic and social well-being. Well over two billion people have increased their incomes, life-expectancy, education, and their access to basic services. Development co-operation has also led to the emergence of new economic partners who play an increasingly dynamic role, generating new trade, investment, and jobs—as well as the need for adjustment—in our own countries. Developing country markets for OECD exports have expanded by 50 per cent since 1990.

We regard development co-operation as a key investment in the future.

2. Combating poverty at its roots is a central challenge

Support for development reflects our enduring concern for the human dignity and well-being of others. Despite the promising trends in many developing countries, more than one billion people still live in extreme poverty. Yet, building on lessons learned, there are good prospects for significantly reducing poverty in the coming years.

We will focus our support on strategies and programmes that will work to enable the poorest to expand their opportunities and improve their lives.

3. Strategies for success are now available

Experience has shown that achievements in sustainable development, and effective co-operation, need to integrate a number of key elements:

- A sound policy framework encouraging stable, growing economies with full scope for a vigorous private sector and an adequate fiscal base.
- Investment in social development, especially education, primary health care, and population activities.
- Enhanced participation of all people, and notably women, in economic and political life, and the reduction of social inequalities.
- Good governance and public management, democratic accountability, the protection of human rights and the rule of law.
- Sustainable environmental practices.
- Addressing root causes of potential conflict, limiting military expenditure, and targeting reconstruction and peace-building efforts toward longer-term reconciliation and development.

We will focus our co-operation on helping to strengthen capacities in our partner countries to meet these demanding, integrated requirements for sustainable development, guided by the conditions and commitments in each country.

4. Development assistance is vital to complement other resources

Developing countries themselves are ultimately responsible for their own development. Their own earnings, savings and tax revenues are the most important source of investment in their economic and social progress. For development to succeed, the people of the countries concerned must be the "owners" of their development policies and programmes.

Private investment flows are mainly attracted by the most dynamic countries and sectors of the developing world, and private donations are directed primarily to immediate humanitarian needs. Official development assistance remains vital for many key investments in developing countries, especially the poorer countries.

We remain committed to generating substantial resources for development co-operation to back the efforts of countries and people to help themselves.

5. Other policies need to be coherent with development goals

Expanded trade, investment and other linkages, and the growing role of the developing countries in the international economic system (notably in the World Trade Organisation) have raised the stakes for OECD countries. It is critical that other policies not undercut development objectives.

We will work with the other policy-makers concerned to ensure that our countries follow consistent, open economic policies in relations with our development partners.

6. Our co-operation must be effective and efficient

Both bilateral and multilateral development assistance must be managed for maximum efficiency and effectiveness. We are confident that past achievements and lessons learned in development co-operation show clearly how best to reinforce current efforts of developing countries.

We will intensify our activities in aid co-ordination, the evaluation of aid effectiveness, peer reviews, and the implementation of best practices.

The agreed principles and best practices for effective aid must be implemented with rigor. Critical evaluation must be an ongoing feature of development assistance efforts, to identify the best and most cost-effective approaches. Public accountability, based on indicators of achievement, is essential.

7. The Development Assistance Committee will advance these priorities

Co-operation for sustainable development is a fundamental concern of the OECD. Effective development co-operation helps to strengthen the multilateral system and promotes job-creating growth and social cohesion on an international scale. OECD members commit substantial resources toward this effort, including more than \$50 billion annually in official development assistance, 90 per cent of the world's total.

We reaffirm our commitment to work together in the Development Assistance Committee to implement the directions outlined here for this decade, to integrate the contributions of development co-operation with the other policy priorities of Members, and to help prepare strategies looking to the next century.

Report of the Panel on United Nations Peace Operations (Brahimi Report), UN Doc A/55/305-S/2000/809 (21 August 2000)

Available at http://www.un.org/peace/reports/peace_operations, paras 76-83.

H. The challenge of transitional civil administration

76. Until mid-1999, the United Nations had conducted just a small handful of field operations with elements of civil administration conduct or oversight. In June 1999, however, the Secretariat found itself directed to develop a transitional civil administration for Kosovo, and three months later for East Timor. The struggles of the United Nations to set up and manage those operations are part of the backdrop to the narratives on rapid deployment and on Headquarters staffing and structure in the present report.

77. These operations face challenges and responsibilities that are unique among United Nations field operations. No other operations must set and enforce the law, establish customs services and regulations, set and collect business and personal taxes, attract foreign investment, adjudicate property disputes and liabilities for war damage, reconstruct and operate all public utilities, create a banking system, run schools and pay teachers and collect the garbage — in a war-damaged society, using voluntary contributions, because the assessed mission budget, even for such "transitional administration" missions, does not fund local administration itself. In addition to such tasks, these missions must also try to rebuild civil society and promote respect for human rights, in places where grievance is widespread and grudges run deep.

78. Beyond such challenges lies the larger question of whether the United Nations should be in this business at all, and if so whether it should be considered an element of peace operations or should be managed by some other structure. Although the Security Council may not again direct the United Nations to do transitional civil administration, no one expected it to do so with respect to Kosovo or East Timor either. Intra-State conflicts continue and future instability is hard to predict, so that despite evident ambivalence about civil administration among United Nations Member States and within the Secretariat, other such missions may indeed be established in the future and on an equally urgent basis. Thus, the Secretariat faces an unpleasant dilemma: to assume that transitional administration is a transitory responsibility, not prepare for additional missions and do badly if it is once again flung into the breach, or to prepare well and be asked to undertake them more often because it is well prepared. Certainly, if the Secretariat anticipates future transitional administrations as the rule rather than the exception, then a dedicated and distinct responsibility centre for those tasks must be created somewhere within the United Nations system. In the interim, DPKO has to continue to support this function.

79. Meanwhile, there is a pressing issue in transitional civil administration that must be addressed, and that is the issue of "applicable law." In the two locales where United Nations operations now have law enforcement responsibility, local judicial and legal capacity was found to be non-existent, out of practice or subject to intimidation by armed elements. Moreover, in both places, the law and legal systems prevailing prior to the conflict were questioned or rejected by key groups considered to be the victims of the conflicts.

80. Even if the choice of local legal code were clear, however, a mission's justice team would face the prospect of learning that code and its associated procedures well enough to prosecute and adjudicate cases in court. Differences in language, culture, custom and experience mean that the learning process could easily take six months or longer. The United Nations currently has no answer to the question of what such an operation should do while its law and order team inches up such a learning curve. Powerful local political factions can and have taken advantage of the learning period to set up their own parallel administrations, and crime syndicates gladly exploit whatever legal or enforcement vacuums they can find.

81. These missions' tasks would have been much easier if a common United Nations justice package had allowed them to apply an interim legal code to which mission personnel could have been pre-trained while the final answer to the "applicable law" question was being worked out. Although no work is currently under way within Secretariat

legal offices on this issue, interviews with researchers indicate that some headway toward dealing with the problem has been made outside the United Nations system, emphasizing the principles, guidelines, codes and procedures contained in several dozen international conventions and declarations relating to human rights, humanitarian law, and guidelines for police, prosecutors and penal systems.

82. Such research aims at a code that contains the basics of both law and procedure to enable an operation to apply due process using international jurists and internationally agreed standards in the case of such crimes as murder, rape, arson, kidnapping and aggravated assault. Property law would probably remain beyond reach of such a "model code", but at least an operation would be able to prosecute effectively those who burned their neighbours' homes while the property law issue was being addressed.

83. Summary of key recommendation on transitional civil administration: the Panel recommends that the Secretary-General invite a panel of international legal experts, including individuals with experience in United Nations operations that have transitional administration mandates, to evaluate the feasibility and utility of developing an interim criminal code, including any regional adaptations potentially required, for use by such operations pending the re-establishment of local rule of law and local law enforcement capacity.

Gusmão, Jose 'Kay Rala Xanana', 'New Year's Message: The Right to Live in Peace and Harmony' (Dili, East Timor, 31 December 2000)

Available at <http://www.cpa.org.au/garchve3/1031xan.html>.

The Guardian January 31, 2001

Xanana Gusmao: The right to live in peace and harmony

A new year's message from Xanana Gusmao, President of the CNRT/CN Dili East Timor Dec 31, 2000

Compatriots! Timorese!

Today, in East Timor, we are witnessing a move by politicians to affirm, or re-affirm, their position in society. Some try to defend points of view that are almost contrary to common sense just to recruit some followers because they claim to be the defenders of the "underprivileged".

Others, resort to past memories, become untouchable and, because of this, become insensitive to the (real) facts of history.

They live in and revisit the past as an alternative to confronting common sense and reality.

They claim historic impunity, they surround themselves by angels of peace and heroes of a revolution ... that brought grief and left scars in our souls.

Others, living thousands of kilometres away from Dili, spout forth points of view as if they own a knowledge of their own, in a remote-control-style very much in line with the globalisation that turned each country into a larger or smaller village in this world.

Timorese reality

We are witnessing another phenomenon in East Timor; that of an obsessive acculturation to standards that hundreds of international experts try to convey to the East Timorese, who are hungry for values:

- * democracy (many of those who teach us never practised it in their own countries because they became UN staff members);
- * human rights (many of those who remind us of them forget the situation in their own countries);
- * gender (many of the women who attend the workshops know that in their countries this issue is no example for others);
- * NGOs (numerous NGOs live off the aid "business" to poor countries);
- * Youth (all those who remind us of this issue know that in their countries most of the youth are unemployed and that experience is the main employment drive apart from some exceptions based on intellectual skills).

It might sound as though I am speaking against these noble values of democratic participation. I do not mind if it happens in the democratic minds of people.

What seems to be absurd is that we absorb standards just to pretend we look like a democratic society and please our masters of independence.

What concerns me is the non-critical absorption of (universal) standards given the current stage of the historic process we are building.

Old democracies are no longer like a smooth pavement or a linear social process where such standards slide along without the slightest friction.

What concerns me is that the Timorese may become detached from their reality and, above all, try to copy something which is not yet clearly understood by them.

It is necessary that we are sincere and humble so that we do not lose track of the highest interests of our People.

Democracy

Democracy is not built overnight and it is by experiencing the system that democracy can be shaped.

Some think that mere political party membership is a synonym of democracy and, therefore, it does not need to be cared for.

School-aged youths think democracy empowers them with the right to protest, criticise and insult the teachers, to skip or disturb classes.

Some adults share the opinion that democracy demands that everyone must decide on everything.

This process of preparation for independence is not an easy one when we discuss issues such as democracy, human rights and freedom.

There is some anxiety for self-affirmation which the international staff currently in East Timor try to enhance; they forget how unaware they are of the whole process of our people's struggle and, therefore, encourage the expression of various forms of difference as if this was the only way of ensuring democracy.

This natural need for self-affirmation, of parties and individuals, whether politicians or not, leads to a strong ill-feeling against the CNRT as if the CNRT was the main enemy of political parties and civil society.

To a certain extent, this situation is encouraged by the perception shared by many international organisations that the CNRT is a political party.

It is hard for us to believe that foreigners who come to East Timor to work do not have some knowledge of Timorese political reality.

Foreigners should bear in mind that the essential condition for their operational success is to be aware that they do not come to save East Timor but rather to fulfill a mission of support; therefore, if they are not aware of this reality they will face the ungrateful mission of earning money for six months and returning to their homes, as so many have done, often revealing themselves to be less skilled than the East Timorese who can not find a job.

CNRT and political process

CNRT is looked at as an obstacle to the development of political parties. Those who fiercely attack the CNRT forget something. The CNRT is paving the way so that, in the near future, the parties may run for political power.

They also forget that CNRT is not a political party. We all know that if, one day, the CNRT were to turn into a political party, there would be no party capable of competing with CNRT.

The CNRT is quite certain of this although it will not do it.

The CNRT would like to say to the political parties and politicians that because the CNRT is more mature and better prepared than the parties, it will not exploit the current emotional condition of our People.

The CNRT is concerned with political stability during the post-independence period; the CNRT is concerned with the environment of peace and harmony that must be created amidst the population.

Our People have that right: THE RIGHT TO LIVE IN PEACE AND HARMONY!

Our political experience over the past 25 years alerts us to the possibility of violence amidst the people; we are observing manoeuvres by certain groups which are showing no respect whatsoever for our People's right to live in peace and the right to never again face a situation where Timorese kill other Timorese.

The CNRT is extremely concerned with the feelings some groups may begin having when there is violence amidst the population; a feeling of euphoria of a victory over "the others who got what they asked for" or because "they even have more supporters than we do".

CNRT is following the movement and the desire for affirmation or re-affirmation of leaders and politicians. In fact, what our people need now is leaders, new leaders who are wise, thoughtful and with a broad vision of the process.

The CNRT only hopes that maturity resulting from 25 years of struggle may lead political parties to act with greater realism and objectiveness in their analysis on the complexity of the independence process.

A new millennium

January 1, 2001, will be the first day of the millennium. We are celebrating the most important New Year in modern history for we are about to enter a new millennium. In a few hours we will open a new chapter in the history of Mankind.

This unique event for Mankind will have a very special meaning for the Maubere People, Timor Lorosa'e will be engraved in the journals of history as the first independent country of this new millennium.

During the year 2000 many people celebrated the New Year as the beginning of the new millennium when it was actually merely the end of the old millennium.

The year 2000 must be mostly considered as one of learning the numerous aspects of and the relationship with UNTAET (United Nations Transitional Administration in East Timor), with the international institutions and with the International Community.

If we do not understand this we will think of ourselves as able enough to rehabilitate everything overnight and to immediately do all that is necessary. This is being unrealistic.

Budgetary constraints are not UNTAET's; budgetary constraints are part and parcel of this transition and in its relationship with the donor community.

Of course there are many unfortunate things happening, many perceptions which are not in tune with Timorese reality, there is a lot more money available to pay the hundreds and hundreds of foreigners rather than for reconstruction.

There is bad management or inclusion of structures and a heavy bureaucratic apparatus that, in some cases, resorts to corruption.

International staff are of the opinion that the East Timorese simply lack capacity and this opinion is seconded by some sectors of our society.

We do not call for a hasty transition period, an inadequate one "la Cambodia" where the international staff left a vacuum behind after leaving.

A clearly phased strategy

For this reason, we defend a clearly phased strategy for the political process.

Rather than considering the success it may be for the UN we are concentrated on a process that may bring success to the suffering people of East Timor. And, eventually, the International Community will have assuaged its conscience for having assisted a martyred people.

We are about to commence a decisive year for East Timor and its People!

This year will be filled with political activity and, above all, activities that will involve the participation of the people.

The two foundations that sustain the transition towards independence are, as we have often stated, timorisation and the political process.

We must speak in one voice so that UNTAET will begin the timorisation process in a serious way. To appoint ministers is not to timorise.

To recruit Director-Generals or Heads of Departments and their staff will be our priority for the first quarter of 2001.

If this is not to happen we will be convinced that the extension of UNTAET's mandate only aims at benefiting the international staff who are handsomely paid in East Timor.

But if we are to undertake an appropriate and genuine timorisation, UNTAET's mandate will be looked at as an extension of the East Timorese capacity-building process.

Some people expressed their opposition to the political calendar.

We do not wish to discuss their reasons for differences of opinion are part of the democracy that all seem to so wisely put into practice. The timorisation process must evolve side by side with the development of the political process.

There will be a great number of political events during 2001. Civil Registration, as a database to be prepared for the Electoral Registration, will soon begin. The electoral system must be determined.

In January, the Regulation on Political Parties must also be prepared and adopted by the National Council.

This will enable the registration of political parties and give them a legitimate status to address the people; thus, we will hamper the activity by uncontrollable groups showing up as parties merely to create confusion amidst our people.

We urge New York to understand the East Timorese political reality; it is profoundly different from that in the United States which has just experienced moments during the recent presidential elections that countries undergoing democratisation processes called "the greatest democracy scandal".

There will be civic education programmes throughout the territory to enable people to know the system to be set up in East Timor and to make people aware of the dimension of freedom, democracy, justice and peace, as basic conditions for progress and the well-being of every citizen.

A draft of a simple Constitution must also be drafted by the East Timorese whereby the fundamental universal principles, citizen's rights and the system of government will be clearly enshrined.

The debate of this draft with the population throughout the territory will enable the people to know the foundations of the Timorese Nation.

The National Council will also debate the Electoral Law; and once it is adopted there will be an electoral education campaign so that our People may have a genuine awareness of the democratic values by the time the first elections are held in the free Timor Lorosa'e.

The East Timorese People must feel by then total freedom to vote, i.e., they will not feel any kind of fear of intimidation or threat of reprisals.

Having said this, we truly believe that the electoral campaigns will be held in an atmosphere of tolerance and mutual respect.

Consequently, elections for the Constituent Assembly will also be held in a peaceful atmosphere.

Those who do not believe that our people will achieve this ought to recall August 30, 1999.

Those who feel sceptical about this process are those who were not in East Timor during the difficult and dramatic period experienced by our people.

If it is accepted that the Constitution should not be of a programmatic or ideological nature and that it should be simple and universal, the Constituent Assembly will not need a lengthy period of time to debate the first Constitution of Timor.

It will only require enough time to fine tune the draft that will then be adopted as the Constitution and which will come into effect on the first day of Independence.

We do not want a chaotic transition whereby for purposes of "revenge" the East Timorese will re-initiate the whole process again.

Phased and orderly transition

Once again, and to make it very clear, we wish to state that we defend a phased and orderly transition!

Independence is not forged by simply choosing the colour of the national flag or the choice of the day it will be proclaimed.

We understand independence as the system to be implemented and the capacity of the East Timorese to carry out their responsibilities even before independence is proclaimed.

The outcome of the elections will dictate the composition of the Constituent Assembly and may even be a reference for the setting up of the government.

Consequently, political parties may (or may not) be called to debate this and to appoint members of the government.

This is the way the East Timorese are preparing themselves to gradually receive the transfer of responsibility until independence, including at ministerial level.

Similarly, the Legislative Assembly, as an elected body emerging from the Constituent Assembly, will gain greater experience and will also initiate its legislative activity in the run up to independence.

This is our perspective for the preparation of the East Timorese for independence, at all levels of governance. There may be other and better ways.

We perceive the elections, as the focal point of this political process for it will confer legitimacy to political acts.

The reviewing of ETTA's legal status may be easier to achieve with the existence of elected bodies. This process will meet the demands put forth in Security Council Resolution nr. 1272.

Dear compatriots

I repeat that this is CNRT's opinion and might not be accepted by the Timorese democratic society.

These thoughts are not being elaborated to serve CNRT's interests but rather the interests of the People which CNRT organised and mobilised to decide on their future and which the People has responded to with courage and determination.

As from January, the Timorese, political parties, politicians and intellectuals should initiate in-depth debates on the ideal Government structure (i.e. the minimum necessary one) to ensure that we do not inherit extremely heavy structures which are non-efficient and, above all, not sustainable.

These debates should also include the issues of centralisation and decentralisation.

This will enable that, as from March, we will begin working on the budget for the next fiscal year from July 2001 to June 2002 because, in June 2001 the Donors' Conference will be held in Canberra to decide on it.

There are political parties, politicians and intellectuals who claim rights but forget their duty to think carefully about this process so that the contribution of each individual may contribute to a better perception of the complexity of this problem.

CNRT is, therefore, convinced that the elections will be the engine for change, above all, for a change of still distorted mentalities that exist both in foreigners working in East Timor and in the East Timorese who seek self-affirmation in our society.

Dear CNRT Cadres

My last words are addressed to you.

Today we are being looked at as agitators of instability. August 30, 1999 would not have happened if it had not been for your commitment and dedication.

A year later, you are still committed to serving our People, without any salary. Many of the East Timorese who criticise you are well placed now.

The foreigners who look askance at you think you are about to take half of their salaries to provide for your families, build your homes or send your children to school.

They all forget that the fingers of one hand are too many to count the number of CNRT cadres who suffered in East Timor and are now working in the civil service.

They also forget that none of the CNRT cadres are working as UNTAET local staff. I will give you just one example, not to mention those which apply to NGOs and International Agencies.

In Oecussi, the local UNTAET staff were all pro-autonomy. And no one protests. However, any minor mistake by a CNRT cadre, where ever it may happen, is magnified to melodramatic proportions.

We were together during the extremely hard times of the struggle, when many of those who now arrive in East Timor, had no knowledge of our problem.

I am aware of the difficulties each one of you is facing in your private lives. Your and my experience is solely one of resistance.

We do not have the skills to hope for a job, and we acknowledge this with modesty. We have the CNRT imprint labelled on us and when others mention CNRT cadres, they are led to thinking of nepotism, corruption and lack of transparency.

We have often mentioned amongst us that CNRT cadres are today like an old shirt that is thrown away when it is worn out.

This year will be very demanding of you and in your work with the population. Do not give up working to educate our people, to serve our people.

I will be with you in undertaking this noble task, as you have already done in the past, as you have worked during the difficult years of resistance TO SERVE THE PEOPLE!

I will do my utmost and will bring down every obstacle so as to enable the establishment of a Credit Bank in East Timor.

A private Bank detached from meaningless political assumptions often referred to when it comes to CNRT cadres; a Bank that may give new perspective to your lives.

I will struggle for you as you have struggled for our People! Let us not think about rewards, where ever they may come from! The best reward was the victory achieved by our People on 30 August 1999 and there is no one in East Timor who can take from you the success of your work!

We still have work ahead, namely to lead our people to defend their right to live in peace and in harmony and avoid a repetition of the past experience of political violence.

In the meantime, we will organise ourselves in groups and learn the skills of management so that each one of you may be prepared to reconstruct your lives.

We will face new difficulties in this process but I know that you are always prepared to serve our People.

May 2001 bring success to your efforts in moving towards a genuine transition to independence and may it also bring you new prospects for the future.

**Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex:
Regulations Concerning the Laws and Customs of War on Land (1907 Hague Regulations),
done at The Hague, 18 October 1907, 36 Stat 2277, 1 Bevans 631**

Available at <http://www.icrc.org/ihl>.

(List of Contracting Parties)

Seeing that while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where the appeal to arms has been brought about by events which their care was unable to avert;

Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization;

Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible; Have deemed it necessary to complete and explain in certain particulars the work of the First Peace Conference, which, following on the Brussels Conference of 1874, and inspired by the ideas dictated by a wise and generous forethought, adopted provisions intended to define and govern the usages of war on land.

According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.

It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice;

On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

They declare that it is in this sense especially that Articles I and 2 of the Regulations adopted must be understood. The High Contracting Parties, wishing to conclude a fresh Convention to this effect, have appointed the following as their Plenipotentiaries:

(Here follow the names of Plenipotentiaries)

Who, after having deposited their full powers, found in good and due form, have agreed upon the following:

Article 1. The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention.

Art. 2. The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention.

Art. 3. A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Art. 4. The present Convention, duly ratified, shall as between the Contracting Powers, be substituted for the Convention of 29 July 1899, respecting the laws and customs of war on land.

The Convention of 1899 remains in force as between the Powers which signed it, and which do not also ratify the present Convention.

Art. 5. The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

The first deposit of ratifications shall be recorded in a procès-verbal signed by the Representatives of the Powers which take part therein and by the Netherlands Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Netherlands Government and accompanied by the instrument of ratification.

A duly certified copy of the procès-verbal relative to the first deposit of ratifications, of the notifications mentioned in the preceding paragraph, as well as of the instruments of ratification, shall be immediately sent by the Netherlands Government, through the diplomatic channel, to the powers invited to the Second Peace Conference, as well as to the other Powers which have adhered to the Convention. In the cases contemplated in the preceding paragraph the said Government shall at the same time inform them of the date on which it received the notification.

Art. 6. Non-Signatory Powers may adhere to the present Convention.

The Power which desires to adhere notifies in writing its intention to the Netherlands Government, forwarding to it the act of adhesion, which shall be deposited in the archives of the said Government.

This Government shall at once transmit to all the other Powers a duly certified copy of the notification as well as of the act of adhesion, mentioning the date on which it received the notification.

Art. 7. The present Convention shall come into force, in the case of the Powers which were a party to the first deposit of ratifications, sixty days after the date of the procès-verbal of this deposit, and, in the case of the Powers which ratify subsequently or which adhere, sixty days after the notification of their ratification or of their adhesion has been received by the Netherlands Government.

Art. 8. In the event of one of the Contracting Powers wishing to denounce the present Convention, the denunciation shall be notified in writing to the Netherlands Government, which shall at once communicate a duly certified copy of the notification to all the other Powers, informing them of the date on which it was received.

The denunciation shall only have effect in regard to the notifying Power, and one year after the notification has reached the Netherlands Government.

Art. 9. A register kept by the Netherlands Ministry for Foreign Affairs shall give the date of the deposit of ratifications made in virtue of Article 5, paragraphs 3 and 4, as well as the date on which the notifications of adhesion (Article 6, paragraph 2), or of denunciation (Article 8, paragraph 1) were received.

Each Contracting Power is entitled to have access to this register and to be supplied with duly certified extracts. In faith whereof the Plenipotentiaries have appended their signatures to the present Convention.

Done at The Hague 18 October 1907, in a single copy, which shall remain deposited in the archives of the Netherlands Government, and duly certified copies of which shall be sent, through the diplomatic channel to the Powers which have been invited to the Second Peace Conference.

(Here follow signatures)

ANNEX TO THE CONVENTION

REGULATIONS RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND

SECTION I ON BELLIGERENTS

CHAPTER I

The qualifications of belligerents

Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

Art. 2. The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

Art. 3. The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.

CHAPTER II

Prisoners of war

Art. 4. Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.

They must be humanely treated.

All their personal belongings, except arms, horses, and military papers, remain their property.

Art. 5. Prisoners of war may be interned in a town, fortress, camp, or other place, and bound not to go beyond certain fixed limits; but they cannot be confined except as in indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist.

Art. 6. The State may utilize the labour of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of the war.

Prisoners may be authorized to work for the public service, for private persons, or on their own account.

Work done for the State is paid for at the rates in force for work of a similar kind done by soldiers of the national army, or, if there are none in force, at a rate according to the work executed.

When the work is for other branches of the public service or for private persons the conditions are settled in agreement with the military authorities.

The wages of the prisoners shall go towards improving their position, and the balance shall be paid them on their release, after deducting the cost of their maintenance.

Art. 7. The Government into whose hands prisoners of war have fallen is charged with their maintenance.

In the absence of a special agreement between the belligerents, prisoners of war shall be treated as regards board, lodging, and clothing on the same footing as the troops of the Government who captured them.

Art. 8. Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary.

Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment.

Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight.

Art. 9. Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, and if he infringes this rule, he is liable to have the advantages given to prisoners of his class curtailed.

Art. 10. Prisoners of war may be set at liberty on parole if the laws of their country allow, and, in such cases, they are bound, on their personal honour, scrupulously to fulfil, both towards their own Government and the Government by whom they were made prisoners, the engagements they have contracted.

In such cases their own Government is bound neither to require of nor accept from them any service incompatible with the parole given.

Art. 11. A prisoner of war cannot be compelled to accept his liberty on parole; similarly the hostile Government is not obliged to accede to the request of the prisoner to be set at liberty on parole.

Art. 12. Prisoners of war liberated on parole and recaptured bearing arms against the Government to whom they had pledged their honour, or against the allies of that Government, forfeit their right to be treated as prisoners of war, and can be brought before the courts.

Art. 13. Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.

Art. 14. An inquiry office for prisoners of war is instituted on the commencement of hostilities in each of the belligerent States, and, when necessary, in neutral countries which have received belligerents in their territory. It is the function of this office to reply to all inquiries about the prisoners. It receives from the various services concerned full information respecting internments and transfers, releases on parole, exchanges, escapes, admissions into hospital, deaths, as well as other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war. The office must state in this return the regimental number, name and surname, age, place of origin, rank, unit, wounds, date and place of capture, internment, wounding, and death, as well as any observations of a special character. The individual return shall be sent to the Government of the other belligerent after the conclusion of peace.

It is likewise the function of the inquiry office to receive and collect all objects of personal use, valuables, letters, etc., found on the field of battle or left by prisoners who have been released on parole, or exchanged, or who have escaped, or died in hospitals or ambulances, and to forward them to those concerned.

Art. 15. Relief societies for prisoners of war, which are properly constituted in accordance with the laws of their country and with the object of serving as the channel for charitable effort shall receive from the belligerents, for themselves and their duly accredited agents every facility for the efficient performance of their humane task within the bounds imposed by military necessities and administrative regulations. Agents of these societies may be admitted to the places of internment for the purpose of distributing relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an undertaking in writing to comply with all measures of order and police which the latter may issue.

Art. 16. Inquiry offices enjoy the privilege of free postage. Letters, money orders, and valuables, as well as parcels by post, intended for prisoners of war, or dispatched by them, shall be exempt from all postal duties in the countries of origin and destination, as well as in the countries they pass through.

Presents and relief in kind for prisoners of war shall be admitted free of all import or other duties, as well as of payments for carriage by the State railways.

Art. 17. Officers taken prisoners shall receive the same rate of pay as officers of corresponding rank in the country where they are detained, the amount to be ultimately refunded by their own Government.

Art. 18. Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities.

Art. 19. The wills of prisoners of war are received or drawn up in the same way as for soldiers of the national army. The same rules shall be observed regarding death certificates as well as for the burial of prisoners of war, due regard being paid to their grade and rank.

Art. 20. After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.

CHAPTER III

The sick and wounded

Art. 21. The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention.

SECTION II HOSTILITIES

CHAPTER I

Means of injuring the enemy, sieges, and bombardments

Art. 22. The right of belligerents to adopt means of injuring the enemy is not unlimited.

Art. 23. In addition to the prohibitions provided by special Conventions, it is especially forbidden

- (a) To employ poison or poisoned weapons;
- (b) To kill or wound treacherously individuals belonging to the hostile nation or army;
- (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
- (d) To declare that no quarter will be given;
- (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering;
- (f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;
- (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;
- (h) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party. A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

Art. 24. Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.

Art. 25. The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

Art. 26. The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.

Art. 27. In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

Art. 28. The pillage of a town or place, even when taken by assault, is prohibited.

CHAPTER II

Spies

Art. 29. A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, entrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.

Art. 30. A spy taken in the act shall not be punished without previous trial.

Art. 31. A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.

CHAPTER III

Flags of truce

Art. 32. A person is regarded as a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag. He has a right to inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer and interpreter who may accompany him.

Art. 33. The commander to whom a parlementaire is sent is not in all cases obliged to receive him. He may take all the necessary steps to prevent the parlementaire taking advantage of his mission to obtain information.

In case of abuse, he has the right to detain the parlementaire temporarily.

Art. 34. The parlementaire loses his rights of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treason.

CHAPTER IV

Capitulations

Art. 35. Capitulations agreed upon between the Contracting Parties must take into account the rules of military honour.

Once settled, they must be scrupulously observed by both parties.

CHAPTER V

Armistices

Art. 36. An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

Art. 37. An armistice may be general or local. The first suspends the military operations of the belligerent States everywhere; the second only between certain fractions of the belligerent armies and within a fixed radius.

Art. 38. An armistice must be notified officially and in good time to the competent authorities and to the troops. Hostilities are suspended immediately after the notification, or on the date fixed.

Art. 39. It rests with the Contracting Parties to settle, in the terms of the armistice, what communications may be held in the theatre of war with the inhabitants and between the inhabitants of one belligerent State and those of the other.

Art. 40. Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

Art. 41. A violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders or, if necessary, compensation for the losses sustained.

SECTION III

MILITARY AUTHORITY OVER THE TERRITORY OF THE HOSTILE STATE

Art. 42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

Art. 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Art. 44. A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense.

Art. 45. It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.

Art. 46. Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.
Private property cannot be confiscated.

Art. 47. Pillage is formally forbidden.

Art. 48. If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.

Art. 49. If, in addition to the taxes mentioned in the above article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.

Art. 50. No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

Art. 51. No contribution shall be collected except under a written order, and on the responsibility of a commander-in-chief.

The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.

For every contribution a receipt shall be given to the contributors.

Art. 52. Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

Art. 53. An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

Art. 54. Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made.

Art. 55. The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Art. 56. The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), done at Geneva, 12 August 1949

Available at <http://www.icrc.org/ihl>.

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of establishing a Convention for the Protection of Civilian Persons in Time of War, have agreed as follows:

Part I. General Provisions

Article 1. The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Art. 2. In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Art. 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Art. 4. Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in application, as defined in Article 13.

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, shall not be considered as protected persons within the meaning of the present Convention.

Art. 5 Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

Art. 6. The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.

Art. 7. In addition to the agreements expressly provided for in Articles 11, 14, 15, 17, 36, 108, 109, 132, 133 and 149, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, not restrict the rights which it confers upon them.

Protected persons shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict.

Art. 8. Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.

Art. 9. The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention.

They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties.

Art. 10. The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief.

Art. 11. The High Contracting Parties may at any time agree to entrust to an international organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When persons protected by the present Convention do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power is occupied.

Whenever in the present Convention mention is made of a Protecting Power, such mention applies to substitute organizations in the sense of the present Article.

The provisions of this Article shall extend and be adapted to cases of nationals of a neutral State who are in occupied territory or who find themselves in the territory of a belligerent State in which the State of which they are nationals has not normal diplomatic representation.

Art. 12. In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for protected persons, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval

by the Parties to the conflict a person belonging to a neutral Power, or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

Part II. General Protection of Populations Against Certain Consequences of War

Art. 13. The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.

Art. 14. In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.

Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary.

The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospital and safety zones and localities.

Art. 15. Any Party to the conflict may, either direct or through a neutral State or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction:

- (a) wounded and sick combatants or non-combatants;
- (b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

When the Parties concerned have agreed upon the geographical position, administration, food supply and supervision of the proposed neutralized zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict. The agreement shall fix the beginning and the duration of the neutralization of the zone.

Art. 16. The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.

As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.

Art. 17. The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.

Art. 18. Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.

States which are Parties to a conflict shall provide all civilian hospitals with certificates showing that they are civilian hospitals and that the buildings which they occupy are not used for any purpose which would deprive these hospitals of protection in accordance with Article 19.

Civilian hospitals shall be marked by means of the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, but only if so authorized by the State.

The Parties to the conflict shall, in so far as military considerations permit, take the necessary steps to make the distinctive emblems indicating civilian hospitals clearly visible to the enemy land, air and naval forces in order to obviate the possibility of any hostile action.

In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives.

Art. 19. The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded.

The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants and not yet been handed to the proper service, shall not be considered to be acts harmful to the enemy.

Art. 20. Persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases shall be respected and protected.

In occupied territory and in zones of military operations, the above personnel shall be recognizable by means of an identity card certifying their status, bearing the photograph of the holder and embossed with the stamp of the responsible authority, and also by means of a stamped, water-resistant armband which they shall wear on the left arm while carrying out their duties. This armband shall be issued by the State and shall bear the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

Other personnel who are engaged in the operation and administration of civilian hospitals shall be entitled to respect and protection and to wear the armband, as provided in and under the conditions prescribed in this Article, while they are employed on such duties. The identity card shall state the duties on which they are employed.

The management of each hospital shall at all times hold at the disposal of the competent national or occupying authorities an up-to-date list of such personnel.

Art. 21. Convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases, shall be respected and protected in the same manner as the hospitals provided for in Article 18, and shall be marked, with the consent of the State, by the display of the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

Art. 22. Aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases or for the transport of medical personnel and equipment, shall not be attacked, but shall be respected while flying at heights, times and on routes specifically agreed upon between all the Parties to the conflict concerned.

They may be marked with the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

Unless agreed otherwise, flights over enemy or enemy occupied territory are prohibited.

Such aircraft shall obey every summons to land. In the event of a landing thus imposed, the aircraft with its occupants may continue its flight after examination, if any.

Art. 23. Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

- (a) that the consignments may be diverted from their destination,
- (b) that the control may not be effective, or
- (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.

Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.

Art.24. The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.

The Parties to the conflict shall facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards for the observance of the principles stated in the first paragraph.

They shall, furthermore, endeavour to arrange for all children under twelve to be identified by the wearing of identity discs, or by some other means.

Art. 25. All persons in the territory of a Party to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them. This correspondence shall be forwarded speedily and without undue delay.

If, as a result of circumstances, it becomes difficult or impossible to exchange family correspondence by the ordinary post, the Parties to the conflict concerned shall apply to a neutral intermediary, such as the Central Agency provided for in Article 140, and shall decide in consultation with it how to ensure the fulfilment of their obligations under the best possible conditions, in particular with the cooperation of the National Red Cross (Red Crescent, Red Lion and Sun) Societies.

If the Parties to the conflict deem it necessary to restrict family correspondence, such restrictions shall be confined to the compulsory use of standard forms containing twenty-five freely chosen words, and to the limitation of the number of these forms despatched to one each month.

Art. 26. Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.

