DECLARATION OF JUDGE BUERGENTHAL

1. Since I believe that the Court should have exercised its discretion and declined to render the requested advisory opinion, I dissent from its decision to hear the case. My negative votes with regard to the remaining items of the *dispositif* should not be seen as reflecting my view that the construction of the wall by Israel on the Occupied Palestinian Territory does not raise serious questions as a matter of international law. I believe it does, and there is much in the Opinion with which I agree. However, I am compelled to vote against the Court's findings on the merits because the Court did not have before it the requisite factual bases for its sweeping findings; it should therefore have declined to hear the case. In reaching this conclusion, I am guided by what the Court said in *Western Sahara*, where it emphasized that the critical question in determining whether or not to exercise its discretion in acting on an advisory opinion request 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, Advisory Opinion, I.C.J. Reports 1975*, pp. 28-29, para. 46).

In my view, the absence in this case of the requisite information and evidence vitiates the Court's findings on the merits.

2. I share the Court's conclusion that international humanitarian law, including the Fourth Geneva Convention, and international human rights law are applicable to the Occupied Palestinian Territory and must there be faithfully complied with by Israel. I accept that the wall is causing deplorable suffering to many Palestinians living in that territory. In this connection, I agree that the means used to defend against terrorism must conform to all applicable rules of international law and that a State which is the victim of terrorism may not defend itself against this scourge by resorting to measures international law prohibits.

3. It may well be, and I am prepared to assume it, that on a thorough analysis of all relevant facts, a finding could well be made that some or even all segments of the wall being constructed by Israel on the Occupied Palestinian Territory violate international law (see para. 10 below). But to reach that conclusion with regard to the wall as a whole without

having before it or seeking to ascertain all relevant facts bearing directly on issues of Israel's legitimate right of self-defence, military necessity and security needs, given the repeated deadly terrorist attacks in and upon Israel proper coming from the Occupied Palestinian Territory to which Israel has been and continues to be subjected, cannot be justified as a matter of law. The nature of these cross-Green Line attacks and their impact on Israel and its population are never really seriously examined by the Court, and the dossier provided the Court by the United Nations on which the Court to a large extent bases its findings barely touches on that subject. I am not suggesting that such an examination would relieve Israel of the charge that the wall it is building violates international law, either in whole or in part, only that without this examination the findings made are not legally well founded. In my view, the humanitarian needs of the Palestinian people would have been better served had the Court taken these considerations into account, for that would have given the Opinion the credibility I believe it lacks.

4. This is true with regard to the Court's sweeping conclusion that the wall as a whole, to the extent that it is constructed on the Occupied Palestinian Territory, violates international humanitarian law and international human rights law. It is equally true with regard to the finding that the construction of the wall "severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right" (para. 122). I accept that the Palestinian people have the right to self-determination and that it is entitled to be fully protected. But assuming without necessarily agreeing that this right is relevant to the case before us and that it is being violated, Israel's right to self-defence, if applicable and legitimately invoked, would nevertheless have to preclude any wrongfulness in this regard. See Article 21 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, which declares: "The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations."

5. Whether Israel's right of self-defence is in play in the instant case depends, in my opinion, on an examination of the nature and scope of the deadly terrorist attacks to which Israel proper is being subjected from across the Green Line and the extent to which the construction of the wall, in whole or in part, is a necessary and proportionate response to these attacks. As a matter of law, it is not inconceivable to me that some segments of the wall being constructed on Palestinian territory meet that test and that others do not. But to reach a conclusion either way, one has to examine the facts bearing on that issue with regard to the specific

segments of the wall, their defensive needs and related topographical considerations.

Since these facts are not before the Court, it is compelled to adopt the to me legally dubious conclusion that the right of legitimate or inherent self-defence is not applicable in the present case. The Court puts the matter as follows:

> "Article 51 of the Charter . . . 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.
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> 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.
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> Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case." (Para. 139.)

6. There are two principal problems with this conclusion. The first is that the United Nations Charter, in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State, leaving aside for the moment the question whether Palestine, for purposes of this case, should not be and is not in fact being assimilated by the Court to a State. Article 51 of the Charter provides that "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 . . .". Moreover, in the resolutions cited by the Court, the Security Council has made clear that "international terrorism constitutes a threat to international peace and security" while "*reaffirming* the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)" (Security Council resolution 1373 (2001)). In its resolution 1368 (2001), adopted only one day after the 11 September 2001 attacks on the United States, the Security Council invokes the right of self-defence in calling on the international community to combat terrorism. In neither of these resolutions did the Security Council limit their application to terrorist attacks by State actors only, nor was an assumption to that effect implicit in these resolutions. In fact, the contrary appears to have been the case. (See Thomas Franck, "Terrorism and the Right of Self-Defense", *American Journal of International Law*, Vol. 95, 2001, pp. 839-840.)

