DECLARATION OF JUDGE TOMKA

[Original English text]

1. Having co-signed with Judges Abraham and Aurescu our joint opinion, I wish to add a few additional observations.

2. The request of the General Assembly of the United Nations for an advisory opinion concerns issues which have been on its agenda from the very beginning of its activities, following the notification by the United Kingdom of its intention to transfer the mandate of Palestine to the Organization. Based on the recommendation of the Special Committee on Palestine, established in May 1947, the General Assembly adopted on 29 November 1947 resolution 181 (II), which set out a Plan of Partition envisaging the creation of two independent States, one Arab, the other Jewish, and calling upon the inhabitants of Palestine to take the steps as may be necessary on their part to put this plan into effect. While the Jewish people welcomed the Plan and declared the independence of their State, the State of Israel, on 14 May 1948, the Arab population of Palestine and the Arab States rejected it. Instead, five Arab States launched an armed attack against the nascent State of Israel.

3. The Arab leaders claimed the whole territory of Palestine for an Arab State, rejecting the Partition. Had they accepted it and declared an independent Arab State in the territories as envisaged in the Plan, the tragedy since afflicting the region could have been averted, as the Arab population of Palestine would have been able to exercise its right to self-determination and establish a State of its own.

4. It now rather appears that it is Israel, or at least the important political circles within that State, which would like to claim, if not the whole territory of Palestine, at least its major part, as its own territory. This is demonstrated by various statements of Israeli leaders, including the Prime Minister, and by Israel's continued policy of settlements in the West Bank, including East Jerusalem. That policy has been pursued since shortly after the 1967 armed conflict (the "Six-Day War"), despite Israel being aware that establishing settlements in the occupied territory and transferring its population therein would be contrary to Article 49, paragraph 6, of the Fourth Geneva Convention[1]. Since then, Israel has entrenched its policy to expand the settlements in the West Bank, despite its commitment to refrain from such activities in the Oslo II Accord. I fully agree with the Court's view that such settlements are illegal and are to be viewed as an effort at annexing parts of the West Bank, following the *de jure* annexation of East Jerusalem in 1980.

5. The Security Council, in its resolution 478 (1980), rightly determined that all legislative and administrative measures and actions taken by Israel which had altered or purported to alter the character and status of Jerusalem, and in particular the "basic law" on Jerusalem, were null and void and had to be rescinded forthwith.

[1] This warning was clearly stated in the opinion of the Legal Advisor of Israel's Ministry of Foreign Affairs submitted on 18 September 1967 as a "Top Secret" document to the Political Secretary to the Prime Minister and Head of his office, who transmitted it to the Minister of Justice. Excerpts from the opinion may be found in Gershom Gorenberg, *The Accidental Empire: Israel and the Birth of the Settlements, 1967-1977* (New York, 2006), p. 9.

6. In my view, the Court does not clearly distinguish between the nullity, which affects the act in question, depriving it of its validity in international law, and the responsibility that affects the State author of the act which is null[2].

The act in question does not affect the legal régime of the occupation and Israel remains bound by its obligations under international law as an occupying Power.

7. The Court goes too far, however, when it opines that Israel's continued presence in the Occupied Palestinian Territory (in other words, Israel's occupation) is unlawful as such.

The unlawfulness depends on the manner in which occupation has been established. This has to be determined under the rules governing the use of force. The term "occupation" describes a factual situation to which international law attaches certain legal consequences. Under customary international law, as reflected in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907[3], a territory is considered occupied when it is actually placed under the authority of the hostile army. The Court was not asked, nor was it in a position, to determine whether the recourse to force by Israel in 1967, which resulted in the occupation of the West Bank (including East Jerusalem) and the Gaza Strip, was unlawful or not. Despite that, the Court opines that certain subsequent actions by Israel "*render[ed]*" Israel's presence in the Occupied Palestinian Territory unlawful (Advisory Opinion, para. 261), a formula which would seem to imply that the occupation resulted from an act that was not unlawful.

8. Although I do not share the Court's view that Israel's continued presence in the Occupied Palestinian Territory is unlawful, I agree that all States are under an obligation to not recognize the situation arising from its presence in that territory and to refrain from rendering aid or assistance to Israel in maintaining that situation. The main reason for my position is that I believe that States should not assist Israel in its aim to annex a major part of the Occupied Palestinian Territory and to treat it as its own territory. On the contrary, States should, within their power, lend their assistance to reach the overall goal of achieving peace in the Middle East, that is to say, the goal of achieving a situation in which the State of Israel and the State of Palestine live side by side, in peace and security within their internationally recognized boundaries.

For the same reasons, I also support the view that the United Nations, and especially the Security Council and General Assembly, should consider the modalities for bringing to an end as rapidly as possible the presence of the State of Israel in the Occupied Palestinian Territory. This can be done only when security is guaranteed for both States. I believe that achieving the above goal is long overdue and that all relevant actors should redouble their efforts to that effect. This remains the unfulfilled historical responsibility of the United Nations.

(Signed) Peter TOMKA.

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[2] On this point, see Joe Verhoeven, "Les nullités du droit des gens", in Prosper Weil (ed.), *Droit International 1* (Paris, Pedone, 1981), pp. 102-105.

[3] The same provision was already contained in the Regulations annexed to the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899, adopted at the Hague Peace Conference.