Part III. Status and Treatment of Protected Persons

Section I. Provisions common to the territories of the parties to the conflict and to occupied territories

Art. 27. Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

Art. 28. The presence of a protected person may not be used to render certain points or areas immune from military operations.

Art. 29. The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.

Art. 30. Protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them.

These several organizations shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations.

Apart from the visits of the delegates of the Protecting Powers and of the International Committee of the Red Cross, provided for by Article 143, the Detaining or Occupying Powers shall facilitate, as much as possible, visits to protected persons by the representatives of other organizations whose object is to give spiritual aid or material relief to such persons.

Art. 31. No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.

Art. 32. The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

Art. 33. No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

Pillage is prohibited.

Reprisals against protected persons and their property are prohibited.

Art. 34. The taking of hostages is prohibited.

Section II. Aliens in the territory of a party to the conflict

Art. 35. All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State. The applications of such persons to leave shall be decided in accordance with regularly established procedures and the decision shall be taken as rapidly as possible. Those persons permitted to leave may provide themselves with the necessary funds for their journey and take with them a reasonable amount of their effects and articles of personal use.

If any such person is refused permission to leave the territory, he shall be entitled to have refusal reconsidered, as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.

Upon request, representatives of the Protecting Power shall, unless reasons of security prevent it, or the persons concerned object, be furnished with the reasons for refusal of any request for permission to leave the territory and be given, as expeditiously as possible, the names of all persons who have been denied permission to leave.

Art. 36. Departures permitted under the foregoing Article shall be carried out in satisfactory conditions as regards safety, hygiene, sanitation and food. All costs in connection therewith, from the point of exit in the territory of the Detaining Power, shall be borne by the country of destination, or, in the case of accommodation in a neutral country, by the Power whose nationals are benefited. The practical details of such movements may, if necessary, be settled by special agreements between the Powers concerned.

The foregoing shall not prejudice such special agreements as may be concluded between Parties to the conflict concerning the exchange and repatriation of their nationals in enemy hands.

Art. 37. Protected persons who are confined pending proceedings or serving a sentence involving loss of liberty, shall during their confinement be humanely treated.

As soon as they are released, they may ask to leave the territory in conformity with the foregoing Articles.

Art. 38. With the exception of special measures authorized by the present Convention, in particularly by Article 27 and 41 thereof, the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace. In any case, the following rights shall be granted to them:

- (1) they shall be enabled to receive the individual or collective relief that may be sent to them.
- (2) they shall, if their state of health so requires, receive medical attention and hospital treatment to the same extent as the nationals of the State concerned.
- (3) they shall be allowed to practise their religion and to receive spiritual assistance from ministers of their faith.
- (4) if they reside in an area particularly exposed to the dangers of war, they shall be authorized to move from that area to the same extent as the nationals of the State concerned.
- (5) children under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned.

Art. 39. Protected persons who, as a result of the war, have lost their gainful employment, shall be granted the opportunity to find paid employment. That opportunity shall, subject to security considerations and to the provisions of Article 40, be equal to that enjoyed by the nationals of the Power in whose territory they are.

Where a Party to the conflict applies to a protected person methods of control which result in his being unable to support himself, and especially if such a person is prevented for reasons of security from finding paid employment on reasonable conditions, the said Party shall ensure his support and that of his dependents.

Protected persons may in any case receive allowances from their home country, the Protecting Power, or the relief societies referred to in Article 30.

Art. 40. Protected persons may be compelled to work only to the same extent as nationals of the Party to the conflict in whose territory they are.

If protected persons are of enemy nationality, they may only be compelled to do work which is normally necessary to ensure the feeding, sheltering, clothing, transport and health of human beings and which is not directly related to the conduct of military operations.

In the cases mentioned in the two preceding paragraphs, protected persons compelled to work shall have the benefit of the same working conditions and of the same safeguards as national workers in particular as regards wages, hours of labour, clothing and equipment, previous training and compensation for occupational accidents and diseases.

If the above provisions are infringed, protected persons shall be allowed to exercise their right of complaint in accordance with Article 30.

Art. 41. Should the Power, in whose hands protected persons may be, consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43.

In applying the provisions of Article 39, second paragraph, to the cases of persons required to leave their usual places of residence by virtue of a decision placing them in assigned residence, by virtue of a decision placing them in assigned residence, elsewhere, the Detaining Power shall be guided as closely as possible by the standards of welfare set forth in Part III, Section IV of this Convention.

Art. 42. The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

Art. 43. Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.

Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence. The decisions of the courts or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power.

Art. 44. In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government.

Art. 45. Protected persons shall not be transferred to a Power which is not a party to the Convention.

This provision shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country of residence after the cessation of hostilities.

Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with.

In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law.

Art. 46. In so far as they have not been previously withdrawn, restrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities.

Restrictive measures affecting their property shall be cancelled, in accordance with the law of the Detaining Power, as soon as possible after the close of hostilities.

Section III. Occupied territories

Art. 47. Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

Art. 48. Protected persons who are not nationals of the Power whose territory is occupied, may avail themselves of the right to leave the territory subject to the provisions of Article 35, and decisions thereon shall be taken according to the procedure which the Occupying Power shall establish in accordance with the said Article.

Art. 49. Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

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

Art. 50. The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children.

The Occupying Power shall take all necessary steps to facilitate the identification of children and the registration of their parentage. It may not, in any case, change their personal status, nor enlist them in formations or organizations subordinate to it.

Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.

A special section of the Bureau set up in accordance with Article 136 shall be responsible for taking all necessary steps to identify children whose identity is in doubt. Particulars of their parents or other near relatives should always be recorded if available.

The Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers, and mothers of children under seven years.

Art. 51. The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.

The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. Protected

persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations. The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where they are performing compulsory labour.

The work shall be carried out only in the occupied territory where the persons whose services have been requisitioned are. Every such person shall, so far as possible, be kept in his usual place of employment. Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capacities. The legislation in force in the occupied country concerning working conditions, and safeguards as regards, in particular, such matters as wages, hours of work, equipment, preliminary training and compensation for occupational accidents and diseases, shall be applicable to the protected persons assigned to the work referred to in this Article.

In no case shall requisition of labour lead to a mobilization of workers in an organization of a military or semi-military character.

Art. 52. No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power's intervention.

All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited.

Art. 53. Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

Art. 54. The Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.

This prohibition does not prejudice the application of the second paragraph of Article 51. It does not affect the right of the Occupying Power to remove public officials from their posts.

Art. 55. To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods.

The Protecting Power shall, at any time, be at liberty to verify the state of the food and medical supplies in occupied territories, except where temporary restrictions are made necessary by imperative military requirements.

Art. 56. To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties.

If new hospitals are set up in occupied territory and if the competent organs of the occupied State are not operating there, the occupying authorities shall, if necessary, grant them the recognition provided for in Article 18. In similar circumstances, the occupying authorities shall also grant recognition to hospital personnel and transport vehicles under the provisions of Articles 20 and 21.

In adopting measures of health and hygiene and in their implementation, the Occupying Power shall take into consideration the moral and ethical susceptibilities of the population of the occupied territory.

Art. 57. The Occupying Power may requisition civilian hospitals of hospitals only temporarily and only in cases of urgent necessity for the care of military wounded and sick, and then on condition that suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation.

The material and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population.

Art. 58. The Occupying Power shall permit ministers of religion to give spiritual assistance to the members of their religious communities.

The Occupying Power shall also accept consignments of books and articles required for religious needs and shall facilitate their distribution in occupied territory.

Art. 59. If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.

Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.

A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.

Art. 60. Relief consignments shall in no way relieve the Occupying Power of any of its responsibilities under Articles 55, 56 and 59. The Occupying Power shall in no way whatsoever divert relief consignments from the purpose for which they are intended, except in cases of urgent necessity, in the interests of the population of the occupied territory and with the consent of the Protecting Power.

Art. 61. The distribution of the relief consignments referred to in the foregoing Articles shall be carried out with the cooperation and under the supervision of the Protecting Power. This duty may also be delegated, by agreement between the Occupying Power and the Protecting Power, to a neutral Power, to the International Committee of the Red Cross or to any other impartial humanitarian body.

Such consignments shall be exempt in occupied territory from all charges, taxes or customs duties unless these are necessary in the interests of the economy of the territory. The Occupying Power shall facilitate the rapid distribution of these consignments.

All Contracting Parties shall endeavour to permit the transit and transport, free of charge, of such relief consignments on their way to occupied territories.

Art. 62. Subject to imperative reasons of security, protected persons in occupied territories shall be permitted to receive the individual relief consignments sent to them.

Art. 63. Subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power:

- (a) recognized National Red Cross (Red Crescent, Red Lion and Sun) Societies shall be able to pursue their activities in accordance with Red Cross principles, as defined by the International Red Cross Conferences. Other relief societies shall be permitted to continue their humanitarian activities under similar conditions;
- (b) the Occupying Power may not require any changes in the personnel or structure of these societies, which would prejudice the aforesaid activities.

The same principles shall apply to the activities and personnel of special organizations of a non-military character, which already exist or which may be established, for the purpose of ensuring the living conditions of the civilian population by the maintenance of the essential public utility services, by the distribution of relief and by the organization of rescues.

Art. 64. The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.

Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

Art. 65. The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.

Art. 66. In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64 the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.

Art. 67. The courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence. They shall take into consideration the fact the accused is not a national of the Occupying Power.

Art. 68. Protected persons who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed. Furthermore, internment or imprisonment shall, for such offences, be the only measure adopted for depriving protected persons of liberty. The courts provided for under Article 66 of the present Convention may at their discretion convert a sentence of imprisonment to one of internment for the same period.

The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 may impose the death penalty against a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began.

The death penalty may not be pronounced against a protected person unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance.

In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offence.

Art. 69. In all cases the duration of the period during which a protected person accused of an offence is under arrest awaiting trial or punishment shall be deducted from any period of imprisonment of awarded.

Art. 70. Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.

Nationals of the occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.

Art. 71. No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial.

Accused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them, and shall be brought to trial as rapidly as possible. The Protecting Power shall be informed of all proceedings instituted by the Occupying Power against protected persons in respect of charges involving the death penalty or imprisonment for two years or more; it shall be enabled, at any time, to obtain information regarding the state of such proceedings. Furthermore, the Protecting Power shall be entitled, on request, to be furnished with all particulars of these and of any other proceedings instituted by the Occupying Power against protected persons.

The notification to the Protecting Power, as provided for in the second paragraph above, shall be sent immediately, and shall in any case reach the Protecting Power three weeks before the date of the first hearing. Unless, at the opening of the trial, evidence is submitted that the provisions of this Article are fully complied with, the trial shall not proceed. The notification shall include the following particulars:

- (a) description of the accused;
- (b) place of residence or detention;
- (c) specification of the charge or charges (with mention of the penal provisions under which it is brought);
- (d) designation of the court which will hear the case;
- (e) place and date of the first hearing.

Art. 72. Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence.

Failing a choice by the accused, the Protecting Power may provide him with an advocate or counsel. When an accused person has to meet a serious charge and the Protecting Power is not functioning, the Occupying Power, subject to the consent of the accused, shall provide an advocate or counsel.

Accused persons shall, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the hearing in court. They shall have the right at any time to object to the interpreter and to ask for his replacement.

Art.73. A convicted person shall have the right of appeal provided for by the laws applied by the court. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

The penal procedure provided in the present Section shall apply, as far as it is applicable, to appeals. Where the laws applied by the Court make no provision for appeals, the convicted person shall have the right to petition against the finding and sentence to the competent authority of the Occupying Power.

Art. 74. Representatives of the Protecting Power shall have the right to attend the trial of any protected person, unless the hearing has, as an exceptional measure, to be held in camera in the interests of the security of the Occupying Power, which shall then notify the Protecting Power. A notification in respect of the date and place of trial shall be sent to the Protecting Power.

Any judgement involving a sentence of death, or imprisonment for two years or more, shall be communicated, with the relevant grounds, as rapidly as possible to the Protecting Power. The notification shall contain a reference to the

notification made under Article 71 and, in the case of sentences of imprisonment, the name of the place where the sentence is to be served. A record of judgements other than those referred to above shall be kept by the court and shall be open to inspection by representatives of the Protecting Power. Any period allowed for appeal in the case of sentences involving the death penalty, or imprisonment of two years or more, shall not run until notification of judgement has been received by the Protecting Power.

Art. 75. In no case shall persons condemned to death be deprived of the right of petition for pardon or reprieve.

No death sentence shall be carried out before the expiration of a period of at least six months from the date of receipt by the Protecting Power of the notification of the final judgment confirming such death sentence, or of an order denying pardon or reprieve.

The six months period of suspension of the death sentence herein prescribed may be reduced in individual cases in circumstances of grave emergency involving an organized threat to the security of the Occupying Power or its forces, provided always that the Protecting Power is notified of such reduction and is given reasonable time and opportunity to make representations to the competent occupying authorities in respect of such death sentences.

Art. 76. Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein. They shall, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied country.

They shall receive the medical attention required by their state of health.

They shall also have the right to receive any spiritual assistance which they may require.

Women shall be confined in separate quarters and shall be under the direct supervision of women.

Proper regard shall be paid to the special treatment due to minors.

Protected persons who are detained shall have the right to be visited by delegates of the Protecting Power and of the International Committee of the Red Cross, in accordance with the provisions of Article 143.

Such persons shall have the right to receive at least one relief parcel monthly.

Art. 77. Protected persons who have been accused of offences or convicted by the courts in occupied territory, shall be handed over at the close of occupation, with the relevant records, to the authorities of the liberated territory.

Art. 78. If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

Section IV. Regulations for the treatment of internees

Chapter I. General provisions

Art. 79. The Parties to the conflict shall not intern protected persons, except in accordance with the provisions of Articles 41, 42, 43, 68 and 78.

Art. 80. Internees shall retain their full civil capacity and shall exercise such attendant rights as may be compatible with their status.

Art. 81. Parties to the conflict who intern protected persons shall be bound to provide free of charge for their maintenance, and to grant them also the medical attention required by their state of health.

No deduction from the allowances, salaries or credits due to the internees shall be made for the repayment of these costs.

The Detaining Power shall provide for the support of those dependent on the internees, if such dependents are without adequate means of support or are unable to earn a living.

Art.82. The Detaining Power shall, as far as possible, accommodate the internees according to their nationality, language and customs. Internees who are nationals of the same country shall not be separated merely because they have different languages.

Throughout the duration of their internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment, except when separation of a temporary nature is necessitated for reasons of employment or health or for the purposes of enforcement of the provisions of Chapter IX of the present Section. Internees may request that their children who are left at liberty without parental care shall be interned with them.

Wherever possible, interned members of the same family shall be housed in the same premises and given separate accommodation from other internees, together with facilities for leading a proper family life.

Chapter II. Places of Internment

Art. 83. The Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war.

The Detaining Power shall give the enemy Powers, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of places of internment.

Whenever military considerations permit, internment camps shall be indicated by the letters IC, placed so as to be clearly visible in the daytime from the air. The Powers concerned may, however, agree upon any other system of marking. No place other than an internment camp shall be marked as such.

Art.84. Internees shall be accommodated and administered separately from prisoners of war and from persons deprived of liberty for any other reason.

Art. 85. The Detaining Power is bound to take all necessary and possible measures to ensure that protected persons shall, from the outset of their internment, be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health, and provide efficient protection against the rigours of the climate and the effects of the war. In no case shall permanent places of internment be situated in unhealthy areas or in districts, the climate of which is injurious to the internees. In all cases where the district, in which a protected person is temporarily interned, is in an unhealthy area or has a climate which is harmful to his health, he shall be removed to a more suitable place of internment as rapidly as circumstances permit.

The premises shall be fully protected from dampness, adequately heated and lighted, in particular between dusk and lights out. The sleeping quarters shall be sufficiently spacious and well ventilated, and the internees shall have suitable bedding and sufficient blankets, account being taken of the climate, and the age, sex, and state of health of the internees.

Internees shall have for their use, day and night, sanitary conveniences which conform to the rules of hygiene, and are constantly maintained in a state of cleanliness. They shall be provided with sufficient water and soap for their daily personal toilet and for washing their personal laundry; installations and facilities necessary for this purpose

shall be granted to them. Showers or baths shall also be available. The necessary time shall be set aside for washing and for cleaning.

Whenever it is necessary, as an exceptional and temporary measure, to accommodate women internees who are not members of a family unit in the same place of internment as men, the provision of separate sleeping quarters and sanitary conveniences for the use of such women internees shall be obligatory.

Art. 86. The Detaining Power shall place at the disposal of interned persons, of whatever denomination, premises suitable for the holding of their religious services.

Art. 87. Canteens shall be installed in every place of internment, except where other suitable facilities are available. Their purpose shall be to enable internees to make purchases, at prices not higher than local market prices, of foodstuffs and articles of everyday use, including soap and tobacco, such as would increase their personal well-being and comfort.

Profits made by canteens shall be credited to a welfare fund to be set up for each place of internment, and administered for the benefit of the internees attached to such place of internment. The Internee Committee provided for in Article 102 shall have the right to check the management of the canteen and of the said fund.

When a place of internment is closed down, the balance of the welfare fund shall be transferred to the welfare fund of a place of internment for internees of the same nationality, or, if such a place does not exist, to a central welfare fund which shall be administered for the benefit of all internees remaining in the custody of the Detaining Power. In case of a general release, the said profits shall be kept by the Detaining Power, subject to any agreement to the contrary between the Powers concerned.

Art. 88. In all places of internment exposed to air raids and other hazards of war, shelters adequate in number and structure to ensure the necessary protection shall be installed. In case of alarms, the measures internees shall be free to enter such shelters as quickly as possible, excepting those who remain for the protection of their quarters against the aforesaid hazards. Any protective measures taken in favour of the population shall also apply to them.

All due precautions must be taken in places of internment against the danger of fire.

Chapter III. Food and Clothing

Art. 89. Daily food rations for internees shall be sufficient in quantity, quality and variety to keep internees in a good state of health and prevent the development of nutritional deficiencies. Account shall also be taken of the customary diet of the internees.

Internees shall also be given the means by which they can prepare for themselves any additional food in their possession.

Sufficient drinking water shall be supplied to internees. The use of tobacco shall be permitted.

Internees who work shall receive additional rations in proportion to the kind of labour which they perform.

Expectant and nursing mothers and children under fifteen years of age, shall be given additional food, in proportion to their physiological needs.

Art. 90. When taken into custody, internees shall be given all facilities to provide themselves with the necessary clothing, footwear and change of underwear, and later on, to procure further supplies if required. Should any internees not have sufficient clothing, account being taken of the climate, and be unable to procure any, it shall be provided free of charge to them by the Detaining Power.

The clothing supplied by the Detaining Power to internees and the outward markings placed on their own clothes shall not be ignominious nor expose them to ridicule.

Workers shall receive suitable working outfits, including protective clothing, whenever the nature of their work so requires.

Chapter IV. Hygiene and Medical Attention

Art. 91. Every place of internment shall have an adequate infirmary, under the direction of a qualified doctor, where internees may have the attention they require, as well as an appropriate diet. Isolation wards shall be set aside for cases of contagious or mental diseases.

Maternity cases and internees suffering from serious diseases, or whose condition requires special treatment, a surgical operation or hospital care, must be admitted to any institution where adequate treatment can be given and shall receive care not inferior to that provided for the general population.

Internees shall, for preference, have the attention of medical personnel of their own nationality.

Internees may not be prevented from presenting themselves to the medical authorities for examination. The medical authorities of the Detaining Power shall, upon request, issue to every internee who has undergone treatment an official certificate showing the nature of his illness or injury, and the duration and nature of the treatment given. A duplicate of this certificate shall be forwarded to the Central Agency provided for in Article 140.

Treatment, including the provision of any apparatus necessary for the maintenance of internees in good health, particularly dentures and other artificial appliances and spectacles, shall be free of charge to the internee.

Art. 92. Medical inspections of internees shall be made at least once a month. Their purpose shall be, in particular, to supervise the general state of health, nutrition and cleanliness of internees, and to detect contagious diseases, especially tuberculosis, malaria, and venereal diseases. Such inspections shall include, in particular, the checking of weight of each internee and, at least once a year, radioscopic examination.

Chapter V. Religious, Intellectual and Physical Activities

Art. 93. Internees shall enjoy complete latitude in the exercise of their religious duties, including attendance at the services of their faith, on condition that they comply with the disciplinary routine prescribed by the detaining authorities.

Ministers of religion who are interned shall be allowed to minister freely to the members of their community. For this purpose the Detaining Power shall ensure their equitable allocation amongst the various places of internment in which there are internees speaking the same language and belonging to the same religion. Should such ministers be too few in number, the Detaining Power shall provide them with the necessary facilities, including means of transport, for moving from one place to another, and they shall be authorized to visit any internees who are in hospital. Ministers of religion shall be at liberty to correspond on matters concerning their ministry with the religious authorities in the country of detention and, as far as possible, with the international religious organizations of their faith. Such correspondence shall not be considered as forming a part of the quota mentioned in Article 107. It shall, however, be subject to the provisions of Article 112.

When internees do not have at their disposal the assistance of ministers of their faith, or should these latter be too few in number, the local religious authorities of the same faith may appoint, in agreement with the Detaining Power, a minister of the internees' faith or, if such a course is feasible from a denominational point of view, a minister of similar religion or a qualified layman. The latter shall enjoy the facilities granted to the ministry he has assumed. Persons so appointed shall comply with all regulations laid down by the Detaining Power in the interests of discipline and security.

Art. 94. The Detaining Power shall encourage intellectual, educational and recreational pursuits, sports and games amongst internees, whilst leaving them free to take part in them or not. It shall take all practicable measures to ensure the exercise thereof, in particular by providing suitable premises.

All possible facilities shall be granted to internees to continue their studies or to take up new subjects. The education of children and young people shall be ensured; they shall be allowed to attend schools either within the place of internment or outside.

Internees shall be given opportunities for physical exercise, sports and outdoor games. For this purpose, sufficient open spaces shall be set aside in all places of internment. Special playgrounds shall be reserved for children and young people.

Art. 95. The Detaining Power shall not employ internees as workers, unless they so desire. Employment which, if undertaken under compulsion by a protected person not in internment, would involve a breach of Articles 40 or 51 of the present Convention, and employment on work which is of a degrading or humiliating character are in any case prohibited.

After a working period of six weeks, internees shall be free to give up work at any moment, subject to eight days' notice.

These provisions constitute no obstacle to the right of the Detaining Power to employ interned doctors, dentists and other medical personnel in their professional capacity on behalf of their fellow internees, or to employ internees for administrative and maintenance work in places of internment and to detail such persons for work in the kitchens or for other domestic tasks, or to require such persons to undertake duties connected with the protection of internees against aerial bombardment or other war risks. No internee may, however, be required to perform tasks for which he is, in the opinion of a medical officer, physically unsuited.

The Detaining Power shall take entire responsibility for all working conditions, for medical attention, for the payment of wages, and for ensuring that all employed internees receive compensation for occupational accidents and diseases. The standards prescribed for the said working conditions and for compensation shall be in accordance with the national laws and regulations, and with the existing practice; they shall in no case be inferior to those obtaining for work of the same nature in the same district. Wages for work done shall be determined on an equitable basis by special agreements between the internees, the Detaining Power, and, if the case arises, employers other than the Detaining Power to provide for free maintenance of internees and for the medical attention which their state of health may require. Internees permanently detailed for categories of work mentioned in the third paragraph of this Article, shall be paid fair wages by the Detaining Power. The working conditions and the scale of compensation for occupational accidents and diseases to internees, thus detailed, shall not be inferior to those applicable to work of the same nature in the same district.

Art.96. All labour detachments shall remain part of and dependent upon a place of internment. The competent authorities of the Detaining Power and the commandant of a place of internment shall be responsible for the observance in a labour detachment of the provisions of the present Convention. The commandant shall keep an up-to-date list of the labour detachments subordinate to him and shall communicate it to the delegates of the Protecting Power, of the International Committee of the Red Cross and of other humanitarian organizations who may visit the places of internment.

Chapter VI. Personal Property and Financial Resources

Art. 97. Internees shall be permitted to retain articles of personal use. Monies, cheques, bonds, etc., and valuables in their possession may not be taken from them except in accordance with established procedure. Detailed receipts shall be given therefor.

The amounts shall be paid into the account of every internee as provided for in Article 98. Such amounts may not be converted into any other currency unless legislation in force in the territory in which the owner is interned so requires or the internee gives his consent.

Articles which have above all a personal or sentimental value may not be taken away.

A woman internee shall not be searched except by a woman.

On release or repatriation, internees shall be given all articles, monies or other valuables taken from them during internment and shall receive in currency the balance of any credit to their accounts kept in accordance with Article 98, with the exception of any articles or amounts withheld by the Detaining Power by virtue of its legislation in force. If the property of an internee is so withheld, the owner shall receive a detailed receipt.

Family or identity documents in the possession of internees may not be taken away without a receipt being given. At no time shall internees be left without identity documents. If they have none, they shall be issued with special documents drawn up by the detaining authorities, which will serve as their identity papers until the end of their internment.

Internees may keep on their persons a certain amount of money, in cash or in the shape of purchase coupons, to enable them to make purchases.

Art. 98. All internees shall receive regular allowances, sufficient to enable them to purchase goods and articles, such as tobacco, toilet requisites, etc. Such allowances may take the form of credits or purchase coupons.

Furthermore, internees may receive allowances from the Power to which they owe allegiance, the Protecting Powers, the organizations which may assist them, or their families, as well as the income on their property in accordance with the law of the Detaining Power. The amount of allowances granted by the Power to which they owe allegiance shall be the same for each category of internees (infirm, sick, pregnant women, etc.) but may not be allocated by that Power or distributed by the Detaining Power on the basis of discriminations between internees which are prohibited by Article 27 of the present Convention.

The Detaining Power shall open a regular account for every internee, to which shall be credited the allowances named in the present Article, the wages earned and the remittances received, together with such sums taken from him as may be available under the legislation in force in the territory in which he is interned. Internees shall be granted all facilities consistent with the legislation in force in such territory to make remittances to their families and to other dependants. They may draw from their accounts the amounts necessary for their personal expenses, within the limits fixed by the Detaining Power. They shall at all times be afforded reasonable facilities for consulting and obtaining copies of their accounts. A statement of accounts shall be furnished to the Protecting Power, on request, and shall accompany the internee in case of transfer.

Chapter VII. Administration and Discipline

Art. 99. Every place of internment shall be put under the authority of a responsible officer, chosen from the regular military forces or the regular civil administration of the Detaining Power. The officer in charge of the place of internment must have in his possession a copy of the present Convention in the official language, or one of the official languages, of his country and shall be responsible for its application. The staff in control of internees shall be instructed in the provisions of the present Convention and of the administrative measures adopted to ensure its application.

The text of the present Convention and the texts of special agreements concluded under the said Convention shall be posted inside the place of internment, in a language which the internees understand, or shall be in the possession of the Internee Committee.

Regulations, orders, notices and publications of every kind shall be communicated to the internees and posted inside the places of internment, in a language which they understand.

Every order and command addressed to internees individually must, likewise, be given in a language which they understand.

Art. 100. The disciplinary regime in places of internment shall be consistent with humanitarian principles, and shall in no circumstances include regulations imposing on internees any physical exertion dangerous to their health or involving physical or moral victimization. Identification by tattooing or imprinting signs or markings on the body, is prohibited.

In particular, prolonged standing and roll-calls, punishment drill, military drill and manoeuvres, or the reduction of food rations, are prohibited.

Art. 101. Internees shall have the right to present to the authorities in whose power they are, any petition with regard to the conditions of internment to which they are subjected.

They shall also have the right to apply without restriction through the Internee Committee or, if they consider it necessary, direct to the representatives of the Protecting Power, in order to indicate to them any points on which they may have complaints to make with regard to the conditions of internment.

Such petitions and complaints shall be transmitted forthwith and without alteration, and even if the latter are recognized to be unfounded, they may not occasion any punishment.

Periodic reports on the situation in places of internment and as to the needs of the internees may be sent by the Internee Committees to the representatives of the Protecting Powers.

Art. 102. In every place of internment, the internees shall freely elect by secret ballot every six months, the members of a Committee empowered to represent them before the Detaining and the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them. The members of the Committee shall be eligible for re-election.

Internees so elected shall enter upon their duties after their election has been approved by the detaining authorities. The reasons for any refusals or dismissals shall be communicated to the Protecting Powers concerned.

Art. 103. The Internee Committees shall further the physical, spiritual and intellectual well-being of the internees.

In case the internees decide, in particular, to organize a system of mutual assistance amongst themselves, this organization would be within the competence of the Committees in addition to the special duties entrusted to them under other provisions of the present Convention.

Art. 104. Members of Internee Committees shall not be required to perform any other work, if the accomplishment of their duties is rendered more difficult thereby.

Members of Internee Committees may appoint from amongst the internees such assistants as they may require. All material facilities shall be granted to them, particularly a certain freedom of movement necessary for the accomplishment of their duties (visits to labour detachments, receipt of supplies, etc.).

All facilities shall likewise be accorded to members of Internee Committees for communication by post and telegraph with the detaining authorities, the Protecting Powers, the International Committee of the Red Cross and their delegates, and with the organizations which give assistance to internees. Committee members in labour detachments shall enjoy similar facilities for communication with their Internee Committee in the principal place of internment. Such communications shall not be limited, nor considered as forming a part of the quota mentioned in Article 107.

Members of Internee Committees who are transferred shall be allowed a reasonable time to acquaint their successors with current affairs.

Chaper VIII. Relations with the Exterior

Art. 105. Immediately upon interning protected persons, the Detaining Powers shall inform them, the Power to which they owe allegiance and their Protecting Power of the measures taken for executing the provisions of the present Chapter. The Detaining Powers shall likewise inform the Parties concerned of any subsequent modifications of such measures.

Art. 106. As soon as he is interned, or at the latest not more than one week after his arrival in a place of internment, and likewise in cases of sickness or transfer to another place of internment or to a hospital, every internee shall be

enabled to send direct to his family, on the one hand, and to the Central Agency provided for by Article 140, on the other, an internment card similar, if possible, to the model annexed to the present Convention, informing his relatives of his detention, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any way.

Art. 107. Internees shall be allowed to send and receive letters and cards. If the Detaining Power deems it necessary to limit the number of letters and cards sent by each internee, the said number shall not be less than two letters and four cards monthly; these shall be drawn up so as to conform as closely as possible to the models annexed to the present Convention. If limitations must be placed on the correspondence addressed to internees, they may be ordered only by the Power to which such internees owe allegiance, possibly at the request of the Detaining Power. Such letters and cards must be conveyed with reasonable despatch; they may not be delayed or retained for disciplinary reasons.

Internees who have been a long time without news, or who find it impossible to receive news from their relatives, or to give them news by the ordinary postal route, as well as those who are at a considerable distance from their homes, shall be allowed to send telegrams, the charges being paid by them in the currency at their disposal. They shall likewise benefit by this provision in cases which are recognized to be urgent.

As a rule, internees' mail shall be written in their own language. The Parties to the conflict may authorize correspondence in other languages.

Art. 108. Internees shall be allowed to receive, by post or by any other means, individual parcels or collective shipments containing in particular foodstuffs, clothing, medical supplies, as well as books and objects of a devotional, educational or recreational character which may meet their needs. Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.

Should military necessity require the quantity of such shipments to be limited, due notice thereof shall be given to the Protecting Power and to the International Committee of the Red Cross, or to any other organization giving assistance to the internees and responsible for the forwarding of such shipments.

The conditions for the sending of individual parcels and collective shipments shall, if necessary, be the subject of special agreements between the Powers concerned, which may in no case delay the receipt by the internees of relief supplies. Parcels of clothing and foodstuffs may not include books. Medical relief supplies shall, as a rule, be sent in collective parcels.

Art. 109. In the absence of special agreements between Parties to the conflict regarding the conditions for the receipt and distribution of collective relief shipments, the regulations concerning collective relief which are annexed to the present Convention shall be applied.

The special agreements provided for above shall in no case restrict the right of Internee Committees to take possession of collective relief shipments intended for internees, to undertake their distribution and to dispose of them in the interests of the recipients. Nor shall such agreements restrict the right of representatives of the Protecting Powers, the International Committee of the Red Cross, or any other organization giving assistance to internees and responsible for the forwarding of collective shipments, to supervise their distribution to the recipients.

Art. 110. An relief shipments for internees shall be exempt from import, customs and other dues.

All matter sent by mail, including relief parcels sent by parcel post and remittances of money, addressed from other countries to internees or despatched by them through the post office, either direct or through the Information Bureaux provided for in Article 136 and the Central Information Agency provided for in Article 140, shall be exempt from all postal dues both in the countries of origin and destination and in intermediate countries. To this end, in particular, the exemption provided by the Universal Postal Convention of 1947 and by the agreements of the Universal Postal Union in favour of civilians of enemy nationality detained in camps or civilian prisons, shall be extended to the other interned persons protected by the present Convention. The countries not signatory to the above-mentioned agreements shall be bound to grant freedom from charges in the same circumstances.

The cost of transporting relief shipments which are intended for internees and which, by reason of their weight or any other cause, cannot be sent through the post office, shall be borne by the Detaining Power in all the territories under its control. Other Powers which are Parties to the present Convention shall bear the cost of transport in their respective territories.

Costs connected with the transport of such shipments, which are not covered by the above paragraphs, shall be charged to the senders.

The High Contracting Parties shall endeavour to reduce, so far as possible, the charges for telegrams sent by internees, or addressed to them.

Art. 111. Should military operations prevent the Powers concerned from fulfilling their obligation to ensure the conveyance of the mail and relief shipments provided for in Articles 106, 107, 108 and 113, the Protecting Powers concerned, the International Committee of the Red Cross or any other organization duly approved by the Parties to the conflict may undertake the conveyance of such shipments by suitable means (rail, motor vehicles, vessels or aircraft, etc.). For this purpose, the High Contracting Parties shall endeavour to supply them with such transport, and to allow its circulation, especially by granting the necessary safe-conducts.

Such transport may also be used to convey:

- (a) correspondence, lists and reports exchanged between the Central Information Agency referred to in Article 140 and the National Bureaux referred to in Article 136;
- (b) correspondence and reports relating to internees which the Protecting Powers, the International Committee of the Red Cross or any other organization assisting the internees exchange either with their own delegates or with the Parties to the conflict.

These provisions in no way detract from the right of any Party to the conflict to arrange other means of transport if it should so prefer, nor preclude the granting of safe-conducts, under mutually agreed conditions, to such means of transport.

The costs occasioned by the use of such means of transport shall be borne, in proportion to the importance of the shipments, by the Parties to the conflict whose nationals are benefited thereby.

Art. 112. The censoring of correspondence addressed to internees or despatched by them shall be done as quickly as possible.

The examination of consignments intended for internees shall not be carried out under conditions that will expose the goods contained in them to deterioration. It shall be done in the presence of the addressee, or of a fellow-internee duly delegated by him. The delivery to internees of individual or collective consignments shall not be delayed under the pretext of difficulties of censorship.

Any prohibition of correspondence ordered by the Parties to the conflict either for military or political reasons, shall be only temporary and its duration shall be as short as possible.

Art. 113. The Detaining Powers shall provide all reasonable execution facilities for the transmission, through the Protecting Power or the Central Agency provided for in Article 140, or as otherwise required, of wills, powers of attorney, letters of authority, or any other documents intended for internees or despatched by them.

In all cases the Detaining Powers shall facilitate the execution and authentication in due legal form of such documents on behalf of internees, in particular by allowing them to consult a lawyer.

Art. 114. The Detaining Power shall afford internees all facilities to enable them to manage their property, provided this is not incompatible with the conditions of internment and the law which is applicable. For this purpose, the said Power may give them permission to leave the place of internment in urgent cases and if circumstances allow.

Art. 115. In all cases where an internee is a party to proceedings in any court, the Detaining Power shall, if he so requests, cause the court to be informed of his detention and shall, within legal limits, ensure that all necessary steps

are taken to prevent him from being in any way prejudiced, by reason of his internment, as regards the preparation and conduct of his case or as regards the execution of any judgment of the court.

Art. 116. Every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible.

As far as is possible, internees shall be permitted to visit their homes in urgent cases, particularly in cases of death or serious illness of relatives.

Chapter IX. Penal and Disciplinary Sanctions

Art. 117. Subject to the provisions of the present Chapter, the laws in force in the territory in which they are detained will continue to apply to internees who commit offences during internment.

If general laws, regulations or orders declare acts committed by internees to be punishable, whereas the same acts are not punishable when committed by persons who are not internees, such acts shall entail disciplinary punishments only.

No internee may be punished more than once for the same act, or on the same count.