Second, Israel claims that it has a right to defend itself against terrorist attacks to which it is subjected on its territory from across the Green Line and that in doing so it is exercising its inherent right of self-defence. In assessing the legitimacy of this claim, it is irrelevant that Israel is alleged to exercise control in the Occupied Palestinian Territory — whatever the concept of "control" means given the attacks Israel is subjected from that territory — or that the attacks do not originate from outside the territory. For to the extent that the Green Line is accepted by the Court as delimiting the dividing line between Israel and the Occupied Palestinian Territory, to that extent the territory from which the attacks originate is not part of Israel proper. Attacks on Israel coming from across that line must therefore permit Israel to exercise its right of self-defence against such attacks, provided the measures it takes are otherwise consistent with the legitimate exercise of that right. To make that judgment, that is, to determine whether or not the construction of the wall, in whole or in part, by Israel meets that test, all relevant facts bearing on issues of necessity and proportionality must be analysed. The Court's formalistic approach to the right of self-defence enables it to avoid addressing the very issues that are at the heart of this case.

7. In summarizing its finding that the wall violates international humanitarian law and international human rights law, the Court has the following to say:

> "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." (Para. 137.)

The Court supports this conclusion with extensive quotations of the relevant legal provisions and with evidence that relates to the suffering the wall has caused along some parts of its route. But in reaching this conclusion, the Court fails to address any facts or evidence specifically rebutting Israel's claim of military exigencies or requirements of national security. It is true that in dealing with this subject the Court asserts that it draws on the factual summaries provided by the United Nations Secretary-General as well as some other United Nations reports. It is equally true, however, that the Court barely addresses the summaries of Israel's position on this subject that are attached to the Secretary-General's report and which contradict or cast doubt on the material the Court

claims to rely on. Instead, all we have from the Court is a description of the harm the wall is causing and a discussion of various provisions of international humanitarian law and human rights instruments followed by the conclusion that this law has been violated. Lacking is an examination of the facts that might show why the alleged defences of military exigencies, national security or public order are not applicable to the wall as a whole or to the individual segments of its route. The Court says that it "is not convinced" but it fails to demonstrate why it is not convinced, and that is why these conclusions are not convincing.

8. It is true that some international humanitarian law provisions the Court cites admit of no exceptions based on military exigencies. Thus, Article 46 of the Hague Rules provides that private property must be respected and may not be confiscated. In the Summary of the legal position of the Government of Israel, Annex I to the report of the United Nations Secretary-General (A/ES-10/248, p. 8), the Secretary-General reports Israel's position on this subject in part as follows:

> "The Government of Israel argues: there is no change in ownership of the land; compensation is available for use of land, crop yield or damage to the land; residents can petition the Supreme Court to halt or alter construction and there is no change in resident status."

The Court fails to address these arguments. While these Israeli submissions are not necessarily determinative of the matter, they should have been dealt with by the Court and related to Israel's further claim that the wall is a temporary structure, which the Court takes note of as an "assurance given by Israel" (para. 121).

9. Paragraph 6 of Article 49 of the Fourth Geneva Convention also does not admit for exceptions on grounds of military or security exigencies. It provides that "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies". I agree that this provision applies to the Israeli settlements in the West Bank and that their existence violates Article 49, paragraph 6. It follows that the segments of the wall being built by Israel to protect the settlements are *ipso facto* in violation of international humanitarian law. Moreover, given the demonstrable great hardship to which the affected Palestinian population is being subjected in and around the enclaves created by those segments of the wall, I seriously doubt that the wall would here satisfy the proportionality requirement to qualify as a legitimate measure of self-defence.

10. A final word is in order regarding my position that the Court should have declined, in the exercise of its discretion, to hear this case. In this connection, it could be argued that the Court lacked many relevant facts bearing on Israel's construction of the wall because Israel failed to present them, and that the Court was therefore justified in relying almost exclusively on the United Nations reports submitted to it. This proposition would be valid if, instead of dealing with an advisory opinion request, the Court had before it a contentious case where each party has the burden of proving its claims. But that is not the rule applicable to advisory opinion proceedings which have no parties. Once the Court recognized that Israel's consent to these proceedings was not necessary since the case was not brought against it and Israel was not a party to it, Israel had no legal obligation to participate in these proceedings or to adduce evidence supporting its claim regarding the legality of the wall. While I have my own views on whether it was wise for Israel not to produce the requisite information, this is not an issue for me to decide. The fact remains that it did not have that obligation. The Court may therefore not draw any adverse evidentiary conclusions from Israel's failure to supply it or assume, without itself fully enquiring into the matter, that the information and evidence before it is sufficient to support each and every one of its sweeping legal conclusions.

(Signed) Thomas BUERGENTHAL.