INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

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

(REQUEST FOR ADVISORY OPINION)

ORDER OF 30 JANUARY 2004

2004

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

CONSÉQUENCES JURIDIQUES DE L'ÉDIFICATION D'UN MUR DANS LE TERRITOIRE PALESTINIEN OCCUPÉ

(REQUÊTE POUR AVIS CONSULTATIF)

ORDONNANCE DU 30 JANVIER 2004

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

(REQUEST FOR ADVISORY OPINION)

ORDER

Present: *President* SHI; *Vice-President* RANJEVA; *Judges* GUILLAUME, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, OWADA, SIMMA, TOMKA; *Registrar* COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 17, 24, 48 and 68 of the Statute of the Court and to Articles 34, paragraph 2, and 102, paragraph 1, of the Rules of Court,

Having regard to resolution A/RES/ES-10/14 of the Tenth Emergency Special Session of the United Nations General Assembly, whereby the Assembly decided to request the Court, pursuant to Article 65 of its Statute, to give an urgent advisory opinion on the question stated therein,

Having regard to the Order made by the Court on 19 December 2003 whereby *(inter alia)* it decided that the United Nations and its Member States were considered 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 advisory opinion, and provided for the organization of the further procedure in the case,

Makes the following Order:

1. Whereas on 31 December 2003 the Government of Israel addressed a letter to the Registrar of the Court, in which that Government referred to the composition of the Court for purposes of its Order of 19 December 2003, and observed *(inter alia)* that "a Member of the Court who has played a leading role in recent years in the very Emergency Special Session from which the advisory opinion request has now emerged" is participating in decisions in this case;

2. Whereas in that letter the Government of Israel stated further that

> "Resolution A/RES/ES-10/14 requesting the advisory opinion locates the request squarely in the context of the wider Arab-Israeli/Israeli-Palestinian dispute. The essentially contentious nature of the proceedings is also recognised by the Court's invitation to Palestine to participate in the case. It is inappropriate for a Member of the Court to participate in decisions in a case in which he has previously played an active, official and public role as an advocate for a cause that is in contention in this case. Israel will be writing to the President of the Court separately on this matter pursuant to Article 34 (2) of the Rules of Court";

3. Whereas on 15 January 2004 the Government of Israel addressed a confidential letter to the President of the Court referring to Article 34, paragraph 2, of the Rules of Court, in which that Government identified Judge Elaraby as the Member of the Court referred to in the previous letter, and sought to bring to the attention of the President facts which that Government considered of possible relevance to the participation of Judge Elaraby in the case;

4. Whereas the Government of Israel referred in its confidential letter not only to Judge Elaraby's participation in the Tenth Emergency Special Session of the General Assembly but also to his previous activities as principal Legal Adviser to the Egyptian Ministry of Foreign Affairs (1976-1978 and 1983-1987), and as Legal Adviser to the Egyptian Delegation to the Camp David Middle East Peace Conference of 1978, and his involvement in initiatives following the signing of the Israel-Egypt Peace Treaty in 1979, concerning the establishment of autonomy in the West Bank and the Gaza Strip; whereas the Government further cited the published report of an interview given by Judge Elaraby to an Egyptian newspaper in August 2001, which reports the views of Judge Elaraby on questions concerning Israel;

5. Whereas the letter from the Government of Israel concludes by contending that Judge Elaraby, both in his previous professional capacity and in his statements of opinion, has been actively engaged in opposition to Israel including on matters which go directly to aspects of the question now before the Court;

6. Whereas in the case concerning 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 ruled on objections, presented by the Government of South Africa under Article 17, paragraph 2, of the Statute, to the participation of three Members of the Court in the proceedings; whereas those objections were based "on statements made or other participation by the Members concerned, in their former capacity as representatives of their Governments, in United Nations organs which were dealing with matters concerning South West Africa"; whereas the Court reached the conclusion that such activities did not attract the application of Article 17, paragraph 2 (*I.C.J. Reports 1971*, p. 18, para. 9);

7. Whereas Article 17, paragraph 2, of the Statute excludes a Member of the Court from participation in the decision of any case in which he has previously taken part "as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity";

8. Whereas however the activities of Judge Elaraby referred to in the letter of 15 January 2004 from the Government of Israel were performed in his capacity of a diplomatic representative of his country, most of them many years before the question of the construction of a wall in the occupied Palestinian territory, now submitted for advisory opinion, arose; whereas that question was not an issue in the Tenth Emergency Special Session of the General Assembly until after Judge Elaraby had ceased to participate in that Session as representative of Egypt; whereas in the newspaper interview of August 2001, Judge Elaraby expressed no opinion on the question put in the present case; whereas consequently Judge Elaraby could not be regarded as having "previously taken part" in the case in any capacity;

THE COURT,

By thirteen votes to one,

Decides that the matters brought to the attention of the Court by the letter of 31 December 2003 from the Government of Israel, and the further confidential letter of 15 January 2004 from that Government, are not such as to preclude Judge Elaraby from participating in the present case.

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume,

Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Owada, Simma, Tomka;

AGAINST: *Judge* Buergenthal.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this thirtieth day of January, 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 Government of Israel.

(Signed) SHI Jiuyong,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge BUERGENTHAL appends a dissenting opinion to the Order of the Court.

(Initialled) J.Y.S.
(Initialled) Ph.C.