Art. 118. The courts or authorities shall in passing sentence take as far as possible into account the fact that the defendant is not a national of the Detaining Power. They shall be free to reduce the penalty prescribed for the offence with which the internee is charged and shall not be obliged, to this end, to apply the minimum sentence prescribed.

Imprisonment in premises without daylight, and, in general, all forms of cruelty without exception are forbidden.

Internees who have served disciplinary or judicial sentences shall not be treated differently from other internees.

The duration of preventive detention undergone by an internee shall be deducted from any disciplinary or judicial penalty involving confinement to which he may be sentenced.

Internee Committees shall be informed of all judicial proceedings instituted against internees whom they represent, and of their result.

Art. 119. The disciplinary punishments applicable to internees shall be the following:

- (1) a fine which shall not exceed 50 per cent of the wages which the internee would otherwise receive under the provisions of Article 95 during a period of not more than thirty days.
- (2) discontinuance of privileges granted over and above the treatment provided for by the present Convention
- (3) fatigue duties, not exceeding two hours daily, in connection with the maintenance of the place of internment.
- (4) confinement.

In no case shall disciplinary penalties be inhuman, brutal or dangerous for the health of internees. Account shall be taken of the internee's age, sex and state of health.

The duration of any single punishment shall in no case exceed a maximum of thirty consecutive days, even if the internee is answerable for several breaches of discipline when his case is dealt with, whether such breaches are connected or not.

Art. 120. Internees who are recaptured after having escaped or when attempting to escape, shall be liable only to disciplinary punishment in respect of this act, even if it is a repeated offence.

Article 118, paragraph 3, notwithstanding, internees punished as a result of escape or attempt to escape, may be subjected to special surveillance, on condition that such surveillance does not affect the state of their health, that it is exercised in a place of internment and that it does not entail the abolition of any of the safeguards granted by the present Convention.

Internees who aid and abet an escape or attempt to escape, shall be liable on this count to disciplinary punishment only.

Art. 121. Escape, or attempt to escape, even if it is a repeated offence, shall not be deemed an aggravating circumstance in cases where an internee is prosecuted for offences committed during his escape.

The Parties to the conflict shall ensure that the competent authorities exercise leniency in deciding whether punishment inflicted for an offence shall be of a disciplinary or judicial nature, especially in respect of acts committed in connection with an escape, whether successful or not.

Art. 122. Acts which constitute offences against discipline shall be investigated immediately. This rule shall be applied, in particular, in cases of escape or attempt to escape. Recaptured internees shall be handed over to the competent authorities as soon as possible.

In cases of offences against discipline, confinement awaiting trial shall be reduced to an absolute minimum for all internees, and shall not exceed fourteen days. Its duration shall in any case be deducted from any sentence of confinement.

The provisions of Articles 124 and 125 shall apply to internees who are in confinement awaiting trial for offences against discipline.

Art. 123. Without prejudice to the competence of courts and higher authorities, disciplinary punishment may be ordered only by the commandant of the place of internment, or by a responsible officer or official who replaces him, or to whom he has delegated his disciplinary powers.

Before any disciplinary punishment is awarded, the accused internee shall be given precise information regarding the offences of which he is accused, and given an opportunity of explaining his conduct and of defending himself. He shall be permitted, in particular, to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter. The decision shall be announced in the presence of the accused and of a member of the Internee Committee.

The period elapsing between the time of award of a disciplinary punishment and its execution shall not exceed one month.

When an internee is awarded a further disciplinary punishment, a period of at least three days shall elapse between the execution of any two of the punishments, if the duration of one of these is ten days or more.

A record of disciplinary punishments shall be maintained by the commandant of the place of internment and shall be open to inspection by representatives of the Protecting Power.

Art. 124. Internees shall not in any case be transferred to penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) to undergo disciplinary punishment therein.

The premises in which disciplinary punishments are undergone shall conform to sanitary requirements: they shall in particular be provided with adequate bedding. Internees undergoing punishment shall be enabled to keep themselves in a state of cleanliness.

Women internees undergoing disciplinary punishment shall be confined in separate quarters from male internees and shall be under the immediate supervision of women.

Art. 125. Internees awarded disciplinary punishment shall be allowed to exercise and to stay in the open air at least two hours daily.

They shall be allowed, if they so request, to be present at the daily medical inspections. They shall receive the attention which their state of health requires and, if necessary, shall be removed to the infirmary of the place of internment or to a hospital.

They shall have permission to read and write, likewise to send and receive letters. Parcels and remittances of money, however, may be withheld from them until the completion of their punishment; such consignments shall meanwhile be entrusted to the Internee Committee, who will hand over to the infirmary the perishable goods contained in the parcels.

No internee given a disciplinary punishment may be deprived of the benefit of the provisions of Articles 107 and 143 of the present Convention.

Art. 126. The provisions of Articles 71 to 76 inclusive shall apply, by analogy, to proceedings against internees who are in the national territory of the Detaining Power.

Chapter X. Transfers of Internees

Art. 127. The transfer of internees shall always be effected humanely. As a general rule, it shall be carried out by rail or other means of transport, and under conditions at least equal to those obtaining for the forces of the Detaining Power in their changes of station. If, as an exceptional measure, such removals have to be effected on foot, they may not take place unless the internees are in a fit state of health, and may not in any case expose them to excessive fatigue.

The Detaining Power shall supply internees during transfer with drinking water and food sufficient in quantity, quality and variety to maintain them in good health, and also with the necessary clothing, adequate shelter and the necessary medical attention. The Detaining Power shall take all suitable precautions to ensure their safety during transfer, and shall establish before their departure a complete list of all internees transferred.

Sick, wounded or infirm internees and maternity cases shall not be transferred if the journey would be seriously detrimental to them, unless their safety imperatively so demands.

If the combat zone draws close to a place of internment, the internees in the said place shall not be transferred unless their removal can be carried out in adequate conditions of safety, or unless they are exposed to greater risks by remaining on the spot than by being transferred.

When making decisions regarding the transfer of internees, the Detaining Power shall take their interests into account and, in particular, shall not do anything to increase the difficulties of repatriating them or returning them to their own homes.

Art. 128. In the event of transfer, internees shall be officially advised of their departure and of their new postal address. Such notification shall be given in time for them to pack their luggage and inform their next of kin.

They shall be allowed to take with them their personal effects, and the correspondence and parcels which have arrived for them. The weight of such baggage may be limited if the conditions of transfer so require, but in no case to less than twenty-five kilograms per internee.

Mail and parcels addressed to their former place of internment shall be forwarded to them without delay.

The commandant of the place of internment shall take, in agreement with the Internee Committee, any measures needed to ensure the transport of the internees' community property and of the luggage the internees are unable to take with them in consequence of restrictions imposed by virtue of the second paragraph.

Chapter XI. Deaths

Art. 129. The wills of internees shall be received for safe-keeping by the responsible authorities; and if the event of the death of an internee his will shall be transmitted without delay to a person whom he has previously designated. Deaths of internees shall be certified in every case by a doctor, and a death certificate shall be made out, showing the causes of death and the conditions under which it occurred.

An official record of the death, duly registered, shall be drawn up in accordance with the procedure relating thereto in force in the territory where the place of internment is situated, and a duly certified copy of such record shall be transmitted without delay to the Protecting Power as well as to the Central Agency referred to in Article 140.

Art. 130. The detaining authorities shall ensure that internees who die while interned are honourably buried, if possible according to the rites of the religion to which they belonged and that their graves are respected, properly maintained, and marked in such a way that they can always be recognized.

Deceased internees shall be buried in individual graves unless unavoidable circumstances require the use of collective graves. Bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his expressed wish to this effect. In case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased. The ashes shall be retained for safe-keeping by the detaining authorities and shall be transferred as soon as possible to the next of kin on their request.

As soon as circumstances permit, and not later than the close of hostilities, the Detaining Power shall forward lists of graves of deceased internees to the Powers on whom deceased internees depended, through the Information Bureaux provided for in Article 136. Such lists shall include all particulars necessary for the identification of the deceased internees, as well as the exact location of their graves.

Art. 131. Every death or serious injury of an internee, caused or suspected to have been caused by a sentry, another internee or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power.

A communication on this subject shall be sent immediately to the Protecting Power. The evidence of any witnesses shall be taken, and a report including such evidence shall be prepared and forwarded to the said Protecting Power.

If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all necessary steps to ensure the prosecution of the person or persons responsible.

Chapter XIII. Release, Repatriation and Accommodation in Neutral Countries

Art. 132. Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.

The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.

Art. 133. Internment shall cease as soon as possible after the close of hostilities.

Internees in the territory of a Party to the conflict against whom penal proceedings are pending for offences not exclusively subject to disciplinary penalties, may be detained until the close of such proceedings and, if circumstances require, until the completion of the penalty. The same shall apply to internees who have been previously sentenced to a punishment depriving them of liberty.

By agreement between the Detaining Power and the Powers concerned, committees may be set up after the close of hostilities, or of the occupation of territories, to search for dispersed internees.

Art. 134. The High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation.

Art. 135. The Detaining Power shall bear the expense of returning released internees to the places where they were residing when interned, or, if it took them into custody while they were in transit or on the high seas, the cost of completing their journey or of their return to their point of departure.

Where a Detaining Power refuses permission to reside in its territory to a released internee who previously had his permanent domicile therein, such Detaining Power shall pay the cost of the said internee's repatriation. If, however, the internee elects to return to his country on his own responsibility or in obedience to the Government of the Power to which he owes allegiance, the Detaining Power need not pay the expenses of his journey beyond the point of his departure from its territory. The Detaining Power need not pay the cost of repatriation of an internee who was interned at his own request.

If internees are transferred in accordance with Article 45, the transferring and receiving Powers shall agree on the portion of the above costs to be borne by each.

The foregoing shall not prejudice such special agreements as may be concluded between Parties to the conflict concerning the exchange and repatriation of their nationals in enemy hands.

Section V. Information Bureaux and Central Agency

Art. 136. Upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall establish an official Information Bureau responsible for receiving and transmitting information in respect of the protected persons who are in its power.

Each of the Parties to the conflict shall, within the shortest possible period, give its Bureau information of any measure taken by it concerning any protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned. It shall, furthermore, require its various departments concerned with such matters to provide the aforesaid Bureau promptly with information concerning all changes pertaining to these protected persons, as, for example, transfers, releases, repatriations, escapes, admittances to hospitals, births and deaths.

Art. 137. Each national Bureau shall immediately forward information concerning protected persons by the most rapid means to the Powers in whose territory they resided, through the intermediary of the Protecting Powers and likewise through the Central Agency provided for in Article 140. The Bureaux shall also reply to all enquiries which may be received regarding protected persons.

Information Bureaux shall transmit information concerning a protected person unless its transmission might be detrimental to the person concerned or to his or her relatives. Even in such a case, the information may not be withheld from the Central Agency which, upon being notified of the circumstances, will take the necessary precautions indicated in Article 140.

All communications in writing made by any Bureau shall be authenticated by a signature or a seal.

Art. 138. The information received by the national Bureau and transmitted by it shall be of such a character as to make it possible to identify the protected person exactly and to advise his next of kin quickly. The information in respect of each person shall include at least his surname, first names, place and date of birth, nationality last residence and distinguishing characteristics, the first name of the father and the maiden name of the mother, the date, place and nature of the action taken with regard to the individual, the address at which correspondence may be sent to him and the name and address of the person to be informed.

Likewise, information regarding the state of health of internees who are seriously ill or seriously wounded shall be supplied regularly and if possible every week.

Art. 139. Each national Information Bureau shall, furthermore, be responsible for collecting all personal valuables left by protected persons mentioned in Article 136, in particular those who have been repatriated or released, or who have escaped or died; it shall forward the said valuables to those concerned, either direct, or, if necessary, through the Central Agency. Such articles shall be sent by the Bureau in sealed packets which shall be accompanied by statements giving clear and full identity particulars of the person to whom the articles belonged, and by a complete list of the contents of the parcel. Detailed records shall be maintained of the receipt and despatch of all such valuables.

Art. 140. A Central Information Agency for protected persons, in particular for internees, shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of such an Agency, which may be the same as that provided for in Article 123 of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

The function of the Agency shall be to collect all information of the type set forth in Article 136 which it may obtain through official or private channels and to transmit it as rapidly as possible to the countries of origin or of residence of the persons concerned, except in cases where such transmissions might be detrimental to the persons whom the said information concerns, or to their relatives. It shall receive from the Parties to the conflict all reasonable facilities for effecting such transmissions.

The High Contracting Parties, and in particular those whose nationals benefit by the services of the Central Agency, are requested to give the said Agency the financial aid it may require.

The foregoing provisions shall in no way be interpreted as restricting the humanitarian activities of the International Committee of the Red Cross and of the relief Societies described in Article 142.

Art. 141. The national Information Bureaux and the Central Information Agency shall enjoy free postage for all mail, likewise the exemptions provided for in Article 110, and further, so far as possible, exemption from telegraphic charges or, at least, greatly reduced rates.

Part IV. Execution of the Convention

Section I. General Provisions

Art. 142. Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet any other reasonable need, the representatives of religious organizations, relief societies, or any other organizations assisting the protected persons, shall receive from these Powers, for themselves or their duly accredited agents, all facilities for visiting the protected persons, for distributing relief supplies and material from any source, intended for educational, recreational or religious purposes, or for assisting them in organizing their leisure time within the places of internment. Such societies or organizations may be constituted in the territory of the Detaining Power, or in any other country, or they may have an international character.

The Detaining Power may limit the number of societies and organizations whose delegates are allowed to carry out their activities in its territory and under its supervision, on condition, however, that such limitation shall not hinder the supply of effective and adequate relief to all protected persons.

The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times.

Art. 143. Representatives or delegates of the Protecting Powers shall have permission to go to all places where protected persons are, particularly to places of internment, detention and work.

They shall have access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter.

Such visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure. Their duration and frequency shall not be restricted.

Such representatives and delegates shall have full liberty to select the places they wish to visit. The Detaining or Occupying Power, the Protecting Power and when occasion arises the Power of origin of the persons to be visited, may agree that compatriots of the internees shall be permitted to participate in the visits.

The delegates of the International Committee of the Red Cross shall also enjoy the above prerogatives. The appointment of such delegates shall be submitted to the approval of the Power governing the territories where they will carry out their duties.

Art. 144. The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population.

Any civilian, military, police or other authorities, who in time of war assume responsibilities in respect of protected persons, must possess the text of the Convention and be specially instructed as to its provisions.

Art. 145. The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.

Art. 146. The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

Art. 147. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Art. 148. No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

Art. 149. At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

Section II. Final Provisions

Art. 150. The present Convention is established in English and in French. Both texts are equally authentic.

The Swiss Federal Council shall arrange for official translations of the Convention to be made in the Russian and Spanish languages.

Art. 151. The present Convention, which bears the date of this day, is open to signature until 12 February 1950, in the name of the Powers represented at the Conference which opened at Geneva on 21 April 1949.

Art. 152. The present Convention shall be ratified as soon as possible and the ratifications shall be deposited at Berne.

A record shall be drawn up of the deposit of each instrument of ratification and certified copies of this record shall be transmitted by the Swiss Federal Council to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

Art. 153. The present Convention shall come into force six months after not less than two instruments of ratification have been deposited.

Thereafter, it shall come into force for each High Contracting Party six months after the deposit of the instrument of ratification.

Art. 154. In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of 29 July 1899, or that of 18 October 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague.

Art. 155. From the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention.

Art. 156. Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they are received.

The Swiss Federal Council shall communicate the accessions to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

Art. 157. The situations provided for in Articles 2 and 3 shall have immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation. The Swiss Federal Council shall communicate by the quickest method any ratifications or accessions received from Parties to the conflict.

Art. 158. Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release, repatriation and re-establishment of the persons protected by the present Convention have been terminated.

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

Art. 159. The Swiss Federal Council shall register the present Convention with the Secretariat of the United Nations. The Swiss Federal Council shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to the present Convention.

In witness whereof the undersigned, having deposited their respective full powers, have signed the present Convention.

Done at Geneva this twelfth day of August 1949, in the English and French languages. The original shall be deposited in the Archives of the Swiss Confederation. The Swiss Federal Council shall transmit certified copies thereof to each of the signatory and acceding States.

UN Security Council resolution 1483 (2003)

Available at <http://www.un.org/documents/scres.htm>.

The Security Council,

Recalling all its previous relevant resolutions,

Reaffirming the sovereignty and territorial integrity of Iraq,

Reaffirming also the importance of the disarmament of Iraqi weapons of mass destruction and of eventual confirmation of the disarmament of Iraq,

Stressing the right of the Iraqi people freely to determine their own political future and control their own natural resources, welcoming the commitment of all parties concerned to support the creation of an environment in which they may do so as soon as possible, and expressing resolve that the day when Iraqis govern themselves must come quickly,

Encouraging efforts by the people of Iraq to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender, and, in this connection, recalls resolution 1325 (2000) of 31 October 2000,

Welcoming the first steps of the Iraqi people in this regard, and noting in this connection the 15 April 2003 Nasiriyah statement and the 28 April 2003 Baghdad statement,

Resolved that the United Nations should play a vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance,

Noting the statement of 12 April 2003 by the Ministers of Finance and Central Bank Governors of the Group of Seven Industrialized Nations in which the members recognized the need for a multilateral effort to help rebuild and develop Iraq and for the need for assistance from the International Monetary Fund and the World Bank in these efforts,

Welcoming also the resumption of humanitarian assistance and the continuing efforts of the Secretary-General and the specialized agencies to provide food and medicine to the people of Iraq,

Welcoming the appointment by the Secretary-General of his Special Adviser on Iraq,

Affirming the need for accountability for crimes and atrocities committed by the previous Iraqi regime,

Stressing the need for respect for the archaeological, historical, cultural, and religious heritage of Iraq, and for the continued protection of archaeological, historical, cultural, and religious sites, museums, libraries, and monuments,

Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the "Authority"),

Noting further that other States that are not occupying powers are working now or in the future may work under the Authority,

Welcoming further the willingness of Member States to contribute to stability and security in Iraq by contributing personnel, equipment, and other resources under the Authority,

Concerned that many Kuwaitis and Third-State Nationals still are not accounted for since 2 August 1990,

Determining that the situation in Iraq, although improved, continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. Appeals to Member States and concerned organizations to assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and to contribute to conditions of stability and security in Iraq in accordance with this resolution;

2. Calls upon all Member States in a position to do so to respond immediately to the humanitarian appeals of the United Nations and other international organizations for Iraq and to help meet the humanitarian and other needs of the Iraqi people by providing food, medical supplies, and resources necessary for reconstruction and rehabilitation of Iraq's economic infrastructure;

3. Appeals to Member States to deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice;

4. Calls upon the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future;

5. Calls upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907;

6. Calls upon the Authority and relevant organizations and individuals to continue efforts to locate, identify, and repatriate all Kuwaiti and Third-State Nationals or the remains of those present in Iraq on or after 2 August 1990, as well as the Kuwaiti archives, that the previous Iraqi regime failed to undertake, and, in this regard, directs the High-Level Coordinator, in consultation with the International Committee of the Red Cross and the Tripartite Commission and with the appropriate support of the people of Iraq and in coordination with the Authority, to take steps to fulfil his mandate with respect to the fate of Kuwaiti and Third-State National missing persons and property;

7. Decides that all Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions, of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 2 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and calls upon the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph;

8. Requests the Secretary-General to appoint a Special Representative for Iraq whose independent responsibilities shall involve reporting regularly to the Council on his activities under this resolution, coordinating activities of the United Nations in post-conflict processes in Iraq, coordinating among United Nations and international agencies engaged in humanitarian assistance and reconstruction activities in Iraq, and, in coordination with the Authority, assisting the people of Iraq through:

(a) coordinating humanitarian and reconstruction assistance by United Nations agencies and between United Nations agencies and non-governmental organizations;

(b) promoting the safe, orderly, and voluntary return of refugees and displaced persons;

(c) working intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq;

- (d) facilitating the reconstruction of key infrastructure, in cooperation with other international organizations;
- (e) promoting economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organizations, as appropriate, civil society, donors and the international financial institutions;
- (f) encouraging international efforts to contribute to basic civilian administration functions;
- (g) promoting the protection of human rights;
- (h) encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; and
- (i) encouraging international efforts to promote legal and judicial reform;

9. Supports the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority;

10. Decides that, with the exception of prohibitions related to the sale or supply to Iraq of arms and related materiel other than those arms and related materiel required by the Authority to serve the purposes of this and other related resolutions, all prohibitions related to trade with Iraq and the provision of financial or economic resources to Iraq established by resolution 661 (1990) and subsequent relevant resolutions, including resolution 778 (1992) of 2 October 1992, shall no longer apply;

11. Reaffirms that Iraq must meet its disarmament obligations, encourages the United Kingdom of Great Britain and Northern Ireland and the United States of America to keep the Council informed of their activities in this regard, and underlines the intention of the Council to revisit the mandates of the United Nations Monitoring and Verification Commission and the International Atomic Energy Agency as set forth in resolutions 687 (1991) of 3 April 1991, 1284 (1999) of 17 December 1999, and 1441 (2002) of 8 November 2002;

12. Notes the establishment of a Development Fund for Iraq to be held by the Central Bank of Iraq and to be audited by independent public accountants approved by the International Advisory and Monitoring Board of the Development Fund for Iraq and looks forward to the early meeting of that International Advisory and Monitoring Board, whose members shall include duly qualified representatives of the Secretary-General, of the Managing Director of the International Monetary Fund, of the Director-General of the Arab Fund for Social and Economic Development, and of the President of the World Bank;

13. Notes further that the funds in the Development Fund for Iraq shall be disbursed at the direction of the Authority, in consultation with the Iraqi interim administration, for the purposes set out in paragraph 14 below;

14. Underlines that the Development Fund for Iraq shall be used in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq;

15. Calls upon the international financial institutions to assist the people of Iraq in the reconstruction and development of their economy and to facilitate assistance by the broader donor community, and welcomes the readiness of creditors, including those of the Paris Club, to seek a solution to Iraq's sovereign debt problems;

16. Requests also that the Secretary-General, in coordination with the Authority, continue the exercise of his responsibilities under Security Council resolution 1472 (2003) of 28 March 2003 and 1476 (2003) of 24 April 2003, for a period of six months following the adoption of this resolution, and terminate within this time period, in the most cost effective manner, the ongoing operations of the "Oil-for-Food" Programme (the "Programme"), both at headquarters level and in the field, transferring responsibility for the administration of any remaining activity under the Programme to the Authority, including by taking the following necessary measures:

- (a) to facilitate as soon as possible the shipment and authenticated delivery of priority civilian goods as identified by the Secretary-General and representatives designated by him, in coordination with the Authority and the Iraqi interim administration, under approved and funded contracts previously concluded by the previous Government of Iraq, for the humanitarian relief of the people of Iraq, including, as necessary, negotiating adjustments in the terms or conditions of these contracts and respective letters of credit as set forth in paragraph 4 (d) of resolution 1472 (2003);

(b) to review, in light of changed circumstances, in coordination with the Authority and the Iraqi interim administration, the relative utility of each approved and funded contract with a view to determining whether such contracts contain items required to meet the needs of the people of Iraq both now and during reconstruction, and to postpone action on those contracts determined to be of questionable utility and the respective letters of credit until an internationally recognized, representative government of Iraq is in a position to make its own determination as to whether such contracts shall be fulfilled;

(c) to provide the Security Council within 21 days following the adoption of this resolution, for the Security Council's review and consideration, an estimated operating budget based on funds already set aside in the account established pursuant to paragraph 8 (d) of resolution 986 (1995) of 14 April 1995, identifying:

(i) all known and projected costs to the United Nations required to ensure the continued functioning of the activities associated with implementation of the present resolution, including operating and administrative expenses associated with the relevant United Nations agencies and programmes responsible for the implementation of the Programme both at Headquarters and in the field;

(ii) all known and projected costs associated with termination of the Programme;

(iii) all known and projected costs associated with restoring Government of Iraq funds that were provided by Member States to the Secretary-General as requested in paragraph 1 of resolution 778 (1992) of 2 October 1992; and

(iv) all known and projected costs associated with the Special Representative and the qualified representative of the Secretary-General identified to serve on the International Advisory and Monitoring Board, for the six month time period defined above, following which these costs shall be borne by the United Nations;

(d) to consolidate into a single fund the accounts established pursuant to paragraphs 8 (a) and 8 (b) of resolution 986 (1995);

(e) to fulfil all remaining obligations related to the termination of the Programme, including negotiating, in the most cost effective manner, any necessary settlement payments, which shall be made from the escrow accounts established pursuant to paragraphs 8 (a) and 8 (b) of resolution 986 (1995), with those parties that previously have entered into contractual obligations with the Secretary-General under the Programme, and to determine, in coordination with the Authority and the Iraqi interim administration, the future status of contracts undertaken by the United Nations and related United Nations agencies under the accounts established pursuant to paragraphs 8 (b) and 8 (d) of resolution 986 (1995);

(f) to provide the Security Council, 30 days prior to the termination of the Programme, with a comprehensive strategy developed in close coordination with the Authority and the Iraqi interim administration that would lead to the delivery of all relevant documentation and the transfer of all operational responsibility of the Programme to the Authority;

17. Requests further that the Secretary-General transfer as soon as possible to the Development Fund for Iraq 1 billion United States dollars from unencumbered funds in the accounts established pursuant to paragraphs 8 (a) and 8 (b) of resolution 986 (1995), restore Government of Iraq funds that were provided by Member States to the Secretary-General as requested in paragraph 1 of resolution 778 (1992), and decides that, after deducting all relevant United Nations expenses associated with the shipment of authorized contracts and costs to the Programme outlined in paragraph 16 (c) above, including residual obligations, all surplus funds in the escrow accounts established pursuant to paragraphs 8 (a), 8 (b), 8 (d), and 8 (f) of resolution 986 (1995) shall be transferred at the earliest possible time to the Development Fund for Iraq;

18. Decides to terminate effective on the adoption of this resolution the functions related to the observation and monitoring activities undertaken by the Secretary-General under the Programme, including the monitoring of the export of petroleum and petroleum products from Iraq;

19. Decides to terminate the Committee established pursuant to paragraph 6 of resolution 661 (1990) at the conclusion of the six months period called for in paragraph 16 above and further decides that the Committee shall identify individuals and entities referred to in paragraph 23 below;

20. Decides that all export sales of petroleum, petroleum products, and natural gas from Iraq following the date of the adoption of this resolution shall be made consistent with prevailing international market best practices, to be audited by independent public accountants reporting to the International Advisory and Monitoring Board referred to in paragraph 12 above in order to ensure transparency, and decides further that, except as provided in paragraph 21

below, all proceeds from such sales shall be deposited into the Development Fund for Iraq, until such time as an internationally recognized, representative government of Iraq is properly constituted;

21. Decides further that 5 percent of the proceeds referred to in paragraph 20 above shall be deposited into the Compensation Fund established in accordance with resolution 687 (1991) of 3 April 1991 and subsequent relevant resolutions and that, unless an internationally recognized, representative government of Iraq and the Governing Council of the United Nations Compensation Commission, in the exercise of its authority over methods of ensuring that payments are made into the Compensation Fund, decide otherwise, this requirement shall be binding on a properly constituted, internationally recognized, representative government of Iraq and any successor thereto;

22. Noting the relevance of the establishment of an internationally recognized, representative government of Iraq and the desirability of prompt completion of the restructuring of Iraq's debt as referred to in paragraph 15 above, further decides that, until December 31, 2007, unless the Council decides otherwise, petroleum, petroleum products, and natural gas originating in Iraq shall be immune, until title passes to the initial purchaser, from legal proceedings against them and not be subject to any form of attachment, garnishment, or execution, and that all States shall take any steps that may be necessary under their respective domestic legal systems to assure this protection, and that proceeds and obligations arising from sales thereof, as well as the Development Fund for Iraq, shall enjoy privileges and immunities equivalent to those enjoyed by the United Nations except that the above-mentioned privileges and immunities will not apply with respect to any legal proceeding in which recourse to such proceeds or obligations is necessary to satisfy liability for damages assessed in connection with an ecological accident, including an oil spill, that occurs after the date of adoption of this resolution;

23. Decides that all Member States in which there are:

(a) funds or other financial assets or economic resources of the previous Government of Iraq or its state bodies, corporations, or agencies, located outside Iraq as of the date of this resolution, or

(b) funds or other financial assets or economic resources that have been removed from Iraq, or acquired, by Saddam Hussein or other senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, shall freeze without delay those funds or other financial assets or economic resources and, unless these funds or other financial assets or economic resources are themselves the subject of a prior judicial, administrative, or arbitral lien or judgement, immediately shall cause their transfer to the Development Fund for Iraq, it being understood that, unless otherwise addressed, claims made by private individuals or non-government entities on those transferred funds or other financial assets may be presented to the internationally recognized, representative government of Iraq; and decides further that all such funds or other financial assets or economic resources shall enjoy the same privileges, immunities, and protections as provided under paragraph 22;

24. Requests the Secretary-General to report to the Council at regular intervals on the work of the Special Representative with respect to the implementation of this resolution and on the work of the International Advisory and Monitoring Board and encourages the United Kingdom of Great Britain and Northern Ireland and the United States of America to inform the Council at regular intervals of their efforts under this resolution;

25. Decides to review the implementation of this resolution within twelve months of adoption and to consider further steps that might be necessary;

26. Calls upon Member States and international and regional organizations to contribute to the implementation of this resolution;

27. Decides to remain seized of this matter.

***Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory
(Advisory Opinion) (International Court of Justice, 9 July 2004)***

Available at <http://www.icj-cij.org>.

Present: President SHI; Vice-President RANJEVA; Judges GUILLAUME, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, ELARABY, OWADA, SIMMA, TOMKA; Registrar COUVREUR.

On the legal consequences of the construction of a wall in the Occupied Palestinian Territory,

THE COURT,

Composed as above,

Gives the following Advisory Opinion:

1. The question on which the advisory opinion of the Court has been requested is set forth in resolution ES-10/14 adopted by the General Assembly of the United Nations (hereinafter the “General Assembly”) on 8 December 2003 at its Tenth Emergency Special Session. By a letter dated 8 December 2003 and received in the Registry by facsimile on 10 December 2003, the original of which reached the Registry subsequently, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit the question for an advisory opinion. Certified true copies of the English and French versions of resolution ES-10/14 were enclosed with the letter. The resolution reads as follows:

“The General Assembly,

Reaffirming its resolution ES-10/13 of 21 October 2003,

Guided by the principles of the Charter of the United Nations,

Aware of the established principle of international law on the inadmissibility of the acquisition of territory by force,

Aware also that developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples is among the purposes and principles of the Charter of the United Nations,

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

Recalling also the resolutions of the tenth emergency special session of the General Assembly,

Recalling further relevant Security Council resolutions, including resolutions 242 (1967) of 22 November 1967, 338 (1973) of 22 October 1973, 267 (1969) of 3 July 1969, 298 (1971) of 25 September 1971, 446 (1979) of 22 March 1979, 452 (1979) of 20 July 1979, 465 (1980) of 1 March 1980, 476 (1980) of 30 June 1980, 478 (1980) of 20 August 1980, 904 (1994) of 18 March 1994, 1073 (1996) of 28 September 1996, 1397 (2002) of 12 March 2002 and 1515 (2003) of 19 November 2003,

Reaffirming the applicability of the Fourth Geneva Convention¹ as well as Additional Protocol I to the Geneva Conventions² to the Occupied Palestinian Territory, including East Jerusalem,

Recalling the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land of 1907³,

Welcoming the convening of the Conference of High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, at Geneva on 15 July 1999,

Expressing its support for the declaration adopted by the reconvened Conference of High Contracting Parties at Geneva on 5 December 2001,

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

Recalling relevant United Nations resolutions affirming that actions taken by Israel, the occupying Power, to change the status and demographic composition of Occupied East Jerusalem have no legal validity and are null and void,

Noting the agreements reached between the Government of Israel and the Palestine Liberation Organization in the context of the Middle East peace process,

Gravely concerned at the commencement and continuation of construction by Israel, the occupying Power, of a wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure from the Armistice Line of 1949 (Green Line) and which has involved the confiscation and destruction of Palestinian land and resources, the disruption of the lives of thousands of protected civilians and the de facto annexation of large areas of territory, and underlining the unanimous opposition by the international community to the construction of that wall,

Gravely concerned also at the even more devastating impact of the projected parts of the wall on the Palestinian civilian population and on the prospects for solving the Palestinian-Israeli conflict and establishing peace in the region,

Welcoming the report of 8 September 2003 of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967⁴, in particular the section regarding the wall,

Affirming the necessity of ending the conflict on the basis of the two-State solution of Israel and Palestine living side by side in peace and security based on the Armistice Line of 1949, in accordance with relevant Security Council and General Assembly resolutions,

Having received with appreciation the report of the Secretary-General, submitted in accordance with resolution ES-10/13⁵,

Bearing in mind that the passage of time further compounds the difficulties on the ground, as Israel, the occupying Power, continues to refuse to comply with international law vis-à-vis its construction of the above-mentioned wall, with all its detrimental implications and consequences,

Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to urgently render an advisory opinion on the following question:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

¹United Nations, *Treaty Series*, Vol. 75, No. 973.

²*Ibid.*, Vol. 1125, No. 17512.

³See Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915).

⁴E/CN.4/2004/6.

⁵A/ES-10/248.”

Also enclosed with the letter were the certified English and French texts of the report of the Secretary-General dated 24 November 2003, prepared pursuant to General Assembly resolution ES-10/13 (A/ES-10/248), to which resolution ES-10/14 makes reference.

2. By letters dated 10 December 2003, the Registrar notified the request for an advisory opinion to all States entitled to appear before the Court, in accordance with Article 66, paragraph 1, of the Statute.

3. By a letter dated 11 December 2003, the Government of Israel informed the Court of its position on the request for an advisory opinion and on the procedure to be followed.

4. By an Order of 19 December 2003, the Court decided that the United Nations and its Member States were likely, in accordance with Article 66, paragraph 2, of the Statute, to be able to furnish information on all aspects raised by the question submitted to the Court for an advisory opinion and fixed 30 January 2004 as the time-limit within which written statements might be submitted to it on the question in accordance with Article 66, paragraph 4, of the Statute. By the same Order, the Court further decided that, in the light of resolution ES-10/14 and the report of the Secretary-General transmitted with the request, and taking into account the fact that the General Assembly had granted Palestine a special status of observer and that the latter was co-sponsor of the draft resolution requesting the advisory opinion, Palestine might also submit a written statement on the question within the above time-limit.

5. By the aforesaid Order, the Court also decided, in accordance with Article 105, paragraph 4, of the Rules of Court, to hold public hearings during which oral statements and comments might be presented to it by the United Nations and its Member States, regardless of whether or not they had submitted written statements, and fixed 23 February 2004 as the date for the opening of the said hearings. By the same Order, the Court decided that, for the reasons set out above (see paragraph 4), Palestine might also take part in the hearings. Lastly, it invited the United Nations and its Member States, as well as Palestine, to inform the Registry, by 13 February 2004 at the latest, if they were intending to take part in the above-mentioned hearings. By letters of 19 December 2004, the Registrar informed them of the Court's decisions and transmitted to them a copy of the Order.

6. Ruling on requests submitted subsequently by the League of Arab States and the Organization of the Islamic Conference, the Court decided, in accordance with Article 66 of its Statute, that those two international organizations were likely to be able to furnish information on the question submitted to the Court, and that consequently they might for that purpose submit written statements within the time-limit fixed by the Court in its Order of 19 December 2003 and take part in the hearings.

7. Pursuant to Article 65, paragraph 2, of the Statute, the Secretary-General of the United Nations communicated to the Court a dossier of documents likely to throw light upon the question.

8. By a reasoned Order of 30 January 2004 regarding its composition in the case, the Court decided that the matters brought to its attention by the Government of Israel in a letter of 31 December 2003, and

in a confidential letter of 15 January 2004 addressed to the President pursuant to Article 34, paragraph 2, of the Rules of Court, were not such as to preclude Judge Elaraby from sitting in the case.

9. Within the time-limit fixed by the Court for that purpose, written statements were filed by, in order of their receipt: Guinea, Saudi Arabia, League of Arab States, Egypt, Cameroon, Russian Federation, Australia, Palestine, United Nations, Jordan, Kuwait, Lebanon, Canada, Syria, Switzerland, Israel, Yemen, United States of America, Morocco, Indonesia, Organization of the Islamic Conference, France, Italy, Sudan, South Africa, Germany, Japan, Norway, United Kingdom, Pakistan, Czech Republic, Greece, Ireland on its own behalf, Ireland on behalf of the European Union, Cyprus, Brazil, Namibia, Malta, Malaysia, Netherlands, Cuba, Sweden, Spain, Belgium, Palau, Federated States of Micronesia, Marshall Islands, Senegal, Democratic People's Republic of Korea. Upon receipt of those statements, the Registrar transmitted copies thereof to the United Nations and its Member States, to Palestine, to the League of Arab States and to the Organization of the Islamic Conference.

10. Various communications were addressed to these latter by the Registry, concerning in particular the measures taken for the organization of the oral proceedings. By communications of 20 February 2004, the Registry transmitted a detailed timetable of the hearings to those of the latter who, within the time-limit fixed for that purpose by the Court, had expressed their intention of taking part in the aforementioned proceedings.

11. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements accessible to the public, with effect from the opening of the oral proceedings.

12. In the course of hearings held from 23 to 25 February 2004, the Court heard oral statements, in the following order, by:

For Palestine:

H.E. Mr. Nasser Al-Kidwa, Ambassador, Permanent Observer of Palestine to the United Nations,

Ms Stephanie Koury, Member, Negotiations Support Unit, Counsel,

Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Member of the Institute of International Law, Counsel and Advocate,

Mr. Georges Abi-Saab, Professor of International Law, Graduate Institute of International Studies, Geneva, Member of the Institute of International Law, Counsel and Advocate,

Mr. Vaughan Lowe, Chichele Professor of International Law, University of Oxford, Counsel and Advocate,

Mr. Jean Salmon, Professor Emeritus of International Law, Université libre de Bruxelles, Member of the Institute of International Law, Counsel and Advocate;

For the Republic of South Africa: H.E. Mr. Aziz Pahad, Deputy Minister for Foreign Affairs, Head of Delegation,

Judge M. R. W. Madlanga, S.C.;

For the People's Democratic Republic of Algeria: Mr. Ahmed Laraba, Professor of International Law;

For the Kingdom of Saudi Arabia: H.E. Mr. Fawzi A. Shobokshi, Ambassador and Permanent Representative of the Kingdom of Saudi Arabia to the United Nations in New York, Head of Delegation;

For the People's Republic of Bangladesh: H.E. Mr. Liaquat Ali Choudhury, Ambassador of the People's Republic of Bangladesh to the Kingdom of the Netherlands;

For Belize: Mr. Jean-Marc Sorel, Professor at the University of Paris I (Panthéon-Sorbonne);

For the Republic of Cuba: H.E. Mr. Abelardo Moreno Fernández, Deputy Minister for Foreign Affairs;

For the Republic of Indonesia: H.E. Mr. Mohammad Jusuf, Ambassador of the Republic of Indonesia to the Kingdom of the Netherlands, Head of Delegation;

For the Hashemite Kingdom of Jordan: H.R.H. Ambassador Zeid Ra'ad Zeid Al-Hussein, Permanent Representative of the Hashemite Kingdom of Jordan to the United Nations, New York, Head of Delegation,

Sir Arthur Watts, K.C.M.G., Q.C., Senior Legal Adviser to the Government of the Hashemite Kingdom of Jordan;

For the Republic of Madagascar: H.E. Mr. Alfred Rambeloson, Permanent Representative of Madagascar to the Office of the United Nations at Geneva and to the Specialized Agencies, Head of Delegation;

For Malaysia: H.E. Datuk Seri Syed Hamid Albar, Foreign Minister of Malaysia, Head of Delegation;

For the Republic of Senegal: H.E. Mr. Saliou Cissé, Ambassador of the Republic of Senegal to the Kingdom of the Netherlands, Head of Delegation;

For the Republic of the Sudan: H.E. Mr. Abuelgasim A. Idris, Ambassador of the Republic of the Sudan to the Kingdom of the Netherlands;

For the League of Arab States: Mr. Michael Bothe, Professor of Law, Head of the Legal Team;

For the Organization of the Islamic Conference: H.E. Mr. Abdelouahed Belkeziz, Secretary General of the Organization of the Islamic Conference,

Ms Monique Chemillier-Gendreau, Professor of Public Law, University of Paris VII-Denis Diderot, as Counsel.

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13. When seised of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why it should decline to exercise any such jurisdiction (see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 232, para. 10).

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14. The Court will thus first address the question whether it possesses jurisdiction to give the advisory opinion requested by the General Assembly on 8 December 2003. The competence of the Court in this regard is based on Article 65, paragraph 1, of its Statute, according to which the Court “may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request”. The Court has already had occasion to indicate that:

“It is . . . a precondition of the Court’s competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council,

that question should be one arising within the scope of the activities of the requesting organ.”
(*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, pp. 333-334, para. 21.)

15. It is for the Court to satisfy itself that the request for an advisory opinion comes from an organ or agency having competence to make it. In the present instance, the Court notes that the General Assembly, which seeks the advisory opinion, is authorized to do so by Article 96, paragraph 1, of the Charter, which provides: “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.”

16. Although the above-mentioned provision states that the General Assembly may seek an advisory opinion “on any legal question”, the Court has sometimes in the past given certain indications as to the relationship between the question the subject of a request for an advisory opinion and the activities of the General Assembly (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, p. 70; *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, pp. 232 and 233, paras. 11 and 12).

17. The Court will so proceed in the present case. The Court would observe that Article 10 of the Charter has conferred upon the General Assembly a competence relating to “any questions or any matters” within the scope of the Charter, and that Article 11, paragraph 2, has specifically provided it with competence on “questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations . . .” and to make recommendations under certain conditions fixed by those Articles. As will be explained below, the question of the construction of the wall in the Occupied Palestinian Territory was brought before the General Assembly by a number of Member States in the context of the Tenth Emergency Special Session of the Assembly, convened to deal with what the Assembly, in its resolution ES-10/2 of 25 April 1997, considered to constitute a threat to international peace and security.

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18. Before further examining the problems of jurisdiction that have been raised in the present proceedings, the Court considers it necessary to describe the events that led to the adoption of resolution ES-10/14, by which the General Assembly requested an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

19. The Tenth Emergency Special Session of the General Assembly, at which that resolution was adopted, was first convened following the rejection by the Security Council, on 7 March and 21 March 1997, as a result of negative votes by a permanent member, of two draft resolutions concerning certain Israeli settlements in the Occupied Palestinian Territory (see, respectively, S/1997/199 and S/PV.3747, and S/1997/241 and S/PV.3756). By a letter of 31 March 1997, the Chairman of the Arab Group then requested “that an emergency special session of the General Assembly be convened pursuant to resolution 377 A (V) entitled ‘Uniting for Peace’” with a view to discussing “Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory” (letter dated 31 March 1997 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General, A/ES-10/1, 22 April 1997, Annex). The majority of Members of the United Nations having concurred in

this request, the first meeting of the Tenth Emergency Special Session of the General Assembly took place on 24 April 1997 (see A/ES-10/1, 22 April 1997). Resolution ES-10/2 was adopted the following day; the General Assembly thereby expressed its conviction that:

“the repeated violation by Israel, the occupying Power, of international law and its failure to comply with relevant Security Council and General Assembly resolutions and the agreements reached between the parties undermine the Middle East peace process and constitute a threat to international peace and security”,

and condemned the “illegal Israeli actions” in occupied East Jerusalem and the rest of the Occupied Palestinian Territory, in particular the construction of settlements in that territory. The Tenth Emergency Special Session was then adjourned temporarily and has since been reconvened 11 times (on 15 July 1997, 13 November 1997, 17 March 1998, 5 February 1999, 18 October 2000, 20 December 2001, 7 May 2002, 5 August 2002, 19 September 2003, 20 October 2003 and 8 December 2003).

20. By a letter dated 9 October 2003, the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, requested an immediate meeting of the Security Council to consider the “grave and ongoing Israeli violations of international law, including international humanitarian law, and to take the necessary measures in this regard” (letter of 9 October 2003 from the Permanent Representative of the Syrian Arab Republic to the United Nations to the President of the Security Council, S/2003/973, 9 October 2003). This letter was accompanied by a draft resolution for consideration by the Council, which condemned as illegal the construction by Israel of a wall in the Occupied Palestinian Territory departing from the Armistice Line of 1949. The Security Council held its 4841st and 4842nd meetings on 14 October 2003 to consider the item entitled “The situation in the Middle East, including the Palestine question”. It then had before it another draft resolution proposed on the same day by Guinea, Malaysia, Pakistan and the Syrian Arab Republic, which also condemned the construction of the wall. This latter draft resolution was put to a vote after an open debate and was not adopted owing to the negative vote of a permanent member of the Council (S/PV.4841 and S/PV.4842).

On 15 October 2003, the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, requested the resumption of the Tenth Emergency Special Session of the General Assembly to consider the item of “Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory” (A/ES-10/242); this request was supported by the Non-Aligned Movement (A/ES-10/243) and the Organization of the Islamic Conference Group at the United Nations (A/ES-10/244). The Tenth Emergency Special Session resumed its work on 20 October 2003.

21. On 27 October 2003, the General Assembly adopted resolution ES-10/13, by which it demanded that “Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law” (para. 1). In paragraph 3, the Assembly requested the Secretary-General “to report on compliance with the . . . resolution periodically, with the first report on compliance with paragraph 1 [of that resolution] to be submitted within one month . . .”. The Tenth Emergency Special Session was temporarily adjourned and, on 24 November 2003, the report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13 (hereinafter the “report of the Secretary-General”) was issued (A/ES-10/248).

22. Meanwhile, on 19 November 2003, the Security Council adopted resolution 1515 (2003), by which it “*Endorse[d]* the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict”. The Quartet consists of representatives of the United States of America, the European Union, the Russian Federation and the United Nations. That resolution

“*Call[ed]* on the parties to fulfil their obligations under the Roadmap in cooperation with the Quartet and to achieve the vision of two States living side by side in peace and security.”

Neither the “Roadmap” nor resolution 1515 (2003) contained any specific provision concerning the construction of the wall, which was not discussed by the Security Council in this context.

23. Nineteen days later, on 8 December 2003, the Tenth Emergency Special Session of the General Assembly again resumed its work, following a new request by the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, and pursuant to resolution ES-10/13 (letter dated 1 December 2003 to the President of the General Assembly from the Chargé d’affaires a.i. of the Permanent Mission of Kuwait to the United Nations, A/ES-10/249, 2 December 2003). It was during the meeting convened on that day that resolution ES-10/14 requesting the present Advisory Opinion was adopted.

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24. Having thus recalled the sequence of events that led to the adoption of resolution ES-10/14, the Court will now turn to the questions of jurisdiction that have been raised in the present proceedings. First, Israel has alleged that, given the active engagement of the Security Council with the situation in the Middle East, including the Palestinian question, the General Assembly acted *ultra vires* under the Charter when it requested an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

25. The Court has already indicated that the subject of the present request for an advisory opinion falls within the competence of the General Assembly under the Charter (see paragraphs 15-17 above). However, Article 12, paragraph 1, of the Charter provides that:

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

A request for an advisory opinion is not in itself a “recommendation” by the General Assembly “with regard to [a] dispute or situation”. It has however been argued in this case that the adoption by the General Assembly of resolution ES-10/14 was *ultra vires* as not in accordance with Article 12. The Court thus considers that it is appropriate for it to examine the significance of that Article, having regard to the relevant texts and the practice of the United Nations.

26. Under Article 24 of the Charter the Security Council has “primary responsibility for the maintenance of international peace and security”. In that regard it can impose on States “an explicit obligation of compliance if for example it issues an order or command . . . under Chapter VII” and can, to that end, “require enforcement by coercive action” (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 163). However, the Court would emphasize that Article 24 refers to a primary, but not necessarily exclusive, competence. The General Assembly does have the power, *inter alia*, under Article 14 of the Charter, to “recommend measures for the peaceful adjustment” of various situations (*Certain Expenses of the United Nations, ibid.*, p. 163). “[T]he only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so.” (*Ibid.*).

27. As regards the practice of the United Nations, both the General Assembly and the Security Council initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council’s agenda. Thus the Assembly during its fourth session refused to recommend certain measures on the question of Indonesia, on the ground, *inter alia*, that the Council remained seised of the matter (*Official Records of the General Assembly, Fourth Session, Ad Hoc Political Committee, Summary Records of Meetings, 27 September-7 December 1949, 56th Meeting, 3 December 1949*, p. 339, para. 118). As for the Council, on a number of occasions it deleted items from its agenda in order to enable the Assembly to deliberate on them (for example, in respect of the Spanish question (*Official Records of the Security Council, First Year: Second Series, No. 21, 79th Meeting, 4 November 1946*, p. 498), in connection with incidents on the Greek border (*Official Records of the Security Council, Second Year, No. 89, 202nd Meeting, 15 September 1947*, pp. 2404-2405) and in regard to the Island of Taiwan (Formosa) (*Official Records of the Security Council, Fifth Year, No. 48, 506th Meeting, 29 September 1950*, p. 5)). In the case of the Republic of Korea, the Council decided on 31 January 1951 to remove the relevant item from the list of matters of which it was seised in order to enable the Assembly to deliberate on the matter (*Official Records of the Security Council, Sixth Year, S/PV.531, 531st Meeting, 31 January 1951*, pp. 11-12, para. 57).

However, this interpretation of Article 12 has evolved subsequently. Thus the General Assembly deemed itself entitled in 1961 to adopt recommendations in the matter of the Congo (resolutions 1955 (XV) and 1600 (XVI)) and in 1963 in respect of the Portuguese colonies (resolution 1913 (XVIII)) while those cases still appeared on the Council’s agenda, without the Council having adopted any recent resolution concerning them. In response to a question posed by Peru during the Twenty-third session of the General Assembly, the Legal Counsel of the United Nations confirmed that the Assembly interpreted the words “is exercising the functions” in Article 12 of the Charter as meaning “is exercising the functions at this moment” (Twenty-third General Assembly, Third Committee, 1637th meeting, A/C.3/SR.1637, para. 9). Indeed, the Court notes that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security (see, for example, the matters involving Cyprus, South Africa, Angola, Southern Rhodesia and more recently Bosnia and Herzegovina and Somalia). It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.

28. The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter.

The Court is accordingly of the view that the General Assembly, in adopting resolution ES-10/14, seeking an advisory opinion from the Court, did not contravene the provisions of Article 12, paragraph 1, of the Charter. The Court concludes that by submitting that request the General Assembly did not exceed its competence.

29. It has however been contended before the Court that the present request for an advisory opinion did not fulfil the essential conditions set by resolution 377 A (V), under which the Tenth Emergency Special Session was convened and has continued to act. In this regard, it has been said, first, that “The Security Council was never seised of a draft resolution proposing that the Council itself should request an advisory opinion from the Court on the matters now in contention”, and, that specific issue having thus never been brought before the Council, the General Assembly could not rely on any inaction by the Council to make such a request. Secondly, it has been claimed that, in adopting resolution 1515 (2003), which endorsed the “Roadmap”, before the adoption by the General Assembly of resolution ES-10/14, the Security Council continued to exercise its responsibility for the maintenance of international peace and security and that, as a result, the General Assembly was not entitled to act in its place. The validity of the procedure followed by the Tenth Emergency Special Session, especially the Session’s “rolling character” and the fact that its meeting was convened to deliberate on the request for the advisory opinion at the same time as the General Assembly was meeting in regular session, has also been questioned.

30. The Court would recall that resolution 377 A (V) states that:

“if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures . . .”

The procedure provided for by that resolution is premised on two conditions, namely that the Council has failed to exercise its primary responsibility for the maintenance of international peace and security as a result of a negative vote of one or more permanent members, and that the situation is one in which there appears to be a threat to the peace, breach of the peace, or act of aggression. The Court must accordingly ascertain whether these conditions were fulfilled as regards the convening of the Tenth Emergency Special Session of the General Assembly, in particular at the time when the Assembly decided to request an advisory opinion from the Court.

31. In the light of the sequence of events described in paragraphs 18 to 23 above, the Court observes that, at the time when the Tenth Emergency Special Session was convened in 1997, the Council had been unable to take a decision on the case of certain Israeli settlements in the Occupied Palestinian Territory, due to negative votes of a permanent member; and that, as indicated in resolution ES-10/2 (see paragraph 19 above), there existed a threat to international peace and security.

The Court further notes that, on 20 October 2003, the Tenth Emergency Special Session of the General Assembly was reconvened on the same basis as in 1997 (see the statements by the representatives of Palestine and Israel, A/ES-10/PV.21, pp. 2 and 5), after the rejection by the Security Council, on 14 October 2003, again as a result of the negative vote of a permanent member, of a draft resolution concerning the construction by Israel of the wall in the Occupied Palestinian Territory. The Court considers that the Security Council again failed to act as contemplated in resolution 377 A (V). It does not

appear to the Court that the situation in this regard changed between 20 October 2003 and 8 December 2003, since the Council neither discussed the construction of the wall nor adopted any resolution in that connection. Thus, the Court is of the view that, up to 8 December 2003, the Council had not reconsidered the negative vote of 14 October 2003. It follows that, during that period, the Tenth Emergency Special Session was duly reconvened and could properly be seised, under resolution 377 A (V), of the matter now before the Court.

32. The Court would also emphasize that, in the course of this Emergency Special Session, the General Assembly could adopt any resolution falling within the subject-matter for which the Session had been convened, and otherwise within its powers, including a resolution seeking the Court's opinion. It is irrelevant in that regard that no proposal had been made to the Security Council to request such an opinion.

33. Turning now to alleged further procedural irregularities of the Tenth Emergency Special Session, the Court does not consider that the "rolling" character of that Session, namely the fact of its having been convened in April 1997 and reconvened 11 times since then, has any relevance with regard to the validity of the request by the General Assembly. The Court observes in that regard that the Seventh Emergency Special Session of the General Assembly, having been convened on 22 July 1980, was subsequently reconvened four times (on 20 April 1982, 25 June 1982, 16 August 1982 and 24 September 1982), and that the validity of resolutions or decisions of the Assembly adopted under such circumstances was never disputed. Nor has the validity of any previous resolutions adopted during the Tenth Emergency Special Session been challenged.

34. The Court also notes the contention by Israel that it was improper to reconvene the Tenth Emergency Special Session at a time when the regular Session of the General Assembly was in progress. The Court considers that, while it may not have been originally contemplated that it would be appropriate for the General Assembly to hold simultaneous emergency and regular sessions, no rule of the Organization has been identified which would be thereby violated, so as to render invalid the resolution adopting the present request for an advisory opinion.

35. Finally, the Tenth Emergency Special Session appears to have been convened in accordance with Rule 9 (b) of the Rules of Procedure of the General Assembly, and the relevant meetings have been convened in pursuance of the applicable rules. As the Court stated in its Advisory Opinion of 21 June 1971 concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, a "resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted" (*I.C.J. Reports 1971*, p. 22, para. 20). In view of the foregoing, the Court cannot see any reason why that presumption is to be rebutted in the present case.

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36. The Court now turns to a further issue related to jurisdiction in the present proceedings, namely the contention that the request for an advisory opinion by the General Assembly is not on a "legal question" within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute of the Court. It has been contended in this regard that, for a question to constitute a "legal question" for the purposes of these two provisions, it must be reasonably specific, since otherwise it would

not be amenable to a response by the Court. With regard to the request made in the present advisory proceedings, it has been argued that it is not possible to determine with reasonable certainty the legal meaning of the question asked of the Court for two reasons.

First, it has been argued that the question regarding the “legal consequences” of the construction of the wall only allows for two possible interpretations, each of which would lead to a course of action that is precluded for the Court. The question asked could first be interpreted as a request for the Court to find that the construction of the wall is illegal, and then to give its opinion on the legal consequences of that illegality. In this case, it has been contended, the Court should decline to respond to the question asked for a variety of reasons, some of which pertain to jurisdiction and others rather to the issue of propriety. As regards jurisdiction, it is said that, if the General Assembly had wished to obtain the view of the Court on the highly complex and sensitive question of the legality of the construction of the wall, it should have expressly sought an opinion to that effect (cf. *Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10*, p. 17). A second possible interpretation of the request, it is said, is that the Court should assume that the construction of the wall is illegal, and then give its opinion on the legal consequences of that assumed illegality. It has been contended that the Court should also decline to respond to the question on this hypothesis, since the request would then be based on a questionable assumption and since, in any event, it would be impossible to rule on the legal consequences of illegality without specifying the nature of that illegality.

Secondly, it has been contended that the question asked of the Court is not of a “legal” character because of its imprecision and abstract nature. In particular, it has been argued in this regard that the question fails to specify whether the Court is being asked to address legal consequences for “the General Assembly or some other organ of the United Nations”, “Member States of the United Nations”, “Israel”, “Palestine” or “some combination of the above, or some different entity”.

37. As regards the alleged lack of clarity of the terms of the General Assembly’s request and its effect on the “legal nature” of the question referred to the Court, the Court observes that this question is directed to the legal consequences arising from a given factual situation considering the rules and principles of international law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter the “Fourth Geneva Convention”) and relevant Security Council and General Assembly resolutions. The question submitted by the General Assembly has thus, to use the Court’s phrase in its Advisory Opinion on *Western Sahara*, “been framed in terms of law and raise[s] problems of international law”; it is by its very nature susceptible of a reply based on law; indeed it is scarcely susceptible of a reply otherwise than on the basis of law. In the view of the Court, it is indeed a question of a legal character (see *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15).

38. The Court would point out that lack of clarity in the drafting of a question does not deprive the Court of jurisdiction. Rather, such uncertainty will require clarification in interpretation, and such necessary clarifications of interpretation have frequently been given by the Court.

In the past, both the Permanent Court and the present Court have observed in some cases that the wording of a request for an advisory opinion did not accurately state the question on which the Court’s opinion was being sought (*Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16 (I)*, pp. 14-16), or did not correspond to the “true legal question” under consideration (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, pp. 87-89,

paras. 34-36). The Court noted in one case that “the question put to the Court is, on the face of it, at once infelicitously expressed and vague” (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, para. 46).

Consequently, the Court has often been required to broaden, interpret and even reformulate the questions put (see the three Opinions cited above; see also *Jaworzina, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8; Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 25; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, pp. 157-162).

In the present instance, the Court will only have to do what it has often done in the past, namely “identify the existing principles and rules, interpret them and apply them . . . , thus offering a reply to the question posed based on law” (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, p. 234, para. 13).

39. In the present instance, if the General Assembly requests the Court to state the “legal consequences” arising from the construction of the wall, the use of these terms necessarily encompasses an assessment of whether that construction is or is not in breach of certain rules and principles of international law. Thus, the Court is first called upon to determine whether such rules and principles have been and are still being breached by the construction of the wall along the planned route.

40. The Court does not consider that what is contended to be the abstract nature of the question posed to it raises an issue of jurisdiction. Even when the matter was raised as an issue of propriety rather than one of jurisdiction, in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*, the Court took the position that to contend that it should not deal with a question couched in abstract terms is “a mere affirmation devoid of any justification” and that “the Court may give an advisory opinion on any legal question, abstract or otherwise” (*I.C.J. Reports 1996 (I)*, p. 236, para. 15, referring to *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, p. 51; and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 27, para. 40). In any event, the Court considers that the question posed to it in relation to the legal consequences of the construction of the wall is not an abstract one, and moreover that it would be for the Court to determine for whom any such consequences arise.

41. Furthermore, the Court cannot accept the view, which has also been advanced in the present proceedings, that it has no jurisdiction because of the “political” character of the question posed. As is clear from its long-standing jurisprudence on this point, the Court considers that the fact that a legal question also has political aspects,

“as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a ‘legal question’ and to ‘deprive the Court of a competence expressly conferred on it by its Statute’ (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial

task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, pp. 61-62; *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, pp. 6-7; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155).” (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, p. 234, para. 13.)

In its Opinion concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the Court indeed emphasized that, “in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate . . .” (*I.C.J. Reports 1980*, p. 87, para. 33). Moreover, the Court has affirmed in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that “the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion” (*I.C.J. Reports 1996 (I)*, p. 234, para. 13). The Court is of the view that there is no element in the present proceedings which could lead it to conclude otherwise.

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42. The Court accordingly has jurisdiction to give the advisory opinion requested by resolution ES-10/14 of the General Assembly.

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43. It has been contended in the present proceedings, however, that the Court should decline to exercise its jurisdiction because of the presence of specific aspects of the General Assembly’s request that would render the exercise of the Court’s jurisdiction improper and inconsistent with the Court’s judicial function.

44. The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that “The Court *may* give an advisory opinion . . .” (emphasis added), should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 234, para. 14). The Court however is mindful of the fact that its answer to a request for an advisory opinion “represents its participation in the activities of the Organization, and, in principle, should not be refused” (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; see also, for example, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29.) Given its responsibilities as the “principal judicial organ of the United Nations” (Article 92 of the Charter), the Court should in principle not decline to give an advisory opinion. In accordance with its consistent jurisprudence, only “compelling reasons” should lead the Court to refuse its opinion (*Certain Expenses of the United Nations (Article 17, paragraph 2, of*

the Charter), *Advisory Opinion, I.C.J. Reports 1962*, p. 155; see also, for example, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29.)

The present Court has never, in the exercise of this discretionary power, declined to respond to a request for an advisory opinion. Its decision not to give the advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* requested by the World Health Organization was based on the Court's lack of jurisdiction, and not on considerations of judicial propriety (see *I.C.J. Reports 1996 (I)*, p. 235, para. 14). Only on one occasion did the Court's predecessor, the Permanent Court of International Justice, take the view that it should not reply to a question put to it (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*), but this was due to

“the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute, one of the States parties to which was neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, objected to the proceedings, and refused to take part in any way” (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, pp. 235-236, para. 14).

45. These considerations do not release the Court from the duty to satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function, by reference to the criterion of “compelling reasons” as cited above. The Court will accordingly examine in detail and in the light of its jurisprudence each of the arguments presented to it in this regard.

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46. The first such argument is to the effect that the Court should not exercise its jurisdiction in the present case because the request concerns a contentious matter between Israel and Palestine, in respect of which Israel has not consented to the exercise of that jurisdiction. According to this view, the subject-matter of the question posed by the General Assembly “is an integral part of the wider Israeli-Palestinian dispute concerning questions of terrorism, security, borders, settlements, Jerusalem and other related matters”. Israel has emphasized that it has never consented to the settlement of this wider dispute by the Court or by any other means of compulsory adjudication; on the contrary, it contends that the parties repeatedly agreed that these issues are to be settled by negotiation, with the possibility of an agreement that recourse could be had to arbitration. It is accordingly contended that the Court should decline to give the present Opinion, on the basis *inter alia* of the precedent of the decision of the Permanent Court of International Justice on the *Status of Eastern Carelia*.

47. The Court observes that the lack of consent to the Court's contentious jurisdiction by interested States has no bearing on the Court's jurisdiction to give an advisory opinion. In an Advisory Opinion of 1950, the Court explained that:

“The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an

Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused." (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; see also *Western Sahara, I.C.J. Reports 1975*, p. 24, para. 31.)

It followed from this that, in those proceedings, the Court did not refuse to respond to the request for an advisory opinion on the ground that, in the particular circumstances, it lacked jurisdiction. The Court did however examine the opposition of certain interested States to the request by the General Assembly in the context of issues of judicial propriety. Commenting on its 1950 decision, the Court explained in its Advisory Opinion on *Western Sahara* that it had "Thus . . . recognized that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion." The Court continued:

"In certain circumstances . . . the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial 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." (*Western Sahara, I.C.J. Reports 1975*, p. 25, paras. 32-33.)

In applying that principle to the request concerning *Western Sahara*, the Court found that a legal controversy did indeed exist, but one which had arisen during the proceedings of the General Assembly and in relation to matters with which the Assembly was dealing. It had not arisen independently in bilateral relations (*ibid.*, p. 25, para. 34).

48. As regards the request for an advisory opinion now before it, the Court acknowledges that Israel and Palestine have expressed radically divergent views on the legal consequences of Israel's construction of the wall, on which the Court has been asked to pronounce. However, as the Court has itself noted, "Differences of views . . . on legal issues have existed in practically every advisory proceeding" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 24, para. 34).

49. Furthermore, the Court does not consider that the subject-matter of the General Assembly's request can be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court's view that the construction of the wall must be deemed to be directly of concern to the United Nations. The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine (see paragraphs 70 and 71 below). This responsibility has been described by the General Assembly as "a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy" (General Assembly resolution 57/107 of 3 December 2002). Within the institutional framework of the Organization, this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people.

50. The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute. In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground.

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51. The Court now turns to another argument raised in the present proceedings in support of the view that it should decline to exercise its jurisdiction. Some participants have argued that an advisory opinion from the Court on the legality of the wall and the legal consequences of its construction could impede a political, negotiated solution to the Israeli-Palestinian conflict. More particularly, it has been contended that such an opinion could undermine the scheme of the “Roadmap” (see paragraph 22 above), which requires Israel and Palestine to comply with certain obligations in various phases referred to therein. The requested opinion, it has been alleged, could complicate the negotiations envisaged in the “Roadmap”, and the Court should therefore exercise its discretion and decline to reply to the question put.

This is a submission of a kind which the Court has already had to consider several times in the past. For instance, in its Advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court stated:

“It has . . . been submitted that a reply from the Court in this case might adversely affect disarmament negotiations and would, therefore, be contrary to the interest of the United Nations. The Court is aware that, no matter what might be its conclusions in any opinion it might give, they would have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter. Beyond that, the effect of the opinion is a matter of appreciation. The Court has heard contrary positions advanced and there are no evident criteria by which it can prefer one assessment to another.” (*I.C.J. Reports 1996 (I)*, p. 237, para. 17; see also *Western Sahara*, *I.C.J. Reports 1975*, p. 37, para. 73.)

52. One participant in the present proceedings has indicated that the Court, if it were to give a response to the request, should in any event do so keeping in mind

“two key aspects of the peace process: the fundamental principle that permanent status issues must be resolved through negotiations; and the need during the interim period for the parties to fulfill their security responsibilities so that the peace process can succeed”.

53. The Court is conscious that the “Roadmap”, which was endorsed by the Security Council in resolution 1515 (2003) (see paragraph 22 above), constitutes a negotiating framework for the resolution of the Israeli-Palestinian conflict. It is not clear, however, what influence the Court’s opinion might have on those negotiations: participants in the present proceedings have expressed differing views in this regard. The Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.

54. It was also put to the Court by certain participants that the question of the construction of the wall was only one aspect of the Israeli-Palestinian conflict, which could not be properly addressed in the present proceedings. The Court does not however consider this a reason for it to decline to reply to the question asked. The Court is indeed aware that the question of the wall is part of a greater whole, and it would take this circumstance carefully into account in any opinion it might give. At the same time, the question that the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall, and the Court would only examine other issues to the extent that they might be necessary to its consideration of the question put to it.

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55. Several participants in the proceedings have raised the further argument that the Court should decline to exercise its jurisdiction because it does not have at its disposal the requisite facts and evidence to enable it to reach its conclusions. In particular, Israel has contended, referring to the Advisory Opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, that the Court could not give an opinion on issues which raise questions of fact that cannot be elucidated without hearing all parties to the conflict. According to Israel, if the Court decided to give the requested opinion, it would be forced to speculate about essential facts and make assumptions about arguments of law. More specifically, Israel has argued that the Court could not rule on the legal consequences of the construction of the wall without enquiring, first, into the nature and scope of the security threat to which the wall is intended to respond and the effectiveness of that response, and, second, into the impact of the construction for the Palestinians. This task, which would already be difficult in a contentious case, would be further complicated in an advisory proceeding, particularly since Israel alone possesses much of the necessary information and has stated that it chooses not to address the merits. Israel has concluded that the Court, confronted with factual issues impossible to clarify in the present proceedings, should use its discretion and decline to comply with the request for an advisory opinion.

56. The Court observes that the question whether the evidence available to it is sufficient to give an advisory opinion must be decided in each particular instance. In its Opinion concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (*I.C.J. Reports 1950*, p. 72) and again in its Opinion on the *Western Sahara*, the Court made it clear that what is decisive in these circumstances is “whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character” (*Western Sahara, I.C.J. Reports 1975*, pp. 28-29, para. 46). Thus, for instance, in the proceedings concerning the *Status of Eastern Carelia*, the Permanent Court of International Justice decided to decline to give an Opinion *inter alia* because the question put “raised a question of fact which could not be elucidated without hearing both parties” (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, p. 72; see *Status of Eastern Carelia, P.C.I.J., Series B, No. 5*, p. 28). On the other hand, in the *Western Sahara* Opinion, the Court observed that it had been provided with very extensive documentary evidence of the relevant facts (*I.C.J. Reports 1975*, p. 29, para. 47).

57. In the present instance, the Court has at its disposal the report of the Secretary-General, as well as a voluminous dossier submitted by him to the Court, comprising not only detailed information on the route of the wall but also on its humanitarian and socio-economic impact on the Palestinian population. The dossier includes several reports based on on-site visits by special rapporteurs and competent organs of the United Nations. The Secretary-General has further submitted to the Court a written statement updating his report, which supplemented the information contained therein. Moreover, numerous other

participants have submitted to the Court written statements which contain information relevant to a response to the question put by the General Assembly. The Court notes in particular that Israel's Written Statement, although limited to issues of jurisdiction and judicial propriety, contained observations on other matters, including Israel's concerns in terms of security, and was accompanied by corresponding annexes; many other documents issued by the Israeli Government on those matters are in the public domain.

58. The Court finds that it has before it sufficient information and evidence to enable it to give the advisory opinion requested by the General Assembly. Moreover, the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task. There is therefore in the present case no lack of information such as to constitute a compelling reason for the Court to decline to give the requested opinion.

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59. In their written statements, some participants have also put forward the argument that the Court should decline to give the requested opinion on the legal consequences of the construction of the wall because such opinion would lack any useful purpose. They have argued that the advisory opinions of the Court are to be seen as a means to enable an organ or agency in need of legal clarification for its future action to obtain that clarification. In the present instance, the argument continues, the General Assembly would not need an opinion of the Court because it has already declared the construction of the wall to be illegal and has already determined the legal consequences by demanding that Israel stop and reverse its construction, and further, because the General Assembly has never made it clear how it intended to use the opinion.

60. As is clear from the Court's jurisprudence, advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action. In its Opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court observed: "The object of this request for an Opinion is to guide the United Nations in respect of its own action." (*I.C.J. Reports 1951*, p. 19.) Likewise, in its Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court noted: "The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions." (*I.C.J. Reports 1971*, p. 24, para. 32.) The Court found on another occasion that the advisory opinion it was to give would "furnish the General Assembly with elements of a legal character relevant to its further treatment of the decolonization of Western Sahara" (*Western Sahara, I.C.J. Reports 1975*, p. 37, para. 72).

61. With regard to the argument that the General Assembly has not made it clear what use it would make of an advisory opinion on the wall, the Court would recall, as equally relevant in the present proceedings, what it stated in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons*:

"Certain States have observed that the General Assembly has not explained to the Court for what precise purposes it seeks the advisory opinion. Nevertheless, it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." (*I.C.J. Reports 1996 (I)*, p. 237, para. 16.)

62. It follows that the Court cannot decline to answer the question posed based on the ground that its opinion would lack any useful purpose. The Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly. Furthermore, and in any event, the Court considers that the General Assembly has not yet determined all the possible consequences of its own resolution. The Court's task would be to determine in a comprehensive manner the legal consequences of the construction of the wall, while the General Assembly - and the Security Council - may then draw conclusions from the Court's findings.

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63. Lastly, the Court will turn to another argument advanced with regard to the propriety of its giving an advisory opinion in the present proceedings. Israel has contended that Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the Court a remedy for a situation resulting from its own wrongdoing. In this context, Israel has invoked the maxim *nullus commodum capere potest de sua injuria propria*, which it considers to be as relevant in advisory proceedings as it is in contentious cases. Therefore, Israel concludes, good faith and the principle of "clean hands" provide a compelling reason that should lead the Court to refuse the General Assembly's request.

64. The Court does not consider this argument to be pertinent. As was emphasized earlier, it was the General Assembly which requested the advisory opinion, and the opinion is to be given to the General Assembly, and not to a specific State or entity.

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65. In the light of the foregoing, the Court concludes not only that it has jurisdiction to give an opinion on the question put to it by the General Assembly (see paragraph 42 above), but also that there is no compelling reason for it to use its discretionary power not to give that opinion.

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66. The Court will now address the question put to it by the General Assembly in resolution ES-10/14. The Court recalls that the question is as follows:

“What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the

rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”

67. As explained in paragraph 82 below, the “wall” in question is a complex construction, so that that term cannot be understood in a limited physical sense. However, the other terms used, either by Israel (“fence”) or by the Secretary-General (“barrier”), are no more accurate if understood in the physical sense. In this Opinion, the Court has therefore chosen to use the terminology employed by the General Assembly.

The Court notes furthermore that the request of the General Assembly concerns the legal consequences of the wall being built “in the Occupied Palestinian Territory, including in and around East Jerusalem”. As also explained below (see paragraphs 79-84 below), some parts of the complex are being built, or are planned to be built, on the territory of Israel itself; the Court does not consider that it is called upon to examine the legal consequences arising from the construction of those parts of the wall.

68. The question put by the General Assembly concerns the legal consequences of the construction of the wall in the Occupied Palestinian Territory. However, in order to indicate those consequences to the General Assembly the Court must first determine whether or not the construction of that wall breaches international law (see paragraph 39 above). It will therefore make this determination before dealing with the consequences of the construction.

69. To do so, the Court will first make a brief analysis of the status of the territory concerned, and will then describe the works already constructed or in course of construction in that territory. It will then indicate the applicable law before seeking to establish whether that law has been breached.

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70. Palestine was part of the Ottoman Empire. At the end of the First World War, a class “A” Mandate for Palestine was entrusted to Great Britain by the League of Nations, pursuant to paragraph 4 of Article 22 of the Covenant, which provided that:

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

The Court recalls that in its Advisory Opinion on the *International Status of South West Africa*, speaking of mandates in general, it observed that “The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object - a sacred trust of civilization.” (*I.C.J. Reports 1950*, p. 132.) The Court also held in this regard that “two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of . . . peoples [not yet able to govern themselves] form[ed] ‘a sacred trust of civilization’” (*ibid.*, p. 131).

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

71. In 1947 the United Kingdom announced its intention to complete evacuation of the mandated territory by 1 August 1948, subsequently advancing that date to 15 May 1948. In the meantime, the General Assembly had on 29 November 1947 adopted resolution 181 (II) on the future government of Palestine, which “*Recommends* to the United Kingdom . . . and to all other Members of the United Nations the adoption and implementation . . . of the Plan of Partition” of the territory, as set forth in the resolution, between two independent States, one Arab, the other Jewish, as well as the creation of a special international régime for the City of Jerusalem. The Arab population of Palestine and the Arab States rejected this plan, contending that it was unbalanced; on 14 May 1948, Israel proclaimed its independence on the strength of the General Assembly resolution; armed conflict then broke out between Israel and a number of Arab States and the Plan of Partition was not implemented.

72. By resolution 62 (1948) of 16 November 1948, the Security Council decided that “an armistice shall be established in all sectors of Palestine” and called upon the parties directly involved in the conflict to seek agreement to this end. In conformity with this decision, general armistice agreements were concluded in 1949 between Israel and the neighbouring States through mediation by the United Nations. In particular, one such agreement was signed in Rhodes on 3 April 1949 between Israel and Jordan. Articles V and VI of that Agreement fixed the armistice demarcation line between Israeli and Arab forces (often later called the “Green Line” owing to the colour used for it on maps; hereinafter the “Green Line”). Article III, paragraph 2, provided that “No element of the . . . military or para-military forces of either Party . . . shall advance beyond or pass over for any purpose whatsoever the Armistice Demarcation Lines . . .” It was agreed in Article VI, paragraph 8, that these provisions would not be “interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties”. It was also stated that “the Armistice Demarcation Lines defined in articles V and VI of [the] Agreement [were] agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto”. The Demarcation Line was subject to such rectification as might be agreed upon by the parties.

73. In the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under British Mandate (including those known as the West Bank, lying to the east of the Green Line).

74. On 22 November 1967, the Security Council unanimously adopted resolution 242 (1967), which emphasized the inadmissibility of acquisition of territory by war and called for the “Withdrawal of Israel armed forces from territories occupied in the recent conflict”, and “Termination of all claims or states of belligerency”.

75. From 1967 onwards, Israel took a number of measures in these territories aimed at changing the status of the City of Jerusalem. The Security Council, after recalling on a number of occasions “the principle that acquisition of territory by military conquest is inadmissible”, condemned those measures and, by resolution 298 (1971) of 25 September 1971, confirmed in the clearest possible terms that:

“all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and

legislation aimed at the incorporation of the occupied section, are totally invalid and cannot change that status”.

Later, following the adoption by Israel on 30 July 1980 of the Basic Law making Jerusalem the “complete and united” capital of Israel, the Security Council, by resolution 478 (1980) of 20 August 1980, stated that the enactment of that Law constituted a violation of international law and that “all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem . . . are null and void”. It further decided “not to recognize the ‘basic law’ and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem”.

76. Subsequently, a peace treaty was signed on 26 October 1994 between Israel and Jordan. That treaty fixed the boundary between the two States “with reference to the boundary definition under the Mandate as is shown in Annex I (a) . . . without prejudice to the status of any territories that came under Israeli military government control in 1967” (Article 3, paragraphs 1 and 2). Annex I provided the corresponding maps and added that, with regard to the “territory that came under Israeli military government control in 1967”, the line indicated “is the administrative boundary” with Jordan.

77. Lastly, a number of agreements have been signed since 1993 between Israel and the Palestine Liberation Organization imposing various obligations on each party. Those agreements *inter alia* required Israel to transfer to Palestinian authorities certain powers and responsibilities exercised in the Occupied Palestinian Territory by its military authorities and civil administration. Such transfers have taken place, but, as a result of subsequent events, they remained partial and limited.

78. The Court would observe that, under customary international law as reflected (see paragraph 89 below) in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (hereinafter “the Hague Regulations of 1907”), territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.

The territories situated between the Green Line (see paragraph 72 above) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above, have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.

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79. It is essentially in these territories that Israel has constructed or plans to construct the works described in the report of the Secretary-General. The Court will now describe those works, basing itself on that report. For developments subsequent to the publication of that report, the Court will refer to complementary information contained in the Written Statement of the United Nations, which was intended

by the Secretary-General to supplement his report (hereinafter “Written Statement of the Secretary-General”).

80. The report of the Secretary-General states that “The Government of Israel has since 1996 considered plans to halt infiltration into Israel from the central and northern West Bank . . .” (Para. 4.) According to that report, a plan of this type was approved for the first time by the Israeli Cabinet in July 2001. Then, on 14 April 2002, the Cabinet adopted a decision for the construction of works, forming what Israel describes as a “security fence”, 80 kilometres in length, in three areas of the West Bank.

The project was taken a stage further when, on 23 June 2002, the Israeli Cabinet approved the first phase of the construction of a “continuous fence” in the West Bank (including East Jerusalem). On 14 August 2002, it adopted the line of that “fence” for the work in Phase A, with a view to the construction of a complex 123 kilometres long in the northern West Bank, running from the Salem checkpoint (north of Jenin) to the settlement at Elkana. Phase B of the work was approved in December 2002. It entailed a stretch of some 40 kilometres running east from the Salem checkpoint towards Beth Shean along the northern part of the Green Line as far as the Jordan Valley. Furthermore, on 1 October 2003, the Israeli Cabinet approved a full route, which, according to the report of the Secretary-General, “will form one continuous line stretching 720 kilometres along the West Bank”. A map showing completed and planned sections was posted on the Israeli Ministry of Defence website on 23 October 2003. According to the particulars provided on that map, a continuous section (Phase C) encompassing a number of large settlements will link the north-western end of the “security fence” built around Jerusalem with the southern point of Phase A construction at Elkana. According to the same map, the “security fence” will run for 115 kilometres from the Har Gilo settlement near Jerusalem to the Carmel settlement south-east of Hebron (Phase D). According to Ministry of Defence documents, work in this sector is due for completion in 2005. Lastly, there are references in the case file to Israel’s planned construction of a “security fence” following the Jordan Valley along the mountain range to the west.

81. According to the Written Statement of the Secretary-General, the first part of these works (Phase A), which ultimately extends for a distance of 150 kilometres, was declared completed on 31 July 2003. It is reported that approximately 56,000 Palestinians would be encompassed in enclaves. During this phase, two sections totalling 19.5 kilometres were built around Jerusalem. In November 2003 construction of a new section was begun along the Green Line to the west of the Nazlat Issa-Baqa al-Sharqiya enclave, which in January 2004 was close to completion at the time when the Secretary-General submitted his Written Statement.

According to the Written Statement of the Secretary-General, the works carried out under Phase B were still in progress in January 2004. Thus an initial section of this stretch, which runs near or on the Green Line to the village of al-Mutilla, was almost complete in January 2004. Two additional sections diverge at this point. Construction started in early January 2004 on one section that runs due east as far as the Jordanian border. Construction of the second section, which is planned to run from the Green Line to the village of Taysir, has barely begun. The United Nations has, however, been informed that this second section might not be built.

The Written Statement of the Secretary-General further states that Phase C of the work, which runs from the terminus of Phase A, near the Elkana settlement, to the village of Nu’man, south-east of Jerusalem, began in December 2003. This section is divided into three stages. In Stage C1, between *inter alia* the villages of Rantis and Budrus, approximately 4 kilometres out of a planned total of 40 kilometres have been constructed. Stage C2, which will surround the so-called “Ariel Salient” by cutting

22 kilometres into the West Bank, will incorporate 52,000 Israeli settlers. Stage C3 is to involve the construction of two “depth barriers”; one of these is to run north-south, roughly parallel with the section of Stage C1 currently under construction between Rantis and Budrus, whilst the other runs east-west along a ridge said to be part of the route of Highway 45, a motorway under construction. If construction of the two barriers were completed, two enclaves would be formed, encompassing 72,000 Palestinians in 24 communities.

Further construction also started in late November 2003 along the south-eastern part of the municipal boundary of Jerusalem, following a route that, according to the Written Statement of the Secretary-General, cuts off the suburban village of El-Ezariya from Jerusalem and splits the neighbouring Abu Dis in two.

As at 25 January 2004, according to the Written Statement of the Secretary-General, some 190 kilometres of construction had been completed, covering Phase A and the greater part of Phase B. Further construction in Phase C had begun in certain areas of the central West Bank and in Jerusalem. Phase D, planned for the southern part of the West Bank, had not yet begun.

The Israeli Government has explained that the routes and timetable as described above are subject to modification. In February 2004, for example, an 8-kilometre section near the town of Baqa al-Sharqiya was demolished, and the planned length of the wall appears to have been slightly reduced.

82. According to the description in the report and the Written Statement of the Secretary-General, the works planned or completed have resulted or will result in a complex consisting essentially of:

- (1) a fence with electronic sensors;
- (2) a ditch (up to 4 metres deep);
- (3) a two-lane asphalt patrol road;
- (4) a trace road (a strip of sand smoothed to detect footprints) running parallel to the fence;
- (5) a stack of six coils of barbed wire marking the perimeter of the complex.

The complex has a width of 50 to 70 metres, increasing to as much as 100 metres in some places. “Depth barriers” may be added to these works.

The approximately 180 kilometres of the complex completed or under construction as of the time when the Secretary-General submitted his report included some 8.5 kilometres of concrete wall. These are generally found where Palestinian population centres are close to or abut Israel (such as near Qalqiliya and Tulkarm or in parts of Jerusalem).

83. According to the report of the Secretary-General, in its northernmost part, the wall as completed or under construction barely deviates from the Green Line. It nevertheless lies within occupied territories for most of its course. The works deviate more than 7.5 kilometres from the Green Line in certain places to encompass settlements, while encircling Palestinian population areas. A stretch of 1 to 2 kilometres west of Tulkarm appears to run on the Israeli side of the Green Line. Elsewhere, on the other hand, the planned route would deviate eastward by up to 22 kilometres. In the case of Jerusalem, the existing works and the planned route lie well beyond the Green Line and even in some cases beyond the eastern municipal boundary of Jerusalem as fixed by Israel.

84. On the basis of that route, approximately 975 square kilometres (or 16.6 per cent of the West Bank) would, according to the report of the Secretary-General, lie between the Green Line and the wall. This area is stated to be home to 237,000 Palestinians. If the full wall were completed as planned, another 160,000 Palestinians would live in almost completely encircled communities, described as enclaves in the report. As a result of the planned route, nearly 320,000 Israeli settlers (of whom 178,000 in East Jerusalem) would be living in the area between the Green Line and the wall.

85. Lastly, it should be noted that the construction of the wall has been accompanied by the creation of a new administrative régime. Thus in October 2003 the Israeli Defence Forces issued Orders establishing the part of the West Bank lying between the Green Line and the wall as a “Closed Area”. Residents of this area may no longer remain in it, nor may non-residents enter it, unless holding a permit or identity card issued by the Israeli authorities. According to the report of the Secretary-General, most residents have received permits for a limited period. Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel in accordance with the Law of Return may remain in, or move freely to, from and within the Closed Area without a permit. Access to and exit from the Closed Area can only be made through access gates, which are opened infrequently and for short periods.

* * *

86. The Court will now determine the rules and principles of international law which are relevant in assessing the legality of the measures taken by Israel. Such rules and principles can be found in the United Nations Charter and certain other treaties, in customary international law and in the relevant resolutions adopted pursuant to the Charter by the General Assembly and the Security Council. However, doubts have been expressed by Israel as to the applicability in the Occupied Palestinian Territory of certain rules of international humanitarian law and human rights instruments. The Court will now consider these various questions.

87. The Court first recalls that, pursuant to Article 2, paragraph 4, of the United Nations Charter:

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

On 24 October 1970, the General Assembly adopted resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States”

(hereinafter “resolution 2625 (XXV)”), in which it emphasized that “No territorial acquisition resulting from the threat or use of force shall be recognized as legal.” As the Court stated in its Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the principles as to the use of force incorporated in the Charter reflect customary international law (see *I.C.J. Reports 1986*, pp. 98-101, paras. 187-190); the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.

88. The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant to which “Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] . . . of their right to self-determination.” Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter.

The Court would recall that in 1971 it emphasized that current developments in “international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]”. The Court went on to state that “These developments leave little doubt that the ultimate objective of the sacred trust” referred to in Article 22, paragraph 1, of the Covenant of the League of Nations “was the self-determination . . . of the peoples concerned” (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, paras. 52-53). The Court has referred to this principle on a number of occasions in its jurisprudence (*ibid.*; see also *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 68, para. 162). The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes* (see *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29).

89. As regards international humanitarian law, the Court would first note that Israel is not a party to the Fourth Hague Convention of 1907, to which the Hague Regulations are annexed. The Court observes that, in the words of the Convention, those Regulations were prepared “to revise the general laws and customs of war” existing at that time. Since then, however, the International Military Tribunal of Nuremberg has found that the “rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war” (Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, p. 65). The Court itself reached the same conclusion when examining the rights and duties of belligerents in their conduct of military operations (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 256, para. 75). The Court considers that the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court.

The Court also observes that, pursuant to Article 154 of the Fourth Geneva Convention, that Convention is supplementary to Sections II and III of the Hague Regulations. Section III of those Regulations, which concerns “Military authority over the territory of the hostile State”, is particularly pertinent in the present case.

90. Secondly, with regard to the Fourth Geneva Convention, differing views have been expressed by the participants in these proceedings. Israel, contrary to the great majority of the other participants, disputes the applicability *de jure* of the Convention to the Occupied Palestinian Territory. In particular, in

paragraph 3 of Annex I to the report of the Secretary-General, entitled “Summary Legal Position of the Government of Israel”, it is stated that Israel does not agree that the Fourth Geneva Convention “is applicable to the occupied Palestinian Territory”, citing “the lack of recognition of the territory as sovereign prior to its annexation by Jordan and Egypt” and inferring that it is “not a territory of a High Contracting Party as required by the Convention”.

91. The Court would recall that the Fourth Geneva Convention was ratified by Israel on 6 July 1951 and that Israel is a party to that Convention. Jordan has also been a party thereto since 29 May 1951. Neither of the two States has made any reservation that would be pertinent to the present proceedings.

Furthermore, Palestine gave a unilateral undertaking, by declaration of 7 June 1982, to apply the Fourth Geneva Convention. Switzerland, as depositary State, considered that unilateral undertaking valid. It concluded, however, that it “[was] not - as a depositary - in a position to decide whether” “the request [dated 14 June 1989] from the Palestine Liberation Movement in the name of the ‘State of Palestine’ to accede” *inter alia* to the Fourth Geneva Convention “can be considered as an instrument of accession”.

92. Moreover, for the purpose of determining the scope of application of the Fourth Geneva Convention, it should be recalled that under common Article 2 of the four Conventions of 12 August 1949:

“In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”

93. After the occupation of the West Bank in 1967, the Israeli authorities issued an order No. 3 stating in its Article 35 that:

“the Military Court . . . must apply the provisions of the Geneva Convention dated 12 August 1949 relative to the Protection of Civilian Persons in Time of War with respect to judicial procedures. In case of conflict between this Order and the said Convention, the Convention shall prevail.”

Subsequently, the Israeli authorities have indicated on a number of occasions that in fact they generally apply the humanitarian provisions of the Fourth Geneva Convention within the occupied territories. However, according to Israel's position as briefly recalled in paragraph 90 above, that Convention is not applicable *de jure* within those territories because, under Article 2, paragraph 2, it applies only in the case of occupation of territories falling under the sovereignty of a High Contracting Party involved in an armed conflict. Israel explains that Jordan was admittedly a party to the Fourth Geneva Convention in 1967, and that an armed conflict broke out at that time between Israel and Jordan, but it goes on to observe that the territories occupied by Israel subsequent to that conflict had not previously fallen under Jordanian sovereignty. It infers from this that that Convention is not applicable *de jure* in those territories. According however to the great majority of other participants in the proceedings, the Fourth Geneva Convention is applicable to those territories pursuant to Article 2, paragraph 1, whether or not Jordan had any rights in respect thereof prior to 1967.

94. The Court would recall that, according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Article 32 provides that:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 . . . leaves the meaning ambiguous or obscure; or . . . leads to a result which is manifestly obscure or unreasonable.” (See *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objections*, *I.C.J. Reports 1996 (II)*, p. 812, para. 23; see, similarly, *Kasikili/Sedudu Island (Botswana/Namibia)*, *I.C.J. Reports 1999 (II)*, p. 1059, para. 18, and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *Judgment*, *I.C.J. Reports 2002*, p. 645, para. 37.)

95. The Court notes that, according to the first paragraph of Article 2 of the Fourth Geneva Convention, that Convention is applicable when two conditions are fulfilled: that there exists an armed conflict (whether or not a state of war has been recognized); and that the conflict has arisen between two contracting parties. If those two conditions are satisfied, the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties.

The object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties. It is directed simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.

This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power. Whilst the drafters of the Hague Regulations of 1907 were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories, as is shown by Article 47 of the Convention.

That interpretation is confirmed by the Convention's *travaux préparatoires*. The Conference of Government Experts convened by the International Committee of the Red Cross (hereinafter, "ICRC") in the aftermath of the Second World War for the purpose of preparing the new Geneva Conventions recommended that these conventions be applicable to any armed conflict "whether [it] is or is not recognized as a state of war by the parties" and "in cases of occupation of territories in the absence of any state of war" (*Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, 14-26 April 1947*, p. 8). The drafters of the second paragraph of Article 2 thus had no intention, when they inserted that paragraph into the Convention, of restricting the latter's scope of application. They were merely seeking to provide for cases of occupation without combat, such as the occupation of Bohemia and Moravia by Germany in 1939.

96. The Court would moreover note that the States parties to the Fourth Geneva Convention approved that interpretation at their Conference on 15 July 1999. They issued a statement in which they "reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem". Subsequently, on 5 December 2001, the High Contracting Parties, referring in particular to Article 1 of the Fourth Geneva Convention of 1949, once again reaffirmed the "applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem". They further reminded the Contracting Parties participating in the Conference, the parties to the conflict, and the State of Israel as occupying Power, of their respective obligations.

97. Moreover, the Court would observe that the ICRC, whose special position with respect to execution of the Fourth Geneva Convention must be "recognized and respected at all times" by the parties pursuant to Article 142 of the Convention, has also expressed its opinion on the interpretation to be given to the Convention. In a declaration of 5 December 2001, it recalled that "the ICRC has always affirmed the *de jure* applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem".

98. The Court notes that the General Assembly has, in many of its resolutions, taken a position to the same effect. Thus on 10 December 2001 and 9 December 2003, in resolutions 56/60 and 58/97, it reaffirmed "that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967".

99. The Security Council, for its part, had already on 14 June 1967 taken the view in resolution 237 (1967) that "all the obligations of the Geneva Convention relative to the Treatment of Prisoners of War... should be complied with by the parties involved in the conflict". Subsequently, on 15 September 1969, the Security Council, in resolution 271 (1969), called upon "Israel scrupulously to observe the provisions of the Geneva Conventions and international law governing military occupation".

Ten years later, the Security Council examined "the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967". In resolution 446 (1979) of 22 March 1979, the Security Council considered that those settlements had "no legal validity" and affirmed "*once more* that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem". It called "*once more upon* Israel, as the occupying Power, to abide scrupulously" by that Convention.

On 20 December 1990, the Security Council, in resolution 681 (1990), urged “the Government of Israel to accept the *de jure* applicability of the Fourth Geneva Convention . . . to all the territories occupied by Israel since 1967 and to abide scrupulously by the provisions of the Convention”. It further called upon “the high contracting parties to the said Fourth Geneva Convention to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with article 1 thereof”.

Lastly, in resolutions 799 (1992) of 18 December 1992 and 904 (1994) of 18 March 1994, the Security Council reaffirmed its position concerning the applicability of the Fourth Geneva Convention in the occupied territories.

100. The Court would note finally that the Supreme Court of Israel, in a judgment dated 30 May 2004, also found that:

“The military operations of the [Israeli Defence Forces] in Rafah, to the extent they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907 . . . and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949.”

101. In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.

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102. The participants in the proceedings before the Court also disagree whether the international human rights conventions to which Israel is party apply within the Occupied Palestinian Territory. Annex I to the report of the Secretary-General states:

“4. Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.”

Of the other participants in the proceedings, those who addressed this issue contend that, on the contrary, both Covenants are applicable within the Occupied Palestinian Territory.

103. On 3 October 1991 Israel ratified both the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 and the International Covenant on Civil and Political Rights of the same date, as well as the United Nations Convention on the Rights of the Child of 20 November 1989. It is a party to these three instruments.

104. In order to determine whether these texts are applicable in the Occupied Palestinian Territory, the Court will first address the issue of the relationship between international humanitarian law and human rights law and then that of the applicability of human rights instruments outside national territory.

105. In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the Court had occasion to address the first of these issues in relation to the International Covenant on Civil and Political Rights. In those proceedings certain States had argued that “the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict” (*I.C.J. Reports 1996 (I)*, p. 239, para. 24).

The Court rejected this argument, stating that:

“the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.” (*Ibid.*, p. 240, para. 25.)

106. More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

107. It remains to be determined whether the two international Covenants and the Convention on the Rights of the Child are applicable only on the territories of the States parties thereto or whether they are also applicable outside those territories and, if so, in what circumstances.

108. The scope of application of the International Covenant on Civil and Political Rights is defined by Article 2, paragraph 1, thereof, which provides:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the

present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

This provision can be interpreted as covering only individuals who are both present within a State’s territory and subject to that State’s jurisdiction. It can also be construed as covering both individuals present within a State’s territory and those outside that territory but subject to that State’s jurisdiction. The Court will thus seek to determine the meaning to be given to this text.

109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *López Burgos v. Uruguay*; case No. 56/79, *Lilian Celiberti de Casariego v. Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, *Montero v. Uruguay*).

The *travaux préparatoires* of the Covenant confirm the Committee’s interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, *Official Records of the General Assembly, Tenth Session, Annexes, A/2929, Part II, Chap. V, para. 4 (1955)*).

110. The Court takes note in this connection of the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee.

In 1998, Israel stated that, when preparing its report to the Committee, it had had to face the question “whether individuals resident in the occupied territories were indeed subject to Israel’s jurisdiction” for purposes of the application of the Covenant (CCPR/C/SR.1675, para. 21). Israel took the position that “the Covenant and similar instruments did not apply directly to the current situation in the occupied territories” (*ibid.*, para. 27).

The Committee, in its concluding observations after examination of the report, expressed concern at Israel’s attitude and pointed “to the long-standing presence of Israel in [the occupied] territories, Israel’s ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein” (CCPR/C/79/Add.93, para. 10). In 2003 in face of Israel’s consistent position, to the effect that “the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza . . .”, the Committee reached the following conclusion:

“in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party’s authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law” (CCPR/CO/78/ISR, para. 11).

111. In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.

112. The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction. Thus Article 14 makes provision for transitional measures in the case of any State which “at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge”.

It is not without relevance to recall in this regard the position taken by Israel in its reports to the Committee on Economic, Social and Cultural Rights. In its initial report to the Committee of 4 December 1998, Israel provided “statistics indicating the enjoyment of the rights enshrined in the Covenant by Israeli settlers in the occupied Territories”. The Committee noted that, according to Israel, “the Palestinian population within the same jurisdictional areas were excluded from both the report and the protection of the Covenant” (E/C.12/1/Add. 27, para. 8). The Committee expressed its concern in this regard, to which Israel replied in a further report of 19 October 2001 that it has “consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction” (a formula inspired by the language of the International Covenant on Civil and Political Rights). This position, continued Israel, is “based on the well-established distinction between human rights and humanitarian law under international law”. It added: “the Committee’s mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights” (E/1990/6/Add. 32, para. 5). In view of these observations, the Committee reiterated its concern about Israel’s position and reaffirmed “its view that the State party’s obligations under the Covenant apply to all territories and populations under its effective control” (E/C.12/1/Add.90, paras. 15 and 31).

For the reasons explained in paragraph 106 above, the Court cannot accept Israel’s view. It would also observe that the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.

113. As regards the Convention on the Rights of the Child of 20 November 1989, that instrument contains an Article 2 according to which “States Parties shall respect and ensure the rights set forth in the . . . Convention to each child within their jurisdiction . . .”. That Convention is therefore applicable within the Occupied Palestinian Territory.

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114. Having determined the rules and principles of international law relevant to reply to the question posed by the General Assembly, and having ruled in particular on the applicability within the Occupied Palestinian Territory of international humanitarian law and human rights law, the Court will now seek to ascertain whether the construction of the wall has violated those rules and principles.

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115. In this regard, Annex II to the report of the Secretary-General, entitled “Summary Legal Position of the Palestine Liberation Organization”, states that “The construction of the Barrier is an attempt to annex the territory contrary to international law” and that “The de facto annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination.” This view was echoed in certain of the written statements submitted to the Court and in the views expressed at the hearings. *Inter alia*, it was contended that: “The wall severs the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination and constitutes a violation of the legal principle prohibiting the acquisition of territory by the use of force.” In this connection, it was in particular emphasized that “The route of the wall is designed to change the demographic composition of the Occupied Palestinian Territory, including East Jerusalem, by reinforcing the Israeli settlements” illegally established on the Occupied Palestinian Territory. It was further contended that the wall aimed at “reducing and parcelling out the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination”.

116. For its part, Israel has argued that the wall’s sole purpose is to enable it effectively to combat terrorist attacks launched from the West Bank. Furthermore, Israel has repeatedly stated that the Barrier is a temporary measure (see report of the Secretary-General, para. 29). It did so *inter alia* through its Permanent Representative to the United Nations at the Security Council meeting of 14 October 2003, emphasizing that “[the fence] does not annex territories to the State of Israel”, and that Israel is “ready and able, at tremendous cost, to adjust or dismantle a fence if so required as part of a political settlement” (S/PV.4841, p. 10). Israel’s Permanent Representative restated this view before the General Assembly on 20 October and 8 December 2003. On this latter occasion, he added: “As soon as the terror ends, the fence will no longer be necessary. The fence is not a border and has no political significance. It does not change the legal status of the territory in any way.” (A/ES-10/PV.23, p. 6.)

117. The Court would recall that both the General Assembly and the Security Council have referred, with regard to Palestine, to the customary rule of “the inadmissibility of the acquisition of territory by war” (see paragraphs 74 and 87 above). Thus in resolution 242 (1967) of 22 November 1967, the Security Council, after recalling this rule, affirmed that:

“the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

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

- (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force”.

It is on this same basis that the Council has several times condemned the measures taken by Israel to change the status of Jerusalem (see paragraph 75 above).

118. As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a “Palestinian people” is no longer in issue. Such existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr. Yitzhak Rabin, Israeli Prime Minister. In that correspondence, the President of the PLO recognized “the right of the State of Israel to exist in peace and security” and made various other commitments. In reply, the Israeli Prime Minister informed him that, in the light of those commitments, “the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people”. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 also refers a number of times to the Palestinian people and its “legitimate rights” (Preamble, paras. 4, 7, 8; Article II, para. 2; Article III, paras. 1 and 3; Article XXII, para. 2). The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions (see, for example, resolution 58/163 of 22 December 2003).

119. The Court notes that the route of the wall as fixed by the Israeli Government includes within the “Closed Area” (see paragraph 85 above) some 80 per cent of the settlers living in the Occupied Palestinian Territory. Moreover, it is apparent from an examination of the map mentioned in paragraph 80 above that the wall’s sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem).

120. As regards these settlements, the Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.

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

The Security Council has thus taken the view that such policy and practices “have no legal validity”. It has also called upon “Israel, as the occupying Power, to abide scrupulously” by the Fourth Geneva Convention and:

“to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem and, in

particular, not to transfer parts of its own civilian population into the occupied Arab territories” (resolution 446 (1979) of 22 March 1979).

The Council reaffirmed its position in resolutions 452 (1979) of 20 July 1979 and 465 (1980) of 1 March 1980. Indeed, in the latter case it described “Israel’s policy and practices of settling parts of its population and new immigrants in [the occupied] territories” as a “flagrant violation” of the Fourth Geneva Convention.

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

121. Whilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature (see paragraph 116 above), it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudice the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers that the construction of the wall and its associated régime create a “fait accompli” on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.

122. The Court recalls moreover that, according to the report of the Secretary-General, the planned route would incorporate in the area between the Green Line and the wall more than 16 per cent of the territory of the West Bank. Around 80 per cent of the settlers living in the Occupied Palestinian Territory, that is 320,000 individuals, would reside in that area, as well as 237,000 Palestinians. Moreover, as a result of the construction of the wall, around 160,000 other Palestinians would reside in almost completely encircled communities (see paragraphs 84, 85 and 119 above).

In other terms, the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council (see paragraphs 75 and 120 above). There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing, as will be further explained in paragraph 133 below, to the departure of Palestinian populations from certain areas. That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel’s obligation to respect that right.

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123. The construction of the wall also raises a number of issues in relation to the relevant provisions of international humanitarian law and of human rights instruments.

124. With regard to the Hague Regulations of 1907, the Court would recall that these deal, in Section II, with hostilities and in particular with “means of injuring the enemy, sieges, and bombardments”. Section III deals with military authority in occupied territories. Only Section III is

currently applicable in the West Bank and Article 23 (g) of the Regulations, in Section II, is thus not pertinent.

Section III of the Hague Regulations includes Articles 43, 46 and 52, which are applicable in the Occupied Palestinian Territory. Article 43 imposes a duty on the occupant to “take all measures within his power to restore, and, as far as possible, to insure public order and life, respecting the laws in force in the country”. Article 46 adds that private property must be “respected” and that it cannot “be confiscated”. Lastly, Article 52 authorizes, within certain limits, requisitions in kind and services for the needs of the army of occupation.

125. A distinction is also made in the Fourth Geneva Convention between provisions applying during military operations leading to occupation and those that remain applicable throughout the entire period of occupation. It thus states in Article 6:

“The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.”

Since the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3, remain applicable in that occupied territory.

126. These provisions include Articles 47, 49, 52, 53 and 59 of the Fourth Geneva Convention.

According to Article 47:

“Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.”

Article 49 reads as follows:

“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

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

According to Article 52:

“No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power’s intervention.

All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited.”

Article 53 provides that:

“Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or

to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”

Lastly, according to Article 59:

“If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.

Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.

A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.”

127. The International Covenant on Civil and Political Rights also contains several relevant provisions. Before further examining these, the Court will observe that Article 4 of the Covenant allows for derogation to be made, under various conditions, to certain provisions of that instrument. Israel made use of its right of derogation under this Article by addressing the following communication to the Secretary-General of the United Nations on 3 October 1991:

“Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.

These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings.

In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4 (1) of the Covenant.

The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention.

In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision.”

The Court notes that the derogation so notified concerns only Article 9 of the International Covenant on Civil and Political Rights, which deals with the right to liberty and security of person and lays down the rules applicable in cases of arrest or detention. The other Articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory.

128. Among these mention must be made of Article 17, paragraph 1 of which reads as follows: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”

Mention must also be made of Article 12, paragraph 1, which provides: “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”

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

“All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, while ensuring the requirements of public order and decorum, is assumed by the Mandatory . . .”

Article 13 further stated: “nothing in this mandate shall be construed as conferring . . . authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed”.

In the aftermath of the Second World War, the General Assembly, in adopting resolution 181 (II) on the future government of Palestine, devoted an entire chapter of the Plan of Partition to the Holy Places, religious buildings and sites. Article 2 of this Chapter provided, in so far as the Holy Places were concerned:

“the liberty of access, visit and transit shall be guaranteed, in conformity with existing rights, to all residents and citizens [of the Arab State, of the Jewish State] and of the City of Jerusalem, as well as to aliens, without distinction as to nationality, subject to requirements of national security, public order and decorum”.

Subsequently, in the aftermath of the armed conflict of 1948, the 1949 General Armistice Agreement between Jordan and Israel provided in Article VIII for the establishment of a special committee for “the

formulation of agreed plans and arrangements for such matters as either Party may submit to it” for the purpose of enlarging the scope of the Agreement and of effecting improvement in its application. Such matters, on which an agreement of principle had already been concluded, included “free access to the Holy Places”.

This commitment concerned mainly the Holy Places located to the east of the Green Line. However, some Holy Places were located west of that Line. This was the case of the Room of the Last Supper and the Tomb of David, on Mount Zion. In signing the General Armistice Agreement, Israel thus undertook, as did Jordan, to guarantee freedom of access to the Holy Places. The Court considers that this undertaking by Israel has remained valid for the Holy Places which came under its control in 1967. This undertaking has further been confirmed by Article 9, paragraph 1, of the 1994 Peace Treaty between Israel and Jordan, by virtue of which, in more general terms, “Each party will provide freedom of access to places of religious and historical significance.”

130. As regards the International Covenant on Economic, Social and Cultural Rights, that instrument includes a number of relevant provisions, namely: the right to work (Articles 6 and 7); protection and assistance accorded to the family and to children and young persons (Article 10); the right to an adequate standard of living, including adequate food, clothing and housing, and the right “to be free from hunger” (Art. 11); the right to health (Art. 12); the right to education (Arts. 13 and 14).

131. Lastly, the United Nations Convention on the Rights of the Child of 20 November 1989 includes similar provisions in Articles 16, 24, 27 and 28.

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132. From the information submitted to the Court, particularly the report of the Secretary-General, it appears that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention.

133. That construction, the establishment of a closed area between the Green Line and the wall itself and the creation of enclaves have moreover imposed substantial restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto). Such restrictions are most marked in urban areas, such as the Qalqiliya enclave or the City of Jerusalem and its suburbs. They are aggravated by the fact that the access gates are few in number in certain sectors and opening hours appear to be restricted and unpredictably applied. For example, according to the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967, “Qalqiliya, a city with a population of 40,000, is completely surrounded by the Wall and residents can only enter and leave through a single military checkpoint open from 7 a.m. to 7 p.m.” (Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 1993/2 A and entitled “Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine”, E/CN.4/2004/6, 8 September 2003, para. 9.)

There have also been serious repercussions for agricultural production, as is attested by a number of sources. According to the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories

“an estimated 100,000 dunums [approximately 10,000 hectares] of the West Bank’s most fertile agricultural land, confiscated by the Israeli Occupation Forces, have been destroyed during the first phase of the wall construction, which involves the disappearance of vast amounts of property, notably private agricultural land and olive trees, wells, citrus groves and hothouses upon which tens of thousands of Palestinians rely for their survival” (Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, A/58/311, 22 August 2003, para. 26).

Further, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that “Much of the Palestinian land on the Israeli side of the Wall consists of fertile agricultural land and some of the most important water wells in the region” and adds that “Many fruit and olive trees had been destroyed in the course of building the barrier.” (E/CN.4/2004/6, 8 September 2003, para. 9.) The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights states that construction of the wall “cuts off Palestinians from their agricultural lands, wells and means of subsistence” (Report by the Special Rapporteur of the United Nations Commission on Human Rights, Jean Ziegler, “The Right to Food”, Addendum, Mission to the Occupied Palestinian Territories, E/CN.4/2004/10/Add.2, 31 October 2003, para. 49). In a recent survey conducted by the World Food Programme, it is stated that the situation has aggravated food insecurity in the region, which reportedly numbers 25,000 new beneficiaries of food aid (report of the Secretary-General, para. 25).

It has further led to increasing difficulties for the population concerned regarding access to health services, educational establishments and primary sources of water. This is also attested by a number of different information sources. Thus the report of the Secretary-General states generally that “According to the Palestinian Central Bureau of Statistics, so far the Barrier has separated 30 localities from health services, 22 from schools, 8 from primary water sources and 3 from electricity networks.” (Report of the Secretary-General, para. 23.) The Special Rapporteur of the United Nations Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that “Palestinians between the Wall and Green Line will effectively be cut off from their land and workplaces, schools, health clinics and other social services.” (E/CN.4/2004/6, 8 September 2003, para. 9.) In relation specifically to water resources, the Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights observes that “By constructing the fence Israel will also effectively annex most of the western aquifer system (which provides 51 per cent of the West Bank’s water resources).” (E/CN.4/2004/10/Add.2, 31 October 2003, para. 51.) Similarly, in regard to access to health services, it has been stated that, as a result of the enclosure of Qalqiliya, a United Nations hospital in that town has recorded a 40 per cent decrease in its caseload (report of the Secretary-General, para. 24).

At Qalqiliya, according to reports furnished to the United Nations, some 600 shops or businesses have shut down, and 6,000 to 8,000 people have already left the region (E/CN.4/2004/6, 8 September 2003, para. 10; E/CN.4/2004/10/Add.2, 31 October 2003, para. 51). The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights has also observed that “With the fence/wall cutting communities off from their land and water without other means of subsistence, many of the Palestinians living in these areas will be forced to leave.” (E/CN.4/2004/10/Add.2, 31 October 2003, para. 51.) In this respect also the construction of the wall would effectively deprive a

significant number of Palestinians of the “freedom to choose [their] residence”. In addition, however, in the view of the Court, since a significant number of Palestinians have already been compelled by the construction of the wall and its associated régime to depart from certain areas, a process that will continue as more of the wall is built, that construction, coupled with the establishment of the Israeli settlements mentioned in paragraph 120 above, is tending to alter the demographic composition of the Occupied Palestinian Territory.

134. To sum up, the Court is of the opinion that the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated régime, by contributing to the demographic changes referred to in paragraphs 122 and 133 above, contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council resolutions cited in paragraph 120 above.

135. The Court would observe, however, that the applicable international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances.

Neither Article 46 of the Hague Regulations of 1907 nor Article 47 of the Fourth Geneva Convention contain any qualifying provision of this type. With regard to forcible transfers of population and deportations, which are prohibited under Article 49, paragraph 1, of the Convention, paragraph 2 of that Article provides for an exception in those cases in which “the security of the population or imperative military reasons so demand”. This exception however does not apply to paragraph 6 of that Article, which prohibits the occupying Power from deporting or transferring parts of its own civilian population into the territories it occupies. As to Article 53 concerning the destruction of personal property, it provides for an exception “where such destruction is rendered absolutely necessary by military operations”.

The Court considers that the military exigencies contemplated by these texts may be invoked in occupied territories even after the general close of the military operations that led to their occupation. However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.

136. The Court would further observe that some human rights conventions, and in particular the International Covenant on Civil and Political Rights, contain provisions which States parties may invoke in order to derogate, under various conditions, from certain of their conventional obligations. In this respect, the Court would however recall that the communication notified by Israel to the Secretary-General of the United Nations under Article 4 of the International Covenant on Civil and Political Rights concerns only Article 9 of the Covenant, relating to the right to freedom and security of person (see paragraph 127 above); Israel is accordingly bound to respect all the other provisions of that instrument.

The Court would note, moreover, that certain provisions of human rights conventions contain clauses qualifying the rights covered by those provisions. There is no clause of this kind in Article 17 of

the International Covenant on Civil and Political Rights. On the other hand, Article 12, paragraph 3, of that instrument provides that restrictions on liberty of movement as guaranteed under that Article “shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant”. As for the International Covenant on Economic, Social and Cultural Rights, Article 4 thereof contains a general provision as follows:

“The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

The Court would observe that the restrictions provided for under Article 12, paragraph 3, of the International Covenant on Civil and Political Rights are, by the very terms of that provision, exceptions to the right of freedom of movement contained in paragraph 1. In addition, it is not sufficient that such restrictions be directed to the ends authorized; they must also be necessary for the attainment of those ends. As the Human Rights Committee put it, they “must conform to the principle of proportionality” and “must be the least intrusive instrument amongst those which might achieve the desired result” (CCPR/C/21/Rev.1/Add.9, General Comment No. 27, para. 14). On the basis of the information available to it, the Court finds that these conditions are not met in the present instance.

The Court would further observe that the restrictions on the enjoyment by the Palestinians living in the territory occupied by Israel of their economic, social and cultural rights, resulting from Israel’s construction of the wall, fail to meet a condition laid down by Article 4 of the International Covenant on Economic, Social and Cultural Rights, that is to say that their implementation must be “solely for the purpose of promoting the general welfare in a democratic society”.

137. To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.

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138. The Court has thus concluded that the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel. However, Annex I to the report of the Secretary-General states that, according to Israel: “the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and Security Council resolutions 1368 (2001) and 1373 (2001)”. More specifically, Israel’s Permanent Representative to the United Nations asserted in the General Assembly on 20 October 2003 that “the fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the

Charter”; the Security Council resolutions referred to, he continued, “have clearly recognized the right of States to use force in self-defence against terrorist attacks”, and therefore surely recognize the right to use non-forcible measures to that end (A/ES-10/PV.21, p. 6).

139. Under the terms of Article 51 of the Charter of the United Nations:

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

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

140. The Court has, however, considered whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance include qualifying clauses of the rights guaranteed or provisions for derogation (see paragraphs 135 and 136 above). Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged. However, the Court will not need to consider that question. As the Court observed in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, “the state of necessity is a ground recognized by customary international law” that “can only be accepted on an exceptional basis”; it “can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met” (*I.C.J. Reports 1997*, p. 40, para. 51). One of those conditions was stated by the Court in terms used by the International Law Commission, in a text which in its present form requires that the act being challenged be “the only way for the State to safeguard an essential interest against a grave and imminent peril” (Article 25 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts; see also former Article 33 of the Draft Articles on the International Responsibility of States, with slightly different wording in the English text). In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.

141. The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life

of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law.

142. In conclusion, the Court considers that Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall resulting from the considerations mentioned in paragraphs 122 and 137 above. The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law.

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143. The Court having concluded that, by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and by adopting its associated régime, Israel has violated various international obligations incumbent upon it (see paragraphs 114-137 above), it must now, in order to reply to the question posed by the General Assembly, examine the consequences of those violations.

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144. In their written and oral observations, many participants in the proceedings before the Court contended that Israel's action in illegally constructing this wall has legal consequences not only for Israel itself, but also for other States and for the United Nations; in its Written Statement, Israel, for its part, presented no arguments regarding the possible legal consequences of the construction of the wall.

145. As regards the legal consequences for Israel, it was contended that Israel has, first, a legal obligation to bring the illegal situation to an end by ceasing forthwith the construction of the wall in the Occupied Palestinian Territory, and to give appropriate assurances and guarantees of non-repetition.

It was argued that, secondly, Israel is under a legal obligation to make reparation for the damage arising from its unlawful conduct. It was submitted that such reparation should first of all take the form of restitution, namely demolition of those portions of the wall constructed in the Occupied Palestinian Territory and annulment of the legal acts associated with its construction and the restoration of property requisitioned or expropriated for that purpose; reparation should also include appropriate compensation for individuals whose homes or agricultural holdings have been destroyed.

It was further contended that Israel is under a continuing duty to comply with all of the international obligations violated by it as a result of the construction of the wall in the Occupied Palestinian Territory and of the associated régime. It was also argued that, under the terms of the Fourth Geneva Convention, Israel is under an obligation to search for and bring before its courts persons alleged to have committed, or

to have ordered to be committed, grave breaches of international humanitarian law flowing from the planning, construction and use of the wall.

146. As regards the legal consequences for States other than Israel, it was contended before the Court that all States are under an obligation not to recognize the illegal situation arising from the construction of the wall, not to render aid or assistance in maintaining that situation and to co-operate with a view to putting an end to the alleged violations and to ensuring that reparation will be made therefor.

Certain participants in the proceedings further contended that the States parties to the Fourth Geneva Convention are obliged to take measures to ensure compliance with the Convention and that, inasmuch as the construction and maintenance of the wall in the Occupied Palestinian Territory constitutes grave breaches of that Convention, the States parties to that Convention are under an obligation to prosecute or extradite the authors of such breaches. It was further observed that “the United Nations Security Council should consider flagrant and systematic violation of international law norm[s] and principles by Israel, particularly . . . international humanitarian law, and take all necessary measures to put an end [to] these violations”, and that the Security Council and the General Assembly must take due account of the advisory opinion to be given by the Court.

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147. Since the Court has concluded that the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to various of Israel’s international obligations, it follows that the responsibility of that State is engaged under international law.

148. The Court will now examine the legal consequences resulting from the violations of international law by Israel by distinguishing between, on the one hand, those arising for Israel and, on the other, those arising for other States and, where appropriate, for the United Nations. The Court will begin by examining the legal consequences of those violations for Israel.

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149. The Court notes that Israel is first obliged to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory (see paragraphs 114-137 above). Consequently, Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law. Furthermore, it must ensure freedom of access to the Holy Places that came under its control following the 1967 War (see paragraph 129 above).

150. The Court observes that Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory.

The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 149; *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 44, para. 95; *Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 82).

151. Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. Moreover, in view of the Court's finding (see paragraph 143 above) that Israel's violations of its international obligations stem from the construction of the wall and from its associated régime, cessation of those violations entails the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem. All legislative and regulatory acts adopted with a view to its construction, and to the establishment of its associated régime, must forthwith be repealed or rendered ineffective, except in so far as such acts, by providing for compensation or other forms of reparation for the Palestinian population, may continue to be relevant for compliance by Israel with the obligations referred to in paragraph 153 below.

152. Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. The Court would recall that the essential forms of reparation in customary law were laid down by the Permanent Court of International Justice in the following terms:

“The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.” (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.)

153. Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.

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154. The Court will now consider the legal consequences of the internationally wrongful acts flowing from Israel's construction of the wall as regards other States.

155. The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature "the concern of all States" and, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection." (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33.) The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.

156. As regards the first of these, the Court has already observed (paragraph 88 above) that in the *East Timor* case, it described as "irreproachable" the assertion that "the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character" (*I.C.J. Reports 1995*, p. 102, para. 29). The Court would also recall that under the terms of General Assembly resolution 2625 (XXV), already mentioned above (see paragraph 88),

"Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . ."

157. With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, it stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' . . .", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (*I.C.J. Reports 1996 (I)*, p. 257, para. 79). In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character.

158. The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.

159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

160. Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

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* *

161. The Court, being concerned to lend its support to the purposes and principles laid down in the United Nations Charter, in particular the maintenance of international peace and security and the peaceful settlement of disputes, would emphasize the urgent necessity for the United Nations as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy conclusion, thereby establishing a just and lasting peace in the region.

162. The Court has reached the conclusion that the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law and has stated the legal consequences that are to be drawn from that illegality. The Court considers itself bound to add that this construction must be placed in a more general context. Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The "Roadmap" approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.

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* *

163. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) By fourteen votes to one,

Decides to comply with the request for an advisory opinion;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: *Judge* Buergenthal;

(3) *Replies* in the following manner to the question put by the General Assembly:

A. By fourteen votes to one,

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

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: *Judge* Buergenthal;

B. By fourteen votes to one,

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

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: *Judge* Buergenthal;

C. By fourteen votes to one,

Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem;

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;*

AGAINST: *Judge Buergenthal;*

D. By thirteen votes to two,

All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention;

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;*

AGAINST: *Judges Kooijmans, Buergenthal;*

E. By fourteen votes to one,

The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;*

AGAINST: *Judge Buergenthal.*

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this ninth day of July, two thousand and four, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) SHI Jiuyong,

President.

(Signed) Philippe COUVREUR,

Registrar.

Judges KOROMA, HIGGINS, KOOIJMANS and AL-KHASAWNEH append separate opinions to the Advisory Opinion of the Court; Judge BUERGENTHAL appends a declaration to the Advisory Opinion of the Court; Judges ELARABY and OWADA append separate opinions to the Advisory Opinion of the Court.

(Initialed) J.Y.S.

(Initialed) Ph.C.

Beit Sourik v. Israel (Israeli High Court, 30 June 2004) HCJ 2056/04

Available at <http://elyon1.court.gov.il/eng/verdict/framesetSrch.html>.

HCJ 2056/04

Beit Sourik Village Council

v.

The Government of Israel

Commander of the IDF Forces in the West Bank

The Supreme Court Sitting as the High Court of Justice

[February 29, 2004; March 11, 2004; March 17, 2004; March 31, 2004; April 16, 2004; April 21, 2004;
May 2, 2004]

Before President A. Barak, Vice-President E. Mazza, and Justice M. Cheshin

Petition for an Order Nisi.

For petitioners—Mohammed Dahla

For respondents—Anar Helman, Yuval Roitman

JUDGMENT

President A. Barak

The Commander of the IDF Forces in Judea and Samaria issued orders to take possession of plots of land in the area of Judea and Samaria. The purpose of the seizure was to erect a separation fence on the land. The question before us is whether the orders and the fence are legal.

Background

1. Since 1967, Israel has been holding the areas of Judea and Samaria [hereinafter – the area] in belligerent occupation. In 1993 Israel began a political process with the PLO, and signed a number of agreements transferring control over parts of the area to the Palestinian Authority. Israel and the PLO continued political negotiations in an attempt to solve the remaining problems. The negotiations, whose final stages took place at Camp David in Maryland, USA, failed in July 2000.

From respondents' affidavit in answer to *order nisi* we learned that, a short time after the failure of the Camp David talks, the Israeli-Palestinian conflict reached new heights of violence. In September 2000, the Palestinian side began a campaign of terror against Israel and Israelis. Terror attacks take place both in the area and in Israel. They are directed against citizens and soldiers, men and women, elderly and infants, regular citizens and public figures. Terror attacks are carried out everywhere: in public transportation, in shopping centers and markets, in coffee houses and in restaurants. Terror organizations use gunfire attacks, suicide attacks, mortar fire, Katyusha rocket fire, and car bombs. From September 2000 until the beginning of April 2004, more than 780 attacks were carried out within Israel. During the same period, more than 8200 attacks were carried out in the area.

The armed conflict claimed (as of April 2004) the lives of 900 Israeli citizens and residents. More than 6000 were injured, some with serious wounds that have left them severely handicapped. The armed conflict has left many dead and wounded on the Palestinian side as well. Bereavement and pain wash over us.

In H CJ 7015/02 *Ajuri v. IDF Commander*, at 358, I described the security situation:

Israel's fight is complex. Together with other means, the Palestinians use guided human bombs. These suicide bombers reach every place that Israelis can be found (within the boundaries of the State of Israel and in the Jewish communities in Judea and Samaria and the Gaza Strip). They sew destruction and spill blood in the cities and towns. The forces fighting against Israel are terrorists: they are not members of a regular army; they do not wear uniforms; they hide among the civilian Palestinian population in the territories, including inside holy sites; they are supported by part of the civilian population, and by their families and relatives.

2. These terror acts have caused Israel to take security precautions on several levels. The government, for example, decided to carry out various military operations, such as operation "Defensive Wall" (March 2002) and operation "Determined Path" (June 2002). The objective of these military actions was to defeat the Palestinian terrorist infrastructure and to prevent terror attacks. *See* H CJ 3239/02 *Marab v. IDF Commander in the West Bank*, at 355; H CJ 3278/02 *Center for Defense of the Individual v. IDF Commander*, at 389. These combat operations – which are not regular police operations, but embody all the characteristics of armed conflict – did not provide a sufficient answer to the immediate need to stop

the terror. The Ministers' Committee on National Security considered a list of steps intended to prevent additional terror acts and to deter potential terrorists from participating in such acts. *See Ajuri*, at 359. Despite all these measures, the terror did not come to an end. The attacks did not cease. Innocent people paid with both life and limb. This is the background behind the decision to construct the separation fence.

The Decision to Construct the Separation Fence

3. The Ministers' Committee for National Security reached a decision (on April 14, 2002) regarding deployment in the "Seamline Area" between Israel and the area. *See H CJ 8532/02 Ibraheem v. Commander of the IDF Forces in the West Bank*. The purpose behind the decision was "to improve and strengthen operational capability in the framework of fighting terror, and to prevent the penetration of terrorists from the area of Judea and Samaria into Israel." The IDF and the police were given the task of preventing the passage of Palestinians into the State of Israel. As a temporary solution, it was decided to erect an obstacle in the three regions found to be most vulnerable to the passage of terrorists into the Israel: the Umm El-Fahm region and the villages divided between Israel and area (Baka and Barta'a); the Qalqilya-Tulkarm region; and the Greater Jerusalem region. It was further decided to create a team of Ministers, headed by the Prime Minister, which would examine long-term solutions to prevent the infiltration of Palestinians, including terrorists, into Israel.

4. The Government of Israel held deliberations on the "Seamline Area" program (June 23, 2002). The armed services presented their proposal to erect an obstacle on the "Seamline." The government approved stage 1 of the project, which provides a solution to the operational problem of terrorist infiltration into the north of the country, the center of the country and the Jerusalem area. The obstacle that was approved begins in the area of the Salam village, adjacent to the Meggido junction, and continues until the trans-Samaria road. An additional obstacle in the Jerusalem area was also approved. The entire obstacle, as approved, is 116 km long. The government decision provided:

(3) In the framework of stage 1 – approval of the security fences and obstacles in the "Seamline Area" and in Greater Jerusalem, for the purpose of preventing the penetration of terrorists from the area of Judea and Samaria into Israel.

(4) The fence, like the other obstacles, is a security measure. Its construction does not mark a national border or any other border.

....

(6) The precise and final location of the fence will be established by the Prime Minister and the Minister of Defense ... the final location will be presented before the Ministers' Committee on National Security or before the government.

5. The Ministers' Committee on National Security approved (August 14, 2002) the final location of the obstacle. The Prime Minister and the Minister of Defense approved (December 2002) stage 2 of the obstacle from Salam village east to the Jordan River, 60 km long, and an extension, a few kilometers long, from Mount Avner (adjacent to El-Mouteelah village) in the Southern Gilboa range to the village of Tayseer.

6. The Ministers' Committee on National Security decided (on September 5, 2003) to construct stage 3 of the obstacle in the Greater Jerusalem area (except in the Ma'ale Adumim area). The length of this obstacle is 64 km. The government, on October 1, 2003, set out its decision regarding stages 3 and 4 of the obstacle:

- A. The Government reiterates its decision regarding the importance of the "Seamline Area" and emphasizes the security need for the obstacle in the "Seamline Area" and in "Greater Jerusalem."
- B.
- C. Therefore:
- D.
 1. We approve the construction of the obstacle for the prevention of terror activities according to the stages and location as presented today before us by the armed forces (the map of the stages and location of the fence is on file in the government secretariat).
 - 2.
 3. The obstacle that will be erected pursuant to this decision, like other segments of the obstacle in the "Seamline Area," is a security measure for the prevention of terror attacks and does not mark a national border or any other border.
 - 4.
 5. Local changes, either of the location of the obstacle or of its implementation, will be brought before the Minister of Defense and the Prime Minister for approval.
 - 6.
 7. The Prime Minister, the Minister of Defense, and the Finance Minister shall calculate the budget necessary for implementation of this decision as well as its financial schedule. The computation shall be brought before the government for approval.
 - 8.
 9. In this framework, additional immediate security steps for the defense of Israelis in Judea and Samaria during the period of construction of the obstacle in the "Seamline Area" shall be agreed upon.
 - 10.
 11. During the planning, every effort shall be made to minimize, to the extent possible, the disturbances to the daily lives of the Palestinians due to the construction of the obstacle.
 - 12.

The location of this fence, which passes through areas west of Jerusalem, stands at the heart of the dispute between the parties.

The Separation Fence

7. The “Seamline” obstacle is composed of several components. In its center stands a “smart” fence. The purpose of the fence is to alert the forces deployed along its length of any attempt at infiltration. On the fence’s external side lies an anti-vehicle obstacle, composed of a trench or another means, intended to prevent vehicles from breaking through the fence by slamming up against it. There is an additional delaying fence. Near the fence a service road is paved. On the internal side of the electronic fence, there are a number of roads: a dirt road (for the purpose of discovering the tracks of those who pass the fence), a patrol road, and a road for armored vehicles, as well as an additional fence. The average width of the obstacle, in its optimal form, is 50 – 70 meters. Due to constraints, a narrower obstacle, which includes only the components supporting the electronic fence, will be constructed in specific areas. In certain cases the obstacle can reach a width of 100 meters, due to topographical conditions. In the area relevant to this petition, the width of the obstacle will not exceed 35 meters, except in places where a wider obstacle is necessary for topographical reasons. In the area relevant to this petition, the fence is not being replaced by a concrete wall. Efforts are being made to minimize the width of the area of which possession will be taken *de facto*. Various means to help prevent infiltration will be erected along the length of the obstacle. The IDF and the border police will patrol the separation fence, and will be called to locations of infiltration, in order to frustrate the infiltration and to pursue those who succeed in crossing the security fence. Hereinafter, we will refer to the entire obstacle on the “Seamline” as “the separation fence.”

The Seizure Proceedings

8. Parts of the separation fence are being erected on land which is not privately owned. Other parts are being erected on private land. In such circumstances – and in light of the security necessities – an order of seizure is issued by the Commander of the IDF Forces in the area of Judea and Samaria (respondent 2). Pursuant to standard procedure, every land owner whose land is seized will receive compensation for the use of his land. After the order of seizure is signed, it is brought to the attention of the public, and the proper liaison body of the Palestinian Authority is contacted. An announcement is relayed to the residents, and each interested party is invited to participate in a survey of the area affected by the order of seizure, in order to present the planned location of the fence. A few days after the order is issued, a survey is taken of the area, with the participation of the landowners, in order to point out the land which is about to be seized.

After the survey, a one week leave is granted to the landowners, so that they may submit an appeal to the military commander. The substance of the appeals is examined. Where it is possible, an attempt is made to reach understandings with the landowners. If the appeal is denied, leave of one additional week is given to the landowner, so that he may petition the High Court of Justice.

The Petition

9. The petition, as originally worded, attacked the orders of seizure regarding lands in the villages of Beit Sourik, Bidu, El Kabiba, Katane, Beit A'an, Beit Likia, Beit Ajaza and Beit Daku. These lands are adjacent to the towns of Mevo Choron, Har Adar, Mevasseret Zion, and the Jerusalem neighborhoods of Ramot and Giv'at Zeev, which are located west and northwest of Jerusalem. Petitioners are the landowners and the village councils affected by the orders of seizure. They argue that the orders of seizure are illegal. As such, they should be voided or the location of the separation fence should be changed. The injury to petitioners, they argue, is severe and unbearable. Over 42,000 dunams of their lands are affected. The obstacle itself passes over 4,850 dunams, and will separate between petitioners and more than 37,000 dunams, 26,500 of which are agricultural lands that have been cultivated for many generations. Access to these agricultural lands will become difficult and even impossible. Petitioners' ability to go from place to place will depend on a bureaucratic permit regime which is labyrinthine, complex, and burdensome. Use of local water wells will not be possible. As such, access to water for crops will be hindered. Shepherding, which depends on access to these wells, will be made difficult. Tens of thousands of olive and fruit trees will be uprooted. The fence will separate villages from tens of thousands of additional trees. The livelihood of many hundreds of Palestinian families, based on agriculture, will be critically injured. Moreover, the separation fence injures not only landowners to whom the orders of seizure apply; the lives of 35,000 village residents will be disrupted. The separation fence will harm the villages' ability to develop and expand. The access roads to the urban centers of Ramallah and Bir Naballa will be blocked off. Access to medical and other services in East Jerusalem and in other places will become impossible. Ambulances will encounter difficulty in providing emergency services to residents. Children's access to schools in the urban centers, and of students to universities, will be impaired. Petitioners argue that these injuries cannot be justified.

10. Petitioners' argument is that the orders are illegal in light of Israeli administrative law, and in light of the principles of public international law which apply to the dispute before us. First, petitioners claim that respondent lacks the authority to issue the orders of seizure. Were the route of the separation fence to pass along Israel's border, they would have no complaint. However, this is not the case. The route of the separation fence, as per the orders of seizure, passes through areas of Judea and Samaria. According to their argument, these orders alter the borders of the West Bank with no express legal authority. It is claimed that the separation fence annexes areas to Israel in violation of international law. The separation fence serves the needs of the occupying power and not the needs of the occupied area. The objective of the fence is to prevent the infiltration of terrorists into Israel; as such, the fence is not intended to serve the interests of the local population in the occupied area, or the needs of the occupying power in the occupied area. Moreover, military necessity does not require construction of the separation fence along the planned route. The security arguments guiding respondents disguise the real objective: the annexation of areas to Israel. As such, there is no legal basis for the construction of the fence, and the orders of seizure which were intended to make it possible are illegal. Second, petitioners argue that the procedure for the determination of the route of the separation fence was illegal. The orders were not published and were not brought to the knowledge of most of the affected landowners; petitioners learned of them by chance, and they were granted extensions of only a few days for the submission of appeals. Thus, they were not allowed to participate in the determination of the route of the separation fence, and their arguments were not heard.

11. Third, the separation fence violates many fundamental rights of the local inhabitants, illegally and without authority. Their right to property is violated by the very taking of possession of the lands and by the prevention of access to their lands. In addition, their freedom of movement is impeded. Their livelihoods are hurt and their freedom of occupation is restricted. Beyond the difficulties in working the land, the fence will make the trade of farm produce difficult. The fence detracts from the educational

opportunities of village children, and throws local family and community life into disarray. Freedom of religion is violated, as access to holy places is prevented. Nature and landscape features are defaced. Petitioners argue that these violations are disproportionate and are not justified under the circumstances. The separation fence route reflects collective punishment, prohibited by international law. Thus, respondent neglects the obligation, set upon his shoulders by international law, to make normal and proper life possible for the inhabitants of Judea and Samaria. The security considerations guiding him cannot, they claim, justify such severe injury to the local inhabitants. This injury does not fulfill the requirements of proportionality. According to their argument, despite the language of the orders of seizure, it is clear that the fence is not of a temporary character, and the critical wound it inflicts upon the local population far outweighs its benefits.

The Response to the Petition

12. Respondents, in their first response, argued that the orders of seizure and the route through which the separation fence passes are legal. The separation fence is a project of utmost national importance. Israel is in the midst of actual combat against a wave of terror, supported by the Palestinian population and leadership. At issue are the lives of the citizens and residents of Israel, who are threatened by terrorists who infiltrate into the territory of Israel. At issue are the lives of Israeli citizens residing in the area. The construction of the separation fence system must be completed with all possible speed. The separation fence has already proved its efficacy in areas where it has been erected. It is urgent that it also be erected in the region of petitioners' villages. Respondents claim that a number of terror attacks against Jerusalem and against route no. 443, which connects Jerusalem and the city of Modi'in, have originated in this area. The central consideration in choosing the route of the separation fence was the operational-security consideration. The purpose of the fence is to prevent the uncontrolled passage of residents of the area into Israel and into Israeli towns located in the areas. The separation fence is also intended to prevent the smuggling of arms, and to prevent the infiltration of Palestinians, which will likely lead to the establishment of terror cells in Israel and to new recruits for existing cells. Additionally, the forces acting along the obstacle, and Israeli towns on both sides of it, must be protected. As dictated by security considerations, the area of the separation fence must have topographic command of its surroundings. This is in order to allow surveillance and to prevent attacks upon the forces guarding it. To the extent possible, a winding route must be avoided. In addition, a "security zone" is required to provide warning of possible terrorist infiltration into Israel. Thus, in appropriate places, in order to make pursuit possible in the event of infiltration, the fence must pass through the area. An additional security consideration is the fact that, due to construction of the obstacle, attempted attacks will be concentrated on Israeli towns adjacent to the fence, which also must be protected.

13. Respondents explain that, in planning the route of the separation fence, great weight was given to the interests of the residents of the area, in order to minimize, to the extent possible, the injury to them. Certain segments of the fence are brought before the State Attorney for prior examination and, if necessary, before the Attorney-General as well. An effort is being made to lay the obstacle along property that is not privately owned or agriculturally cultivated; consideration is given to the existing planning schemes of Palestinian and Israeli towns; an effort is being made to refrain from cutting lands off from their owners. In the event of such a cutoff, agricultural gateways will allow farmers access to their lands. New roads will be paved which will provide for the needs of the residents. In cases where damage cannot be avoided, landowners will be compensated for the use of their seized lands. Efforts will be made to transfer agricultural crops instead of cutting them down. Prior to seizure of the land, the inhabitants will be

granted the opportunity to appeal. Respondents assert that they are willing to change the route in order to minimize the damage. Respondents declared, in addition, that they intend to erect permanent checkpoints east of certain villages, which will be open 24 hours a day, every day of the year, and which will allow the preservation of the fabric of life in the area. It has also been decided to improve the road system between the villages involved in this petition, in order to tighten the bonds between them, and between them and Ramallah. Likewise, the possibility of paving a road to enable free and speedy passage from the villages to Ramallah is being examined. All these considerations were taken into account in the determination of the route. The appeals of local inhabitants injured by the route are currently being heard. All this, claim respondents, amounts to a proper balance between consideration for the local inhabitants and between the need to protect the lives of Israeli citizens, residents, and soldiers.

14. Respondents claim that the process of seizure was legal. The seizure was brought to the knowledge of petitioners, and they were given the opportunity to participate in a survey and to submit appeals. The contractors responsible for building the obstacle are instructed to move (as opposed to cutting down) trees wherever possible. This is the current practice regarding olive trees. Some buildings, in cooperation with landowners to the extent possible, are taken down and transferred to agreed locations. Respondents argue that the inhabitants did not always take advantage of the right to have their arguments heard.

15. Respondent's position is that the orders of seizure are legal. The power to seize land for the obstacle is a consequence of the natural right of the State of Israel to defend herself against threats from outside her borders. Likewise, security officials have the power to seize lands for combat purposes, and by the laws of belligerent occupation. Respondents do not deny the need to be considerate of the injury to the local population and to keep that injury proportionate; their claim is that they fulfill these obligations. Respondents deny the severity of the injury claimed by petitioners. The extent of the areas to be seized for the building of the fence, the injury to agricultural areas, and the injury to trees and groves, are lesser – by far – than claimed. All the villages are connected to water systems and, as such, damage to wells cannot prevent the supply of water for agricultural and other purposes. The marketing of agricultural produce will be possible even after the construction of the fence. In each village there is a medical clinic, and there is a central clinic in Bidu. A few archeological sites will find themselves beyond the fence, but these sites are neglected and not regularly visited. The educational needs of the local population will also be taken into account. Respondents also note that, in places where the separation fence causes injury to the local population, efforts are being made to minimize that injury. In light of all this, respondents argue that the petitions should be denied.

The Hearing of the Petition

16. Oral arguments were spread out over a number of hearings. During this time, the parties modified the formulation of their arguments. In light of these modifications, respondent was willing to allow changes in part of the route of the separation fence. In certain cases the route was changed *de facto*. Thus, for example, it was changed next to the town of Har Adar, and next to the village of Beit Sourik. This Court (President A. Barak, Vice-President (ret.) T. Or, and Vice-President E. Mazza) heard the petition (on February 29, 2004). The remainder of the hearing was postponed for a week in order to allow the sides

to take full advantage of their right to have their arguments heard and to attempt to reach a compromise. We ordered that no work on the separation fence in the area of the petition be done until the next hearing.

The next hearing of the petition was on March 17, 2004. Petitioners submitted a motion to file additional documents, the most important of which was an affidavit prepared by members of the Council for Peace and Security, which is a registered society of Israelis with a background in security, including high ranking reserve officers, including Major General (res.) Danny Rothchild, who serves as president of the Council, Major General (res.) Avraham Adan (Bren), Commissioner (emeritus) Shaul Giv'oli, who serves as the general manager of the Council, and Colonel (res.) Yuval Dvir. The affidavit was signed by A. Adan, S. Giv'oli and Y. Dvir. The society, which sees itself as nonpartisan, was, it argued, among the first to suggest a separation fence as a solution to Israel's security needs. The affidavit included detailed and comprehensive comments regarding various segments of this route, and raised reservations about them from a security perspective. The claims in the affidavit were serious and grave. After reading them, we requested (on March 17, 2004) the comments of Respondent, The Commander of IDF Forces in the area of Judea and Samaria, Lieutenant-General Moshe Kaplinsky.

17. This Court (President A. Barak, Vice-President E. Mazza, and Justice M. Cheshin) resumed the hearing of the petition (on March 31, 2004). Just prior to reconvening, we granted (on March 23, 2004) petitioners' motion to amend their petition such that it would include additional orders issued by respondent: Tav/110/03 (concerning the area located north of the Beit Daku village in the Giv'at Ze'ev area); Tav/104/03 and Tav/105/03 (concerning areas located southeast of the town of Maccabim and south of the village of Beit Lakia). After we heard (on March 31, 2004) the parties' arguments, we decided to issue an *order nisi*, to the extent relevant to the villages and petitioners, and to narrow the application of the temporary injunction, such that it would not apply to the segment between Beit Ajaza and New Giv'on, and the segment between the Beit Chanan riverbed and the ascent to Jebel Muktam. We further decided to narrow the injunction, such that respondent would refrain from making irrevocable changes in the segment north of Har Adar, and in the segment between the villages of A-Tira and Beit Daku. We have noted respondents' announcement that if it turns out that the building of the obstacle at these locations was illegal, proper compensation will be given to all who suffered injury. *See* our order of March 31, 2004. We continued to hear the arguments of the parties (on April 16, April 21, and May 2, 2004). Petitioners submitted an alternate route for construction of the separation fence. Additional affidavits were submitted by the Council for Peace and Security and by respondent. An opinion paper on the ecological effects of the route of the fence was submitted for our review. Pursuant to our request, detailed relief models representing the topography of the area through which the obstacle passes were submitted. The relief models showed the route of the obstacle, as set out by respondent, as well as the alternate routes proposed by petitioners. In addition, a detailed aerial photograph of these routes was submitted.

18. Members of the Council for Peace and Security moved to be joined as *amici curiae*. Pursuant to the stipulation of the parties, an additional affidavit (of April 15, 2004) submitted (by Major General (res.) D. Rothchild who serves as the president of the council, as well as by A. Adan, S. Giv'oli and Y. Dvir) was joined to the petition, without ruling that this position was identical to petitioners'. In the opinion of the council members, the separation fence must achieve three principle objectives: it must serve as an obstacle to prevent, or at least delay, the entry of terrorists into Israel; it must grant warning to the armed forces in the event of an infiltration; and it must allow control, repair, and monitoring by the mobile forces posted along it. In general, the fence must be far from the houses of the Palestinian villages, not close to them. If the fence is close to villages, it is easier to attack forces patrolling it. Building the fence in the

manner set out by respondent will require the building of passages and gateways, which will engender friction; the injury to the local population and their bitterness will increase the danger to security. Such a route will make it difficult to distinguish between terrorists and innocent inhabitants. Thus, the separation fence must be distanced from the Palestinian homes, and transferred, accordingly, to the border of the area of Judea and Samaria. In their opinion, the argument that the fence must be built at a distance from Israeli towns in order to provide response time in case of infiltration, can be overcome by the reinforcement of the obstacle near Israeli towns. Distancing the planned route from Israeli towns in order to seize distant hilltops with topographical control is unnecessary, and has serious consequences for the length of the separation fence, its functionality, and for attacks on it. In an additional affidavit (from April 18, 2004), members of The Council for Peace and Security stated that the desire of the commander of the area to prevent direct flat-trajectory fire upon the separation fence causes damage from a security perspective. Due to this desire, the fence passes through areas that, though they have topographical control, are superfluous, unnecessarily injuring the local population and increasing friction with it, all without preventing fire upon the fence.

19. Petitioners, pointing to the affidavits of the Council for Peace and Security, argue that the route of the separation fence is disproportionate. It does not serve the security objectives of Israel, since establishing the route adjacent to the houses of the Palestinians will endanger the state and her soldiers who are patrolling along the fence, as well as increasing the general danger to Israel's security. In addition, such a route is not the least injurious means, since it is possible to move the route farther away from petitioners' villages and closer to Israel. It will be possible to overcome the concern about infiltration by reinforcing the fence and its accompanying obstacles.

20. Respondent recognizes the security and military experience of those who signed the affidavit. However, he emphasizes that the responsibility for protecting the residents of Israel from security threats remains on his shoulders and on those of the security officials. The disagreement is between experts on security. Regarding such a disagreement, the opinion of the expert who is also responsible for security bears the greater weight. Respondent accepts that the border between Israel and Judea and Samaria must be taken into consideration when establishing the route of the separation fence, in order to minimize injury to residents of the area and to the fabric of their lives. He argues, however, that the border is a political border and not a security border. The security objective of the fence is not only to separate Israel from the residents of the area of Judea and Samaria, it must also ensure a security zone to allow the pursuit of terrorists who cross the separation fence before they enter Israel. The fence route must prevent direct fire by the Palestinians, it must protect the soldiers guarding the fence, and must also take topographical considerations into account. In light of all this, it is proper, under appropriate circumstances, to move the route of the separation fence within the areas of Judea and Samaria. The military commander concedes that moving the separation fence proximate to houses of Palestinians is likely to cause difficulties, but this is only one of the considerations which must be taken into account. Reinforcement of the fence adjacent to Israeli towns does not provide a solution to the danger of shooting attacks, and does not prevent infiltration into them. Likewise, such a step does not take into consideration the engineering issues of moving the route of the fence. Regarding the route of the fence itself, respondent notes that, after examining the material before him, he is willing to change part of the route. This is especially so regarding the route adjacent to the town of Har Adar and east of it, adjacent to the villages of Beit Sourik and Bidu. The remainder of the route proposed by petitioners does not provide an appropriate solution to the security needs that the fence is intended to provide.

21. Parties presented arguments regarding the environmental damage of the separation fence. Petitioners submitted, for our review, expert opinion papers (dated April 15, 2004), which warn of the ecological damage that will be caused by the separation fence. The separation fence route will damage animal habitats and will separate animal populations from vegetation, damaging the ecosystem in the area. The longer and wider the route of the fence, the more severe the damage. Therefore, it is important to attempt to shorten the route of the fence, and to avoid unnecessary curves. The building of passageways for small animals into the fence, such as pipes of 20-30 cm. diameter, should be considered. The fence will also mar virgin landscape that has remained untouched for millennia. Respondents replied with an opinion paper prepared by an expert of the Nature and Parks Authority. It appears, from his testimony, that there will indeed be ecological damage, but the damage will be along any possible route of the fence. It would have been appropriate to maintain passageways in the separation fence for small animals, but that proposal was rejected by the security agencies and is, in any case, irrelevant to the question of the route. From the testimony it also appears that representatives of the Nature and Parks Agency are involved in the planning of the fence route, and efforts are being made to minimize ecological damage.

22. A number of residents of Mevasseret Zion, which is adjacent to the Beit Sourik village, requested to join as petitioners in this petition. They claim that the fence route should be immediately adjacent to the green line, in order to allow residents of the Beit Sourik village to work their land. In addition, they claim that the gates which will allow the passage of farmers are inefficient, that they will obstruct access to the fields, and that they will violate the farmer's dignity. Furthermore, they point out the decline of relations with the Palestinian population in the area which, as a consequence of the desire to construct the separation fence on its land, has turned from a tranquil population into a hostile one. On the opposing side, Mr. Efraim Halevy requested to join as a respondent in the petition. He argues that moving the route of the fence adjacent to the Green Line will endanger the residents of Mevasseret Zion. It will bring the route closer to the houses and schools in the community. He also points out the terrorist activity which has taken place in the past in the Beit Sourik area. Thus, the alternate route proposed by petitioners should be rejected. He claims that this position reflects the opinions of many residents of Mevasseret Zion. After reading the motions, we decided to accept them, and we considered the arguments they presented.

The Normative Framework

23. The general point of departure of all parties – which is also our point of departure – is that Israel holds the area in belligerent occupation (*occupatio bellica*). See HCJ 619/78 “*El Tal’ia*” *Weekly v. Minister of Defense*; HCJ 69/81 *Abu Ita v. Commander of the Area of Judea and Samaria*; HCJ 606/78 *Ayoob v. Minister of Defense*; HCJ 393/82 *Jam’iat Ascan Elma’almoon Eltha’aoniah Elmahduda Elmaoolieh v. Commander of the IDF Forces in the Area of Judea and Samaria*. In the areas relevant to this petition, military administration, headed by the military commander, continues to apply. Compare HCJ 2717/96 *Wafa v. Minister of Defense* (application of the military administration in “Area C”). The authority of the military commander flows from the provisions of public international law regarding belligerent occupation. These rules are established principally in the Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 [hereinafter – the Hague Regulations]. These regulations reflect customary international law. The military commander's authority is also anchored in IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949. [hereinafter – the Fourth Geneva Convention]. The question of the application of the Fourth Geneva Convention has come up more than once in this Court. See HCJ 390/79 *Duikat v. Government of Israel*; HCJ 61/80 *Haetzni v. State of Israel*, at 597. The question is not before us now, since the parties agree that the

humanitarian rules of the Fourth Geneva Convention apply to the issue under review. See HCJ 698/80 *Kawasme v. Minister of Defense*; *Jam'iyat Ascan*, at 794; *Ajuri*, at 364; HCJ 3278/02 *Center for the Defense of the Individual v. Commander of the IDF Forces in the West Bank Area*, at 396. See also Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 Israel Yearbook on Human Rights 262 (1971).

24. Together with the provisions of international law, “the principles of the Israeli administrative law regarding the use of governing authority” apply to the military commander. See *Jam'iyat Ascan*, at 793. Thus, the norms of substantive and procedural fairness (such as the right to have arguments heard before expropriation, seizure, or other governing actions), the obligation to act reasonably, and the norm of proportionality apply to the military commander. See *Abu Ita*, at 231; HCJ 591/88 *Taha v. Minister of Defense*, at 52; *Ajuri*, at 382; HJC 10356/02 *Hess v. Commander of the IDF Forces in the West Bank*. Indeed, “[e]very Israeli soldier carries, in his pack, the provisions of public international law regarding the laws of war and the basic provisions of Israeli administrative law.” *Jam'iyat Ascan*, at 810.

25. This petition raises two separate questions. The first question: is the military commander in Judea and Samaria authorized, by the law applying to him, to construct the separation fence in Judea and Samaria? An affirmative answer to this question raises a second question concerning the location of the separation fence. Both questions were raised before us in the petition, in the response, and in the parties’ arguments. The parties, however, concentrated on the second question; only a small part of the arguments before us dealt with the first question. The question of the authority to erect the fence in the area is complex and multifaceted, and it did not receive full expression in the arguments before us. Without exhausting it, we too shall occupy ourselves briefly with the first question, dealing only with the arguments raised by the parties, and will then move to focus our discussion on the second question.

Authority to Erect the Separation Fence

26. Petitioners rest their assertion that the military commander does not have authority to construct the fence on two claims. The first is that the military commander does not have the authority to order construction of the fence since his decision is founded upon political – and not military – considerations.

27. We accept that the military commander cannot order the construction of the separation fence if his reasons are political. The separation fence cannot be motivated by a desire to “annex” territories to the state of Israel. The purpose of the separation fence cannot be to draw a political border. In *Duikat*, at 17, this Court discussed whether it is possible to seize land in order to build a Jewish civilian town, when the purpose of the building of the town is not the security needs and defense of the area (as it was in *Ayoob*), but rather based upon a Zionist perspective of settling the entire land of Israel. This question was answered by this Court in the negative. The Vice-President of this Court, Justice Landau, quoted the Prime Minister (the late Mr. Menachem Begin), regarding the right of the Jewish people to settle in Judea and Samaria. In his judgment, Justice Landau stated:

The view regarding the right of the Jewish people, expressed in these words, is built upon Zionist ideology. However, the question before this Court is whether this ideology justifies the taking of the property of the individual in an area under control of the military administration. The answer to that depends upon the interpretation of article 52 of the Hague Regulations. It is my opinion that the needs of the army mentioned in that article cannot include, by way of any reasonable interpretation, national security needs in broad meaning of the term.

In the same spirit I wrote, in *Jam 'iyat Ascan*, at 794, that

The military commander is not permitted to take the national, economic, or social interests of his own country into account . . . even the needs of the army are the army's military needs and not the national security interest in the broad meaning of the term.

In *Jam 'iyat Ascan*, we discussed whether the military commander is authorized to expand a road passing through the area. In this context I wrote, at 795:

The military administration is not permitted to plan and execute a system of roads in an area held in belligerent occupation, if the objective is only to construct a "service road" for his own country. The planning and execution of a system of roads in an occupied territory can be done for military reasons . . . the planning and execution of a system of roads can be done for reasons of the welfare of the local population. This planning and execution cannot be done in order to serve the occupying country.

Indeed, the military commander of territory held in belligerent occupation must balance between the needs of the army on one hand, and the needs of the local inhabitants on the other. In the framework of this delicate balance, there is no room for an additional system of considerations, whether they be political considerations, the annexation of territory, or the establishment of the permanent borders of the state. This Court has emphasized time and time again that the authority of the military commander is inherently temporary, as belligerent occupation is inherently temporary. Permanent arrangements are not the affair of the military commander. True, the belligerent occupation of the area has gone on for many years. This fact affects the scope of the military commander's authority. See *Jam 'iyat Ascan*, at 800. The passage of time, however, cannot extend the authority of the military commander and allow him to take into account considerations beyond the proper administration of the area under belligerent occupation.

28. We examined petitioners' arguments, and have come to the conclusion, based upon the facts before us, that the fence is motivated by security concerns. As we have seen in the government decisions concerning the construction of the fence, the government has emphasized, numerous times, that "the fence, like the additional obstacles, is a security measure. Its construction does not express a political border, or any other border." (decision of June 23, 2002). "The obstacle that will be erected pursuant to this decision, like other segments of the obstacle in the "Seamline Area," is a security measure for the

prevention of terror attacks and does not mark a national border or any other border.” (decision of October 1, 2003).

29. The Commander of the IDF Forces in the area of Judea and Samaria (respondent no. 2), Major General M. Kaplinsky, submitted an affidavit to the Court. In his affidavit he stated that “the objective of the security fence is to help contend with the threat of Palestinian terror. Specifically, the fence is intended to prevent the unchecked passage of inhabitants of the area into Israel and their infiltration into Israeli towns located in the area. Based on this security consideration we determined the topographic route of the fence.” (affidavit of April 15, sections 22-23). The commander of the area detailed his considerations for the choice of the route. He noted the necessity that the fence pass through territory that topographically controls its surroundings, that, in order to allow surveillance of it, its route be as flat as possible, and that a “security zone” be established which will delay infiltration into Israel. These are security considerations *par excellence*. In an additional affidavit, Major General Kaplinsky testified that “it is not a permanent fence, but rather a temporary fence erected for security needs.” (affidavit of April 19, 2004, section 4). We have no reason not to give this testimony less than full weight, and we have no reason not to believe the sincerity of the military commander.

30. Petitioners, by pointing to the route of the fence, attempt to prove that the construction of the fence is not motivated by security considerations, but by political ones. They argue that if the fence was primarily motivated by security considerations, it would be constructed on the “Green Line,” that is to say, on the armistice line between Israel and Jordan after the War of Independence. We cannot accept this argument. The opposite is the case: it is the security perspective – and not the political one – which must examine the route on its security merits alone, without regard for the location of the Green Line. The members of the Council for Peace and Security, whose affidavits were brought before us by agreement of the parties, do not recommend following the Green Line. They do not even argue that the considerations of the military commander are political. Rather, they dispute the proper route of the separation fence based on security considerations themselves.

31. We set aside seven sessions for the hearing of the petition. We heard the explanations of officers and workers who handled the details of the fence. During our hearing of the petition, the route of the fence was altered in several locations. Respondents were open to our suggestions. Thus, for example, adjacent to the town of Har Adar, they agreed to move the fence passing north of the town to the security zone closer to it, and distance it from the lands of the adjacent village of El Kabiba. We have no reason to assume that the objective is political rather than security-based. Indeed, petitioners did not carry the burden and did not persuade us that the considerations behind the construction of the separation fence are political rather than security-based. Similarly, petitioners did not carry their burden, and did not persuade us that the considerations of the Commander of the IDF Forces in the area, in choosing the route of the separation fence, are not military considerations, and that he has not acted to fulfill them in good faith, according to his best military understanding.

32. Petitioner second argument is that the construction of the fence in the area is based, in a large part, on the seizure of land privately owned by local inhabitants, that this seizure is illegal, and that therefore the military commander’s authority has no to construct the obstacle. We cannot accept this argument. We found no defect in the process of issuing the orders of seizure, or in the process of granting the opportunity

to appeal them. Regarding the central question raised before us, our opinion is that the military commander is authorized – by the international law applicable to an area under belligerent occupation – to take possession of land, if this is necessary for the needs of the army. See articles 23(g) and 52 of the Hague Convention; article 53 of the Fourth Geneva Convention. He must, of course, provide compensation for his use of the land. See HCJ 606/78 *Ayoob v. Minister of Defense*; HCJ 401/88 *Abu Rian v. Commander of the IDF Forces in the Area of Judea and Samaria*; *Timraz*. Indeed, on the basis of the provisions of the Hague Convention and the Geneva Convention, this Court has recognized the legality of land and house seizure for various military needs, including the construction of military facilities (HCJ 834/78 *Salama v. Minister of Defense*), the paving of detour roads (HCJ 202/81 *Tabib v. Minister of Defense*; *Wafa*), the building of fences around outposts (*Timraz*), the temporary housing of soldiers (HCJ 290/89 *Jora v. Commander of IDF Forces in Judea and Samaria*), the ensuring of unimpaired traffic on the roads of the area (*Abu Rian*), the construction of civilian administration offices (HCJ 1987/90 *Shadid v. Commander of IDF Forces in the Area of Judea and Samaria*), the seizing of buildings for the deployment of a military force, (HCJ 8286/00 *Association for Civil Rights in Israel v. Commander of the IDF Forces in the Area of Judea and Samaria*). Of course, regarding all these acts, the military commander must consider the needs of the local population. Assuming that this condition is met, there is no doubt that the military commander is authorized to take possession of land in areas under his control. The construction of the separation fence falls within this framework. The infringement of property rights is insufficient, in and of itself, to take away the authority to build it. It is permitted, by the international law applicable to an area under belligerent occupation, to take possession of an individual's land in order to erect the separation fence upon it, on the condition that this is necessitated by military needs. To the extent that construction of the fence is a military necessity, it is permitted, therefore, by international law. Indeed, the obstacle is intended to take the place of combat military operations, by physically blocking terrorist infiltration into Israeli population centers. The building of the obstacle, to the extent it is done out of military necessity, is within the authority of the military commander. Of course, the route of the separation fence must take the needs of the local population into account. That issue, however, concerns the route of the fence and not the authority to erect it. After reaching this conclusion, we must now contend with the second question before us – the question that constituted the main part of the arguments before us. This question is the legality of the location and route of the separation fence. We will now turn to this question.

The Route of the Separation Fence

33. The focus of this petition is the legality of the route chosen for construction of the separation fence. This question stands on its own, and it requires a straightforward, real answer. It is not sufficient that the fence be motivated by security considerations, as opposed to political considerations. The military commander is not at liberty to pursue, in the area held by him in belligerent occupation, every activity which is primarily motivated by security considerations. The discretion of the military commander is restricted by the normative system in which he acts, and which is the source of his authority. Indeed, the military commander is not the sovereign in the occupied territory. See Oppenheim, *The Legal Relations Between an Occupying Power and the Inhabitants*, 33 Law Q. Rev., 363, 364 (1917); Y. Dinstein, *The Law of War* 210 (1983). He must act within the law which establishes his authority in a situation of belligerent occupation. What is the content of this law?

34. The law of belligerent occupation recognizes the authority of the military commander to maintain security in the area and to protect the security of his country and her citizens. However, it imposes

conditions on the use of this authority. This authority must be properly balanced against the rights, needs, and interests of the local population:

The law of war usually creates a delicate balance between two poles: military necessity on one hand, and humanitarian considerations on the other.

Dinstein, *Legislative Authority in the Administered Territories*, 2 *Iyunei Mishpat* 505, 509 (1973)

This Court has emphasized, in its case law since the Six Day War, that “together with the right to administer comes the obligation to provide for the well being of the population.” H CJ 337/71 *Al-jamaya Al-masihiyeh L’alararchi Elmakdasa v. Minister of Defense*, at 581 (Sussman, D.P.).

The obligations and rights of a military administration are defined, on one hand, by its own military needs and, on the other, by the need to ensure, to the extent possible, the normal daily life of the local population.

H CJ 256/72 *Jerusalem District Electric Company v. Defense Minister*, at 138 (Landau, J.).

This doctrine ... does not have to result in the restriction of the power to tax, *if this power is necessary for the well being of the area and due to its needs*, since a proper balance between those considerations and the needs of the ruling army is a central and constant consideration of a military administration.

Abu Ita, at 270 (Shamgar, V.P.) (emphasis in the original).

In *J’mayat Ascan*, at 794, I myself similarly wrote, more than twenty years ago, that:

The Hague Regulations revolve around two central axes: one – the ensuring of the legitimate security interests of the holder of a territory held in belligerent occupation; the other – the ensuring of the needs of the local population in the territory held in belligerent occupation.

In H CJ 72/86 *Zaloom v. The IDF Commander for the Area of Judea and Samaria*, at 532, I held:

In using their authority, respondents must consider, on one hand, security considerations and, on the other hand, the interests of the civilian population. They must attain a balance between these different considerations.

See also Marab, at 365. Similarly:

The obligation of the military administration, defined in regulation 43 of the Hague Regulations, is to preserve the order and the public life of the local population, but to do so while properly balancing between the interests of the population in the territory, and the military and security needs of soldiers and citizens located in the territory.

HCJ 2977/91 *Thaj v. Minister of Defense*, at 474 (Levin, J.).

The Hague Convention authorizes the military commander to act in two central areas: one – ensuring the legitimate security interest of the holder of the territory, and the other – providing for the needs of the local population in the territory held in belligerent occupation The first need is military and the second is civilian-humanitarian. The first focuses upon the security of the military forces holding the area, and the second focuses upon the responsibility for ensuring the well being of the residents. In the latter area the military commander is responsible not only for the maintenance of the order and security of the inhabitants, but also for the protection of their rights, especially their constitutional human rights. The concern for human rights stands at the center of the humanitarian considerations which the military commander must take into account.

Hess, at paragraph 8 (Procaccia, J.).

35. This approach of this Court is well anchored in the humanitarian law of public international law. This is set forth in Regulation 46 of the Hague Regulations and Article 46 of the Fourth Geneva Convention. Regulation 46 of the Hague Regulations provides:

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.

Article 27 of the Fourth Geneva Convention provides:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

These rules are founded upon a recognition of the value of man and the sanctity of his life. *See Physicians for Human Rights*, at para. 11. Interpreting Article 27 of the Fourth Geneva Convention, Pictet writes:

Article 27 . . . occupies a key position among the articles of the Convention. It is the basis of the Convention, proclaiming as it does the principles on which the whole “Geneva Law” is founded. It proclaims the principle of respect for the human person and the inviolable character of the basic rights of individual men and women . . . the right of respect for the person must be understood in its widest sense: it covers all the rights of the individual, that is, the rights and qualities which are inseparable from the human being by the very fact of his existence and his mental and physical powers, it includes, in particular, the right to physical, moral and intellectual integrity – one essential attribute of the human person.

The rules in Regulation 46 of the Hague Regulations and in Article 27 of the Fourth Geneva Convention cast a double obligation upon the military commander: he must refrain from actions that injure the local inhabitants. This is his “negative” obligation. He must take the legally required actions in order to ensure that the local inhabitants shall not be injured. This is his “positive” obligation. *See Physicians for Human Rights*. In addition to these fundamental provisions, there are additional provisions that deal with specifics, such as the seizure of land. *See* Regulation 23(g) and 52 of the Hague Regulations; Article 53 of the Fourth Geneva Convention. These provisions create a single tapestry of norms that recognizes both human rights and the needs of the local population as well recognizing security needs from the perspective of the military commander. Between these conflicting norms, a proper balance must be found. What is that balance?

Proportionality

36. The problem of balancing between security and liberty is not specific to the discretion of a military commander of an area under belligerent occupation. It is a general problem in the law, both domestic and international. Its solution is universal. It is found deep in the general principles of law, including reasonableness and good faith. *See* B. Cheng, *General Principles of Law as Applied By International Courts and Tribunals* (1987); T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989); S. Rosenne, *The Perplexities of Modern International Law* 63 (2002). One of those foundational principles which balance between the legitimate objective and the means of achieving it is the principle of proportionality. According to it, the liberty of the individual can be limited (in this case, the liberty of the local inhabitants under belligerent occupation), on the condition that the restriction

is proportionate. This approach crosses through all branches of law. In the framework of the petition before us, its importance is twofold: first, it is a basic principle in international law in general and specifically in the law of belligerent occupation; second, it is a central standard in Israeli administrative law which applies to the area under belligerent occupation. We shall now briefly discuss each of these.

37. Proportionality is recognized today as a general principle of international law. *See* Meron, at 65; R. Higgins, *Problems and Process: International Law and How We Use It* 219 (1994); Delbruck, *Proportionality*, 3 *Encyclopedia of Public International Law* 1140, 1144 (1997). Proportionality plays a central role in the law regarding armed conflict. During such conflicts, there is frequently a need to balance between military needs and humanitarian considerations. *See* Gardam, *Proportionality and Force in International Law*, 87 *Am. J. Int'l L.* 391 (1993); Garden, *Legal Restraints on Security Council Military Enforcement Action*, 17 *Mich. J. Int'l L.* 285 (1996); Dinstein, *Military Necessity*, 3 *Encyclopedia of Public International Law* 395 (1997); Medenica, *Protocol I and Operation Allied Force: Did NATO Abide by Principles of Proportionality ?*, 23 *Loy. L. A. Int'l & Comp. L. Rev.* 329 (2001); Roberts, *The Laws of War in the War on Terror*, 32 *Isr. Yearbook of Hum. Rights.* 1999 (2002). Proportionality is a standard for balancing. Pictet writes:

In modern terms, the conduct of hostilities, and, at all times the maintenance of public order, must not treat with disrespect the irreducible demands of humanitarian law.

From the foregoing principle springs the Principle of Humanitarian Law (or that of the law of war):

Belligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the strength of the enemy.

J. S. Pictet, *Developments and Principles of International Humanitarian Law* 62 (1985). Similarly, Fenrick has stated:

[T]here is a requirement for a subordinate rule to perform the balancing function between military and humanitarian requirements. This rule is the rule of proportionality.

Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 *Military L. Rev.* 91, 94 (1982). Gasser repeats the same idea:

International humanitarian law takes into account losses and damage as incidental consequences of (lawful) military operations ... The criterion is the principle of proportionality.

Gasser, *Protection of the Civilian Population*, The Handbook of Humanitarian Law in Armed Conflicts 220 (D. Fleck ed., 1995).

38. Proportionality is not only a general principle of international law. Proportionality is also a general principle of Israeli administrative law. See Segal, *The Cause of Action of Disproportionality in Administrative Law*, HaPraklit 50 (1990); Zamir, *The Administrative Law of Israel Compared to the Administrative Law of Germany*, 2 Mishpat U'Mimshal 109, 130 (1994). At first a principle of our case law, then a constitutional principle, enshrined in article 8 of the Basic Law: Human Dignity and Freedom, it is today one of the basic values of the Israeli administrative law. See HCJ 987/94 *Euronet Golden Lines (1992) Ltd. v. Minister of Communications*, at 435; HCJ 3477/95 *Ben-Atiyah v. Minister of Education, Culture & Sports*; HCJ 1255/94 *Bezeq v. Minister of Communications*, at 687; HCJ 3643/97 *Stamka v. Minister of Interior*; HCJ 4644/00 *Tavori v. The Second Authority for Television and Radio*; HCJ 9232/01 *"Koach" Israeli Union of Organizations for the Defense of Animals v. The Attorney-General*, at 261; D. Dorner, *Proportionality*, in 2 The Berenson Book 281 (A. Barak & C. Berenson eds., 1999). The principle of proportionality applies to every act of the Israeli administrative authorities. It also applies to the use of the military commander's authority pursuant to the law of belligerent occupation.

39. Indeed, both international law and the fundamental principles of Israeli administrative law recognize proportionality as a standard for balancing between the authority of the military commander in the area and the needs of the local population. Indeed, the principle of proportionality as a standard restricting the power of the military commander is a common thread running through our case law. See Segal, *Security Authority, Administrative Proportionality and Judicial Review*, 1 *Iyunei Mishpat* 477 (1993). Thus, for example, this Court examined, by use of the standard of proportionality, the authority of the military commander regarding "an order assigning a place of residence." See *Ajuri*; HCJ 9552/03 *Abed v. Commander of the IDF Forces in the West Bank*; HCJ 9586/03 *Sualmeh v. Commander of the IDF Forces in the Judea and Samaria Region*. The standard of proportionality was likewise used to examine his authority to surround towns and position checkpoints on the access roads to and from them, in order to frustrate terror. See HCJ 2847/03 *Alauna v. Commander of the IDF Forces in Judea and Samaria*; HCJ 2410/03 *Elarja v. Commander of the IDF Forces in Judea and Samaria*. The same applied to injury to the property of residents due to combat activities of the IDF (HCJ 9252/00 *El Saka v. State of Israel*); the establishment of entry routes for Israelis into the area and its declaration as "closed military territory" (HCJ 9293/01 *Barakeh v. Minister of Defense*); the means employed to protect the safety of worshippers and their access to holy places (*Hess*); the demolition of houses for operational needs (HCJ 4219/02 *Joosin v. Commander of the IDF Forces in the Gaza Strip*); such demolition for deterrence purposes (HCJ 5510/92 *Turkman v. Defense Minister*, at 219; HCJ 1730/96 *Sabih v. Commander of the IDF Forces in the Area of Judea and Samaria*, at 364; HCJ 893/04 *Farj v. Commander of the IDF Forces in the West Bank*); the living conditions of detained suspects in the area (HCJ 3278/02 *Center for Defense of the Individual v. Commander of the IDF Forces in the West Bank Area*; HCJ 5591/02 *Yassin v. Commander of Kziot Military Camp*); the authority to arrest for investigation purposes and the denial of a meeting between a detainee and an attorney (*Marab*); the siege of those hiding in holy places (HCJ 3451/02 *Almandi v. Minister of Defence*, at 36); and the regulation of the recording and identification of residents of the area (HCJ 2271/98 *Abed v. Interior Minister*).

The Meaning of Proportionality and its Elements

40. According to the principle of proportionality, the decision of an administrative body is legal only if the means used to realize the governmental objective is of proper proportion. The principle of proportionality focuses, therefore, on the relationship between the objective whose achievement is being attempted, and the means used to achieve it. This principle is a general one. It requires application. As such, both in international law, which deals with different national systems – from both the common law family (such as Canada) and the continental family (such as Germany) – as well as in domestic Israeli law, three subtests grant specific content to the principle of proportionality. See J. Schwarze, *European Administrative Law* 687 (1992); N. Emiliou, *The Principle of Proportionality in European Law; A Comparative Study* (1996); *The Principle of Proportionality in the Laws of Europe* (1999).

41. The first subtest is that the objective must be related to the means. The means that the administrative body uses must be constructed to achieve the precise objective which the administrative body is trying to achieve. The means used by the administrative body must rationally lead to the realization of the objective. This is the “appropriate means” or “rational means” test. According to the second subtest, the means used by the administrative body must injure the individual to the least extent possible. In the spectrum of means which can be used to achieve the objective, the least injurious means must be used. This is the “least injurious means” test. The third test requires that the damage caused to the individual by the means used by the administrative body in order to achieve its objectives must be of proper proportion to the gain brought about by that means. That is the “proportionate means” test (or proportionality “in the narrow sense.”) The test of proportionality “in the narrow sense” is commonly applied with “absolute values,” by directly comparing the advantage of the administrative act with the damage that results from it. However, it is also possible to apply the test of proportionality in the narrow sense in a “relative manner.” According to this approach, the administrative act is tested vis-à-vis an alternate act, whose benefit will be somewhat smaller than that of the former one. The original administrative act is disproportionate in the narrow sense if a certain reduction in the advantage gained by the original act – by employing alternate means, for example – ensures a substantial reduction in the injury caused by the administrative act.

42. It is possible to say that the means used by an administrative authority are proportionate only if all three subtests are satisfied. Satisfaction of one or two of these subtests is insufficient. All three of them must be satisfied simultaneously. Not infrequently, there are a number of ways that the requirement of proportionality can be satisfied. In these situations a “zone of proportionality” must be recognized (similar to a “zone of reasonableness.”) Any means chosen by the administrative body that is within the zone of proportionality is proportionate. See *Ben-Atiyah*, at 13; H CJ 4769/95 *Menachem v. Minister of Transportation*, at 258.

43. This principle of proportionality also applies to the exercise of authority by the military commander in an area under belligerent occupation. Thus, for example, in *Ajuri*, the question arose whether restricting the area in which one can live – in that case, the transfer of local inhabitants from the area of Judea and Samaria to the Gaza Strip – was proportionate. Regarding the proportionality test, as applied in that case, I wrote:

Like the use of any other means, the means of restricting the area in which one can live must be also be used proportionately. The individual's offense must be proportionate to the means employed by the authorities ... an appropriate link is necessary between the objective of preventing danger from the person whose living area is restricted, and the danger if this means is not employed ... it is necessary that the injury caused by the means employed be minimal; it is also necessary that the means of restricting the living area be of proper proportion to the security benefit to the area.

Id., at 373.

The Proportionality of the Route of the Separation Fence

44. The principle of proportionality applies to our examination of the legality of the separation fence. This approach is accepted by respondents. It is reflected in the government decision (of October 1, 2003) that “during the planning, every effort shall be made to minimize, to the extent possible, the disturbance to the daily lives of the Palestinians due to the construction of the obstacle.” The argument that the damage caused by the separation fence route is proportionate was the central argument of respondents. Indeed, our point of departure is that the separation fence is intended to realize a security objective which the military commander is authorized to achieve. The key question regarding the route of the fence is: is the route of the separation fence proportionate? The proportionality of the separation fence must be decided by the three following questions, which reflect the three subtests of proportionality. First, does the route pass the “appropriate means” test (or the “rational means” test)? The question is whether there is a rational connection between the route of the fence and the goal of the construction of the separation fence. Second, does it pass the test of the “least injurious” means? The question is whether, among the various routes which would achieve the objective of the separation fence, is the chosen one the least injurious. Third, does it pass the test of proportionality in the narrow sense? The question is whether the separation fence route, as set out by the military commander, injures the local inhabitants to the extent that there is no proper proportion between this injury and the security benefit of the fence. According to the “relative” examination of this test, the separation fence will be found disproportionate if an alternate route for the fence is suggested that has a smaller security advantage than the route chosen by respondent, but which will cause significantly less damage than that original route.

The Scope of Judicial Review

45. Before we examine the proportionality of the route of the separation fence, it is appropriate that we define the character of our examination. Our point of departure is the assumption, which petitioners did not manage to negate, that the government decision to construct the separation fence is motivated by security, and not a political, considerations. As such, we work under the assumption – which the petitioners also did not succeed in negating – that the considerations of the military commander based the route of the fence on military considerations that, to the best of his knowledge, are capable of realizing this security objective. In addition, we assume – and this issue was not even disputed in the case before us – that the military commander is of the opinion that the injury to local inhabitants is proportionate. On the basis of this factual foundation, there are two questions before us. The first question is whether the route

of the separation fence, as determined by the military commander, is well-founded from a military standpoint. Is there another route for the separation fence which better achieves the security objective? This constitutes a central component of proportionality. If the chosen route is not well-founded from the military standpoint, then there is no rational connection between the objective which the fence is intended to achieve and the chosen route (the first subtest); if there is a route which better achieves the objective, we must examine whether this alternative route inflicts a lesser injury (the second subtest). The second question is whether the route of the fence is proportionate. Both these questions are important for the examination of proportionality. However, they also raise separate problems regarding the scope of judicial review. My colleague Justice M. Cheshin has correctly noted:

Different subjects require, in and of themselves, different methods of intervention. Indeed, acts of state and acts of war do not change their character just because they are subject to the review of the judiciary, and the character of the acts, according to the nature of things, imprints its mark on the methods of intervention.

HCJ 1730/96 *Sabih v. Commander of IDF forces in the Area of Judea and Samaria*, at 369. We shall examine, therefore, the scope of intervention for each of the two questions before us, separately.

The Military Nature of the Route of the Separation Fence

46. The first question deals with the military character of the route. It examines whether the route chosen by the military commander for the separation fence achieves its stated objectives, and whether there is no route which achieves this objective better. It raises problems within the realm of military expertise. We, Justices of the Supreme Court, are not experts in military affairs. We shall not examine whether the military commander's military opinion corresponds to ours – to the extent that we have a opinion regarding the military character of the route. So we act in all questions which are matters of professional expertise, and so we act in military affairs as well. All we can determine is whether a reasonable military commander would have set out the route as this military commander did. President Shamgar dealt with this idea, noting:

It is obvious, that a court cannot “slip into the shoes” of the deciding military official ... In order to substitute the discretion of the commander with the discretion of the Court, we examine the question whether, in light of all of the facts, the employment of the means can be viewed as reasonable.

HCJ 1005/89 *Aga v. Commander of the IDF Forces in the Gaza Strip Area*, at 539. Similarly, in *Ajuri*, I wrote:

The Supreme Court, sitting as the High Court of Justice, reviews the legality of the military commander's discretion. Our point of departure is that the military commander, and those who obey his orders, are civil servants holding public positions. In exercising judicial review, we do not turn ourselves into experts in security affairs. We do not substitute the security considerations of the military commander with our own security considerations. We take no position regarding the way security affairs are run. Our task is to guard the borders and to maintain the boundaries of the military commander's discretion It is true, that "the security of the state" is not a "magic word" which makes judicial review disappear. Thus, we shall not be deterred from reviewing the decisions of the military commander ... simply because of the important security considerations anchoring his decision. However, we shall not substitute the discretion of the commander with our own discretion. We shall check the legality of the discretion of the military commander and ensure that his decisions fall within the "zone of reasonableness."

Id., at 375; *see also* H CJ 619/78 "*Al Tal'ia*" *Weekly v. Defense Minister*, at 512; *Jam'iat Ascan*, at 809; *Barake*, at 16.

47. The petition before us is exceptional in that opinions were submitted by the Council for Peace and Security. These opinions deal with the military aspect of the separation fence. They were given by experts in the military and security fields, whose expertise was also recognized by the commander of the area. We stand, therefore, before contradictory military opinions regarding the military aspects of the route of the separation fence. These opinions are based upon contradictory military views. Thus, for example, it is the view of the military commander that the separation fence must be distanced from the houses of Jewish towns, in order to ensure a security zone which will allow pursuit after terrorists who have succeeded in passing the separation fence, and that topographically controlling territory must be included in the route of the fence. In order to achieve these objectives, there is no escaping the need to build the separation fence proximate to the houses of the local inhabitants. In contrast, the view of military experts of the Council for Peace and Security is that the separation fence must be distanced from the houses of local inhabitants, since proximity to them endangers security. Topographically controlling territory can be held without including it in the route of the fence. In this state of affairs, are we at liberty to adopt the opinion of the Council for Peace and Security? Our answer is negative. At the foundation of this approach is our long-held view that we must grant special weight to the military opinion of the official who is responsible for security. Vice-President M. Landau J. dealt with this point in a case where the Court stood before two expert opinions, that of the Major General serving as Coordinator of IDF Activity in the Territories and that of a reserve Major General. Thus wrote the Court:

In such a dispute regarding military-professional questions, in which the Court has no well founded knowledge of its own, the witness of respondents, who speaks for those actually responsible for the preservation of security in the administered territories and within the Green Line, shall benefit from the assumption that his professional reasons are sincere reasons. Very convincing evidence is necessary in order to negate this assumption.

H CJ 258/79 *Amira v. Defense Minister*, 92.

Justice Vitkon wrote similarly in *Duikat*, in which the Court stood before a contrast between the expert opinion of the serving Chief of the General Staff regarding the security of the area, and the expert opinion of a former Chief of the General Staff. The Court ruled, in that case, as follows:

In security issues, where the petitioner relies on the opinion of an expert in security affairs, and the respondent relies on the opinion of a person who is both an expert and also responsible for the security of the state, it natural that we will grant special weight to the opinion of the latter.

HCI 390/79 *Duikat v. Government of Israel*.

Therefore, in our examination of the contrasting military considerations in this case, we give special weight to the fact that the commander of the area is responsible for security. Having employed this approach, we are of the opinion – the details of which we shall explain below – that petitioners have not carried their burden, and have not convinced us that we should prefer the professional expert opinion of members of the Council for Peace and Security over the security stance of the commander of the area. We are dealing with two military approaches. Each of them has military advantages and disadvantages. In this state of affairs, we must place the expert opinion of the military commander at the foundation of our decision.

The Proportionality of the Route of the Separation Fence

48. The second question examines the proportionality of the route of the separation fence, as determined by the military commander. This question raises no problems in the military field; rather, it relates to the severity of the injury caused to the local inhabitants by the route decided upon by the military commander. In the framework of this question we are dealing not with military considerations, but rather with humanitarian considerations. The question is not the proportionality of different military considerations. The question is the proportionality between the military consideration and the humanitarian consideration. The question is not whether to prefer the military approach of the military commander or that of the experts of the Council for Peace and Security. The question is whether the route of the separation fence, according to the approach of the military commander, is proportionate. The standard for this question is not the subjective standard of the military commander. The question is not whether the military commander believed, in good faith, that the injury is proportionate. The standard is objective. The question is whether, by legal standards, the route of the separation fence passes the tests of proportionality. This is a legal question, the expertise for which is held by the Court. I dealt with this issue in *Physicians for Human Rights*, stating:

Judicial review does not examine the wisdom of the decision to engage in military activity. In exercising judicial review, we examine the legality of the military activity. Therefore, we assume that the military activity that took place in Rafah was necessary from a military standpoint. The question before us is whether this military activity satisfies the national and international standards that determine the legality of that activity. The fact that the activity is necessary on the military plane,

does not mean that it is lawful on the legal plane. Indeed, we do not substitute our discretion for that of the military commander's, as far as it concerns military considerations. That is his expertise. We examine the results on the plane of the humanitarian law. That is our expertise.

Id., paragraph 9.

From the General to the Specific

49. The key question before us is whether the route of the separation fence is proportionate. The question is: is the injury caused to local inhabitants by the separation fence proportionate, or is it possible to satisfy the central security considerations while establishing a fence route whose injury to the local inhabitants is lesser and, as such, proportionate? The separation fence which is the subject of this petition is approximately forty kilometers long. Its proportionality varies according to local conditions. We shall examine its proportionality according to the various orders that were issued for the construction of different parts of the fence. We shall examine the legality of the orders along the route of the fence from west to east (See the appendix to this decision for a map of the region.) This route starts east of the town of Maccabim and the Beit Sira village. It continues south to the town of Mevo Choron, and from there continues east to Jerusalem. The route of the fence continues to wind, and it divides between Israeli towns and Palestinian villages adjacent to it. It climbs Jebel Muktam in order to ensure Israeli control of it. As such, it passes the villages of Beit Likia, Beit Anan, and Chirbet Abu A-Lahm. After that, it advances east, separating Ma'aleh HaChamisha and Har Adar from the villages of Katane, El Kabiba, and Bidu. The fence continues and circles the village of Beit Sourik, climbing northward until it reaches route 443, which is a major traffic route connecting Jerusalem to the center of the country. In its final part, it separates the villages Bidu, Beit Ajaza, and Beit Daku from Har Shmuel, New Giv'on, and Giv'at Ze'ev.

Order no. Tav/105/03

50. This order concerns the route beginning east of the town of Maccabim and west of the village of Beit Sira, and ending northeast of the town of Mevo Choron. This segment was not the subject of substantial dispute by the parties. Respondent informed us that the north tip of the route, which is subject to this order, as well as the southern tip, were changed (see map submitted to us by the parties, of March 31 2004). Thus, the injury to the cultivated lands proximate to it was reduced. Petitioners raised no arguments regarding the route itself, and the village of Beit Sira was not joined as a petitioner. Members of the Council for Peace and Security did not mention this order in their affidavits. In light of all this, to the extent that it relates to this order, the petition is denied.

Order Tav/104/03; Order Tav/103/03; Order Tav/84/03 (The Western Part of the Order)

51. These orders apply to more than ten kilometers of the fence route. This segment of the route

surrounds the high mountain range of Jebel Muktam. This ridge topographically controls its immediate and general surroundings. It towers over route 443 which passes north of it, connecting Jerusalem to Modi'in. The route of the obstacle passes from southwest of the village of Beit Likia, southwest of the village of Beit Anan, and west of the village of Chirbet Abu A-Lahm. Respondent explains that the objective of this route is to keep the mountain area under Israeli control. This will ensure an advantage for the armed forces, who will topographically control the area of the fence, and it will decrease the capability of others to attack those traveling on route 443.

52. Petitioners painted a severe picture of how the fence route will damage the villages along it. As far as the Beit Anan village (population: 5500) is concerned, 6000 dunams of village land will be affected by the fact that the obstacle passes over them. 7500 dunams of land will end up beyond the fence (6000 dunams of which are cultivated land). Ninety percent of the cultivated land seized and affected is planted with olive and fruit trees. 18,000 trees will be uprooted. 70,000 trees will be separated from their owners. The livelihood of hundreds of families will be hurt. This damage is especially severe in light of the high unemployment rate in that area (approaching 75%). As far as the Beit Likia village is concerned (population: 8000), 2100 dunams will be affected by the route of the obstacle. Five thousand dunams will end up beyond the fence (3000 dunams of which are cultivated land).

53. Respondents dispute this presentation of the facts. They argue that the extent of damage is less than that described by petitioners. As for the village of Beit Anan, 410 dunams (as opposed to 600) will be seized, and 1245 cultivated dunams will end up on the other side of the obstacle (as opposed to 6000). Respondents further argue that 3500 trees will be uprooted (as opposed to 18,000). However, even according to respondent, the damage to the villages is great, despite certain changes which respondents made during the hearing of the petition in order to relieve the situation of the local inhabitants.

54. Petitioners attached the affidavit of the Council for Peace and Security (signed by Major General (res.) D. Rothchild, Major General (res.) A. Adan (Bren), Commissioner (ret.) S. Giv'oli, and Colonel (res.) Y. Dvir), which relates to this segment. According to the affidavit, the seizure of Jebel Muktam does not fit the principles set out for the building of the fence. Effective light weapon fire from Jebel Muktam upon route 443 or upon any Israeli town is not possible. Moving the obstacle three kilometers south, adjacent to the Green Line, will place it upon topographically controlling territory that is easy to defend. They argue that not every controlling hill is necessary for the defense of the separation fence. Jebel Muktam is one example of that. Moreover, the current route will necessitate the construction and maintenance of agricultural gates, which will create superfluous and dangerous friction with the local population, embittered by the damage inflicted upon them. Petitioners presented two alternate proposals for the route in this area. One passes next to the border of the area of Judea and Samaria. This route greatly reduces the damage to the villages of Beit Likia and Beit Anan. The route of the other proposal passes near the Green Line, south of the route of the first proposal. This route does not affect the lands of these villages or the lands of the village of Chirbet Abu A-Lahm.

55. Respondent stated, in his response to the affidavit of members of the Council for Peace and Security, that it was not his intention to change the route of the fence that goes through this area. He claims that IDF forces' control of Jebel Muktam is a matter of decisive military importance. It is not just another topographically controlling hill, but rather a mountain looking out over the entire area. He

reiterated his stance that the current route will decrease the possibility of attack on travelers on route 443, and that erecting the obstacle upon the mountain will prevent its taking by terrorists. Respondent surveyed the relevant area, and came to the conclusion that the route proposed by petitioners is considerably topographically inferior, and will endanger the forces that will patrol along the fence. In order to reduce the injury to the local inhabitants, the military commander decided that agricultural gates be built. One daytime gate will be built south of Beit Likia. Another daytime gate will be built three kilometers from it (as the crow flies), north of Beit Anan. Specific requests by farmers will be examined on their merits. Owners of land seized will be compensated, and olive trees will be transferred rather than uprooted. The route has even taken into consideration buildings built illegally by Palestinian inhabitants in the area, since there was not enough time to take the legal steps necessary for their demolition. We were further informed that it was decided, during the survey which took place onsite with the participation of petitioners' counsel, to make a local correction in the route of the obstacle, adjacent to the village of Chirbet Abu A-Lahm, which will distance the obstacle from the houses of the village. We originally prohibited (on February 29, 2004) works to erect the separation fence in the part of the route to which the abovementioned orders apply. During the hearing (on March 31, 2004), we ordered the cancellation of the temporary injunction with respect to the segment between the Beit Chanan riverbed and the ascent to Jebel Muktam.

56. From a military standpoint, there is a dispute between experts regarding the route that will realize the security objective. As we have noted, this places a heavy burden on petitioners, who ask that we prefer the opinion of the experts of the Council for Peace and Security over the approach of the military commander. The petitioners have not carried this burden. We cannot – as those who are not experts in military affairs – determine whether military considerations justify laying the separation fence north of Jebel Muktam (as per the stance of the military commander) or whether there is no need for the separation fence to include it (as per the stance of petitioners' and the Council for Peace and Security). Thus, we cannot take any position regarding whether the considerations of the military commander, who wishes to hold topographically controlling hills and thus prevent “flat-trajectory” fire, are correct, militarily speaking, or not. In this state of affairs, there is no justification for our interference in the route of the separation fence from a military perspective.

57. Is the injury to the local inhabitants by the separation fence in this segment, according to the route determined by respondent, proportionate? Our answer to this question necessitates examination of the route's proportionality, using the three subtests. The first subtest examines whether there is a rational connection between the objective of the separation fence and its established route. Our answer is that such a rational connection exists. We are aware that the members of the Council for Peace and Security claim, in their expert opinion, that such a connection does not exist, and that the route proposed by them is the one that satisfies the “rational connection” test. As we stated, we cannot accept this position. By our very ruling that the route of the fence passes the test of military rationality, we have also held that it realizes the military objective of the separation fence.

58. The second subtest examines whether it is possible to attain the security objectives of the separation fence in a way that causes less injury to the local inhabitants. There is no doubt – and the issue is not even disputed – that the route suggested by the members of the Council for Peace and Security causes less injury to the local inhabitants than the injury caused by the route determined by the military commander. The question is whether the former route satisfies the security objective of the security fence to the same extent as the route set out by the military commander. We cannot answer this question in the

affirmative. The position of the military commander is that the route of the separation fence, as proposed by members of the Council for Peace and Security, grants less security than his proposed route. By our very determination that we shall not intervene in that position, we have also determined that there is no alternate route that fulfills, to a similar extent, the security needs while causing lesser injury to the local inhabitants. In this state of affairs, our conclusion is that the second subtest of proportionality, regarding the issue before us, is satisfied.

59. The third subtest examines whether the injury caused to the local inhabitants by the construction of the separation fence stands in proper proportion to the security benefit from the the security fence in its chosen route. This is the proportionate means test (or proportionality “in the narrow sense”). Concerning this topic, Professor Y. Zamir wrote:

The third element is proportionality itself. According to this element, it is insufficient that the administrative authority chose the proper and most moderate means for achieving the objective; it must also weigh the benefit reaped by the public against the damage that will be caused to the citizen by this means under the circumstances of the case at hand. It must ask itself if, under these circumstances, there is a proper proportion between the benefit to the public and the damage to the citizen. The proportion between the benefit and the damage – and it is also possible to say the proportion between means and objective – must be proportionate.

Zamir, *id.*, at 131.

This subtest weighs the costs against the benefits. *See Stamka*, at 776. According to this subtest, a decision of an administrative authority must reach a reasonable balance between communal needs and the damage done to the individual. The objective of the examination is to determine whether the severity of the damage to the individual and the reasons brought to justify it stand in proper proportion to each other. This judgment is made against the background of the general normative structure of the legal system, which recognizes human rights and the necessity of ensuring the provision of the needs and welfare of the local inhabitants, and which preserves “family honour and rights” (Regulation 46 of the Hague Regulations). All these are protected in the framework of the humanitarian provisions of the Hague Regulations and the Geneva Convention. The question before us is: does the severity of the injury to local inhabitants, by the construction of the separation fence along the route determined by the military commander, stand in reasonable (proper) proportion to the security benefit from the construction of the fence along that route?

60. Our answer is that there relationship between the injury to the local inhabitants and the security benefit from the construction of the separation fence along the route, as determined by the military commander, is not proportionate. The route undermines the delicate balance between the obligation of the military commander to preserve security and his obligation to provide for the needs of the local inhabitants. This approach is based on the fact that the route which the military commander established for the security fence – which separates the local inhabitants from their agricultural lands – injures the local inhabitants in a severe and acute way, while violating their rights under humanitarian international law. Here are the facts: more than 13,000 farmers (falihin) are cut off from thousands of dunams of their land

and from tens of thousands of trees which are their livelihood, and which are located on the other side of the separation fence. No attempt was made to seek out and provide them with substitute land, despite our oft repeated proposals on that matter. The separation is not hermetic: the military commander announced that two gates will be constructed, from each of the two villages, to its lands, with a system of licensing. This state of affairs injures the farmers severely, as access to their lands (early in the morning, in the afternoon, and in the evening), will be subject to restrictions inherent to a system of licensing. Such a system will result in long lines for the passage of the farmers themselves; it will make the passage of vehicles (which themselves require licensing and examination) difficult, and will distance the farmer from his lands (since only two daytime gates are planned for the entire length of this segment of the route). As a result, the life of the farmer will change completely in comparison to his previous life. The route of the separation fence severely violates their right of property and their freedom of movement. Their livelihood is severely impaired. The difficult reality of life from which they have suffered (due, for example, to high unemployment in that area) will only become more severe.

61. These injuries are not proportionate. They can be substantially decreased by an alternate route, either the route presented by the experts of the Council for Peace and Security, or another route set out by the military commander. Such an alternate route exists. It is not a figment of the imagination. It was presented before us. It is based on military control of Jebel Muktam, without “pulling” the separation fence to that mountain. Indeed, one must not forget that, even after the construction of the separation fence, the military commander will continue to control the area east of it. In the opinion of the military commander – which we assume to be correct, as the basis of our review – he will provide less security in that area. However, the security advantage reaped from the route as determined by the military commander, in comparison to the proposed route, does not stand in any reasonable proportion to the injury to the local inhabitants caused by this route. Indeed, the real question in the “relative” examination of the third proportionality subtest is not the choice between constructing a separation fence which brings security but injures the local inhabitants, or not constructing a separation fence, and not injuring the local inhabitants. The real question is whether the security benefit reaped by the acceptance of the military commander’s position (that the separation fence should surround Jebel Muktam) is proportionate to the additional injury resulting from his position (with the fence separating local inhabitants from their lands). Our answer to this question is that the military commander’s choice of the route of the separation fence is disproportionate. The gap between the security provided by the military commander’s approach and the security provided by the alternate route is minute, as compared to the large difference between a fence that separates the local inhabitants from their lands, and a fence which does not separate the two (or which creates a separation which is smaller and possible to live with). Indeed, we accept that security needs are likely to necessitate an injury to the lands of the local inhabitants and to their ability to use them. International humanitarian law on one hand, however, and the basic principles of Israeli administrative law on the other, require making every possible effort to ensure that injury will be proportionate. Where construction of the separation fence demands that inhabitants be separated from their lands, access to these lands must be ensured, in order to minimize the damage to the extent possible.

62. We have reached the conclusion that the route of the separation fence, which separates the villages of Beit Likia and Beit Anan from the lands which provide the villagers with their livelihood, is not proportionate. This determination affects order Tav/103/03, which applies directly to the territory of the mountain itself, and leads to its annulment. This determination also affects order Tav/104/03 which applies to the route west of it, which turns in towards the village of Beit Likia, in order to reach the mountain. The same goes for the western part of order Tav/84/03, which descends from the mountain in a southeasterly direction. The eastern part of the latter order was not a matter of significant dispute between the parties, but as a result of the annulment of the aforementioned orders, it should be examined anew.

Order no. Tav/107/30 (Until the Hill Northeast of Har Adar)

63. This order applies to the part of the fence route which begins south of the village of Katane and ends up east of the town of Har Adar. Its length is about four and one half kilometers. It separates between Har Adar and the villages of Katane (population: approximately 1000), El Kabiba (population: 2000), Bidu (population: 7500) and Beit Sourik (population: 3500). Petitioners argue that the route of this segment of the fence will cause direct injury to 300 dunams of the village of Katane. 5700 dunams of the lands of the village will end up on the other side of the fence (4000 of them cultivated lands). They further argue that 200 dunams of the land of the village of El Kabiba will be directly injured by the fence passing through them. 2500 dunams will end up on the other side of the fence (of which 1500 dunams are cultivated land). Indeed, then, the separation fence causes severe injury to the local inhabitants. The fence cuts the residents of the villages off from their lands, and makes their access to it – access upon which the livelihood of many depends – difficult. Study of the map attached by respondents (response of March 10 2004) reveals that along this part of the route, two gates will be built. One gate can only be used by pedestrian traffic. It is located at the western edge of this part of the route (south of the village of Katane). A second gate is a daytime gate located south of the hill which topographically controls the town of Har Adar from the northwest, and west of the village of Bidu. Respondent argues that the gates will allow the passage of farmers to their lands. Compensation will be paid to those whose lands are seized. Thus a proper balance will be struck between security needs and the needs of the local population.

64. After submission of the petition and examination of the arguments raised in it, respondents changed the route of the separation fence in this area. This part of the route, which passes north of Har Adar, will be closer to the security systems already existing in that town. Respondents stated that, as a result of this correction, the solution to security problems will be an inferior one, but they will reduce the injury to the local population and provide a reasonable level of security. Petitioners, however, claim that these changes are insufficient. The stance of the Council for Peace and Security, as per its first affidavit (signed by Major General (res.) Avraham Adan (Bren), Commissioner (res.) Shaul Giv'oli and Colonel (res.) Yuval Dvir), is that the separation fence should be integrated into the existing fence of the town of Har Adar. Moving the fence to a location adjacent to the village of Katane (west of Har Adar) will cause severe injury to the local inhabitants and will suffer all of the same aforementioned problems of a fence proximate to houses of Palestinians. Placing the fence side by side with the existing security systems west of Har Adar will not increase the danger of fire upon Har Adar. That is since it is already possible to fire upon it from the adjacent villages. Moreover, the current route, which passes next to Palestinian buildings, will endanger the forces patrolling along it, and will increase the concerns regarding false alarms.

65. The military commander argued, in response, that it is impossible to make a change in the route in the area of the village of Katane. From the operational standpoint, the proposal will allow terrorists free access all the way to the houses at the western edge of Har Adar. Nor can a change be made in the route from the engineering standpoint, since the patrol road that must pass along the fence will be so steep that it will not allow movement of vehicles there. Regarding the part of the route which passes north of Har Adar, respondent agrees that it will be possible to integrate it with the existing defense perimeter of Har Adar (partially, in the area of the pumping facility of the town). Respondents are not prepared to make any additional changes to the remainder of the route in this segment. The military commander argues, in

addition, that the proposal of the Council for Peace and Security regarding the part of the route which passes east of Har Adar cannot be accepted. That proposal would leave a hill located northeast of the town, which topographically controls it and the surroundings, outside of the defended area. Nonetheless, he testified that, after meetings with petitioners and members of the Council for Peace and Security, it was decided that slight changes would be made in the segment which passes alongside the northeast hill. As a result, the obstacle will be distanced further from the road and from the homes of the local inhabitants in the area (see para. 60 of military commander's affidavit of April 15 2004). Respondent also stated that order of seizure Tav/37/04, which amends the route accordingly, has already been issued. In our decision (of March 31 2004) we held that respondents shall refrain from making irreversible changes in the segment north of Har Adar.

66. From the military standpoint, there is a dispute between the military commander (who wishes to distance the separation fence from Har Adar) and the experts of the Council for Peace and Security (who wish to bring the fence closer to Har Adar). In this disagreement on military issues – and according to our approach, which gives great weight to the position of the military commander responsible for the security of the area – we accept the security stance of the military commander. Against this background, the question arises: is this part of the route of the separation fence proportionate?

67. Like the previous order we considered, this order before us also passes the two first subtests of proportionality (rational connection; the least injurious means). The key question here concerns the third subtest (proportionality in the narrow sense). Here too, as in the case of the previous order, the injury by the separation fence to the lives of more than 3000 farmers in the villages of Katane and El-Kabiba is severe. The rights guaranteed them by the Hague Regulations and the Fourth Geneva Convention are violated. The delicate balance between the military commander's obligation to provide security and his obligation to provide for the local inhabitants is breached. The fence separates between the inhabitants of Katane and El-Kabiba and their lands east and west of Har Adar, while instituting a licensing regime for passage from one side of the fence to the other. As a result, the farmer's way of life is impinged upon most severely. The regime of licensing and gates, as set out by the military commander, does not solve this problem. The difficulties we mentioned regarding the previous order apply here as well. As we have seen, it is possible to lessen this damage substantially if the route of the separation fence passing east and west of Har Adar is changed, reducing the area of agricultural lands lying beyond the fence. The security advantage (in comparison to the possible alternate route) which the military commander wishes to achieve is not proportionate to the severe injury to the farmers (according to the route proposed by the military commander). On this issue, attempts to find an appropriate solution were made during the hearing of the petition. These attempts must continue, in order to find a route which will fulfill the demands of proportionality. As a result of such a route, it may be that there will be no escaping some level of injury to the inhabitants of Katane and El-Kabiba, which should be reduced to the extent possible. As such, since the parties must continue to discuss this issue, we have not seen fit to make a final order regarding Tav/107/03.

The Eastern Tip of Order no. Tav/107/03 and Order no. Tav/108/03

68. This order applies to the five and a half kilometer long segment of the route of the obstacle which passes west and southeast of the villages of Beit Sourik (population: 3500) and Bidu (population: 7500).

A study of this part of the route, as published in the original order, reveals that the injury to these villages is great. From petitioners' data – which was not negated by respondents – it appears that 500 dunams of the lands of the village of Beit Sourik will be directly damaged by the positioning of the obstacle. 6000 additional dunams will remain beyond it (5000 dunams of which are cultivated land), including three greenhouses. Ten thousand trees will be uprooted and the inhabitants of the villages will be cut off from 25,000 thousand olive trees, 25,000 fruit trees and 5400 fig trees, as well as from many other agricultural crops. These numbers do not capture the severity of the damage. We must take into consideration the total consequences of the obstacle for the way of life in this area. The original route as determined in the order leaves the village of Beit Sourik bordered tightly by the obstacle on its west, south, and east sides. This is a veritable chokehold, which will severely stifle daily life. The fate of the village of Bidu is not much better. The obstacle surrounds the village from the east and the south, and impinges upon lands west of it. From a study of the map attached by the respondents (to their response of March 10, 2004) it appears that, on this segment of the route, one seasonal gate will be established south of the village of Beit Sourik. In addition, a checkpoint will be positioned on the road leading eastward from Bidu.

69. In addition to the parties' arguments before us, a number of residents of the town of Mevasseret Zion, south of the village of Beit Sourik, asked to present their position. They pointed out the good neighborly relations between Israelis and Palestinians in the area and expressed concern that the route of the fence, which separates the Palestinian inhabitants from their lands, will put those relations to an end. They argue that the Palestinians' access to their lands will be subject to a series of hindrances and violations of their dignity, and that this access will even be prevented completely. On the other hand, Mr. Efraim Halevi asked to present his position, which represents the opinion of other residents of the town of Mevasseret Tzion. He argues that moving the route of the fence southward, such that it approaches Mevasseret Tzion, will endanger its residents.

70. As with the previous orders, here too we take the route of the separation fence determined by the military commander as the basis of our examination. We do so, since we grant great weight to the stance of the official who is responsible for security. The question which arises before us is: is the damage caused to the local inhabitants by this part of the separation fence route proportionate? Here too, the first two subtests of the principle of proportionality are satisfied. Our doubt relates to the satisfaction of the third subtest. On this issue, the fact is that the damage from the segment of the route before us is most severe. The military commander himself is aware of that. During the hearing of the petition, a number of changes in the route were made in order to ease the situation of the local inhabitants. He mentioned that these changes provide an inferior solution to security problems, but will allow the injury to the local inhabitants to be reduced, and will allow a reasonable level of security. However, even after these changes, the injury is still very severe. The rights of the local inhabitants are violated. Their way of life is completely undermined. The obligations of the military commander, pursuant to the humanitarian law enshrined in the Hague Regulations and the Fourth Geneva Convention, are not being satisfied.

71. The Council for Peace and Security proposed an alternate route, whose injury to the agricultural lands is much smaller. It is proposed that the separation fence be distanced both from the east of the village of Beit Sourik and from its west. Thus, the damage to the agricultural lands will be substantially reduced. We are convinced that the security advantage achieved by the route, as determined by the military commander, in comparison with the alternate route, is in no way proportionate to the additional injury to the lives of the local inhabitants caused by this order. There is no escaping the conclusion that, for reasons of proportionality, this order before us must be annulled. The military commander must

consider the issue again. He must create an arrangement which will avoid this severe injury to the local inhabitants, even at the cost of a certain reduction of the security demands. The proposals of the Council for Peace and Security – whose expertise is recognized by the military commander – may be considered. Other routes, of course, may be considered. This is the military commander's affair, subject to the condition that the location of the route free the village of Beit Sourik (and to a lesser extent, the village of Bidu) from the current chokehold and allow the inhabitants of the villages access to the majority of their agricultural lands.

Order no. Tav/109/103

72. This order applies to the route of the separation fence east of the villages of Bidu, Beit Ajaza and Beit Daku. Its length is approximately five kilometers. As we take notice of its southern tip, its central part, and its northern part, different parts of it raise different problems. The southern tip of the order directly continues from the route of order no. Tav/108/03, to the area passing west of the town of Har Shmuel. This part of the fence passes east of the village of Bidu, and it is the direct continuation of the part of the separation fence considered by us in the framework of order no. Tav/108/03. The fate of this part of order no. Tav/109/03 is the same fate as that of order no. Tav/108/03. As such, the separation fence will be moved eastward, so that the inhabitants of the village of Bidu will be able to continue the agricultural cultivation of the part of their lands east of this part of the fence.

73. The central part of the separation fence in this order passes west of the town of Har Shmuel and east of the village of Bidu, until it reaches New Giv'on, which is east of it, and the village of Beit Ajaza which is west of it. The separation fence separates these two towns. The route causes injury to the agricultural lands of the village of Bidu and to the access to them. The route also impinges upon the lands of the village of Beit Ajaza. We were informed that 350 dunams of the lands of this village will be damaged by the construction of the obstacle. 2400 dunams of the lands of the village will be beyond it (2000 dunams of it cultivated land). In addition, the route cuts off the access roads that connect the villages to the urban center of Ramallah and to East Jerusalem. In the affidavit of the Council for Peace and Security (of April 4 2004) it was mentioned that the current route will allow the local inhabitants to reach Ramallah only via a long and difficult road. Petitioners proposed that the route of the fence pass adjacent to the town of Har Shmuel, to the road connecting the Ramot neighborhood to Giv'at Ze'ev, and to the southern part of the town of New Giv'on. Thus, free access to the agricultural lands in the area will be possible. Petitioners also proposed pressing the route up against the western part of New Giv'on, and thus distancing it a bit from the village of Beit Ajaza.

74. The route proposed by petitioners is unacceptable to respondent. He argues that it does not take into account the palpable threat of weapons fire upon Israeli towns and upon the road connecting Ramot with Giv'at Ze'ev. Neither does it consider the need to establish a security zone which will increase the preparation time available to the armed forces in the event of an infiltration. Respondent argues that pushing the separation fence up against the Israeli towns will substantially endanger those towns. The military commander is aware of this, and therefore testified before us that a gate will be established at that location in order to allow the inhabitants' passage to their lands. East of the village of Bidu, a permanent checkpoint will be established, which will be open 24 hours a day, 365 days a year, in order to allow the preservation of the existing fabric of life in the area and ease the access to the villages. It was further

decided to take steps which will improve the roads connecting the villages to one another, in order to allow the continued relations between these villages, and between them and Ramallah. In addition, respondent is examining the possibility of paving a road which will allow free and fast access from the villages to the direction of Ramallah. In his affidavit (of April 20 2004), respondent testified (paragraph 22 of the affidavit) that, until the completion of said road, he will not prevent passage of the inhabitants of the villages in this petition to the direction of Ramallah; rather, access toward the city will be allowed, according to the current arrangements.

75. According to our approach, great weight must be given to the military stance of the commander of the area. Petitioners did not carry their burden and did not convince us that we should prefer petitioners' military stance (supported in part by the expert opinion of members of the Society for Peace and Security) over the stance of the commander of the area. We assume, therefore, that the position of the commander of the area, as expressed in this part of order no. *Tav/109/03*, is correct, and it forms the basis for our examination.

76. Is the damage caused to the local inhabitants by this part of the route of the separation fence proportionate? Like the orders we considered up to this point, the question is: is the security advantage gained from the route, as determined by the commander of the area, compared to other possible alternate routes, proportionate to the additional injury to the local inhabitants caused by this route, compared to the alternate routes? Here, as well, the picture we have already dealt with reappears. The route of the fence, as determined by the military commander, separates local inhabitants from their lands. The proposed licensing regime cannot substantially solve the difficulties raised by this segment of the fence. All this constitutes a severe violation of the rights of the local inhabitants. The humanitarian provisions of the Hague Regulations and of the Fourth Geneva Convention are not satisfied. The delicate balance between the security of the area and the lives of the local inhabitants, for which the commander of the area is responsible, is upset. There is no escaping, therefore, the annulment of the order, to the extent that it applies to the central part of the fence. The military commander must consider alternatives which, even if they result in a lower level of security, will cause a substantial (even if not complete) reduction of the damage to the lives of the local inhabitants.

77. We shall now turn to the northern part of order no. *Tav/109/03*. The route of the gate at this part begins in the territory separating New Giv'on from the village of Beit Ajaza. It continues northwest to the eastern part of the village of Beit Daku. In our decision (of March 31 2004), we determined that respondents shall refrain from making irreversible changes in the segment between Beit Tira and North Beit Daku. There is no dispute between the parties regarding the part of the fence which separates New Giv'on and Beit Ajaza. This part of the fence is legal. The dispute arises regarding the part of the separation fence which lies beyond it.

78. Petitioners argue that this part of the route of the separation fence severely injures the local inhabitants of the village of Beit Daku. The data in their arguments show that 300 dunams of village lands will be directly damaged by the passage of the obstacle through them. 4000 dunams will remain beyond the obstacle (2500 of them cultivated). The affidavit submitted by the Council for Peace and Security states that the route of the obstacle should be moved a few hundred meters northeast of the planned location, in order to reduce the effect on local inhabitants. Petitioners presented two alternate routes for

the obstacle in this segment. One route passes through the area intended for expansion of the town of Giv'at Ze'ev known by the nickname of "The Gazelles' Basin," where a new neighborhood is already being built. A second alternate route draws the obstacle closer to its present route, northeast of it.

79. Respondent objects to the route proposed by petitioners and by the Society for Peace and Security. He explains that there is great importance to the control of a high hill located east of the village of Beit Daku. This hill topographically controls New Giv'on, Giv'at Ze'ev and "The Gazelles' Basin." The route of the fence was planned such that it would not obstruct the road connecting the villages of Beit Daku and Beit Ajaza. In addition, the route passes over ridges of the hill which are of relatively moderate gradient, whereas the other ridges which descend from it are steep. In respondent's opinion, moving the fence northwest of its current route will allow terrorist activity from the high hill, and thus endanger the Israeli towns and the army forces patrolling along the obstacle. In addition, the fact that the route proposed by petitioners is steeper raises complex engineering problems, whose solution will demand multiple bends in the route that will seriously damage the crops located at the foot of the hill.

80. As with other segments of the separation fence, here too we begin from the assumption that the military-security considerations of the military commander are reasonable, and that there is no justification for our intervention. The question before us, therefore, is: is the route of the separation fence, which actualizes these considerations, proportionate? The main difficulty is the severe injury to the local inhabitants of Beit Daku. The fence separates them from considerable parts (4000 dunams, 2500 of which are cultivated) of their lands. Thus, a disproportionate injury is caused to the lives of the people in this location. We accept – due to the military character of the consideration – that the high hill east of the village of Daku must be under IDF control. We also accept that "The Gazelles' Basin" is a part of Giv'at Ze'ev and needs defense just like the rest of that town. Despite all that, we are of the opinion that the military commander must map out an alternate arrangement – one that will both satisfy the majority of the security considerations and also mitigate, to the extent possible, the separation of the local inhabitants of the village of Daku from their agricultural lands. Such alternate routes were presented before us. We shall not take any stand whatsoever regarding a particular alternate route. The military commander must determine an alternative which will, provide a fitting, if not ideal, solution for the security considerations, and also allow proportionate access of Beit Daku villagers to their lands.

Order no. Tav/110/03

81. This order continues the route of the separation fence northwest of Beit Daku. This part starts out adjacent to the east part of the village of A-Tira, and ends up at route 443, east of Beit Horon. The village of A-Tira is not a party to the petition before us, and we will not deal with its inhabitants. As far as it affects the lands of Beit Daku, this order must go the way of Tav/109/03, which we have already discussed.

Overview of the Proportionality of the Injury Caused by the Orders

82. Having completed the examination of the proportionality of each order separately, it is appropriate that we lift our gaze and look out over the proportionality of the entire route of the part of the separation fence which is the subject of this petition. The length of the part of the separation fence to which these orders apply is approximately forty kilometers. It causes injury to the lives of 35,000 local inhabitants. 4000 dunams of their lands are taken up by the route of the fence itself, and thousands of olive trees growing along the route itself are uprooted. The fence separates the eight villages in which the local inhabitants live from more than 30,000 dunams of their lands. The great majority of these lands are cultivated, and they include tens of thousands of olive trees, fruit trees and other agricultural crops. The licensing regime which the military commander wishes to establish cannot prevent or substantially decrease the extent of the severe injury to the local farmers. Access to the lands depends upon the possibility of crossing the gates, which are very distant from each other and not always open. Security checks, which are likely to prevent the passage of vehicles and which will naturally cause long lines and many hours of waiting, will be performed at the gates. These do not go hand in hand with the farmer's ability to work his land. There will inevitably be areas where the security fence will have to separate the local inhabitants from their lands. In these areas, the commander should allow passage which will reduce, to the extent possible, the injury to the farmers.

83. During the hearings, we asked respondent whether it would be possible to compensate petitioners by offering them other lands in exchange for the lands that were taken to build the fence and the lands that they will be separated from. We did not receive a satisfactory answer. This petition concerns farmers that make their living from the land. Taking petitioners' lands obligates the respondent, under the circumstances, to attempt to find other lands in exchange for the lands taken from the petitioners. Monetary compensation may only be offered if there are no substitute lands.

84. The injury caused by the separation fence is not restricted to the lands of the inhabitants and to their access to these lands. The injury is of far wider a scope. It strikes across the fabric of life of the entire population. In many locations, the separation fence passes right by their homes. In certain places (like Beit Sourik), the separation fence surrounds the village from the west, the south and the east. The fence directly affects the links between the local inhabitants and the urban centers (Bir Nabbala and Ramallah). This link is difficult even without the separation fence. This difficulty is multiplied sevenfold by the construction of the fence.

85. The task of the military commander is not easy. He must delicately balance between security needs and the needs of the local inhabitants. We were impressed by the sincere desire of the military commander to find this balance, and his willingness to change the original plan in order to reach a more proportionate solution. We found no stubbornness on his part. Despite all this, we are of the opinion that the balance determined by the military commander is not proportionate. There is no escaping, therefore, a renewed examination of the route of the fence, according to the standards of proportionality that we have set out.

Epilogue

86. Our task is difficult. We are members of Israeli society. Although we are sometimes in an ivory

tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror. We are aware of the killing and destruction wrought by the terror against the state and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. We are aware that in the short term, this judgment will not make the state's struggle against those rising up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state's struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. There is no security without law. Satisfying the provisions of the law is an aspect of national security. I discussed this point in HCJ 5100/94 *The Public Committee against Torture in Israel v. The Government of Israel*, at 845:

We are aware that this decision does make it easier to deal with that reality. This is the destiny of a democracy—she does not see all means as acceptable, and the ways of her enemies are not always open before her. A democracy must sometimes fight with one arm tied behind her back. Even so, a democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of her security stance. At the end of the day, they strengthen her spirit and this strength allows her to overcome her difficulties.

That goes for this case as well. Only a separation fence built on a base of law will grant security to the state and its citizens. Only a separation route based on the path of law, will lead the state to the security so yearned for.

The result is that we reject the petition against order no. Tav/105/03. We accept the petition against orders Tav/104/03, Tav/103/03, Tav/84/03 (western part), Tav/107/03, Tav/108/03, Tav/109/03, and Tav/110/03 (to the extent that it applies to the lands of Beit Daku), meaning that these orders are nullified, since their injury to the local inhabitants is disproportionate.

Respondents will pay 20,000 NIS in petitioners' costs.

Vice President E. Mazza

I concur.

Justice M. Cheshin

I concur.

Held, as stated in the opinion of President A. Barak.

June 30, 2004