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Title : STATEMENT AT THE ORAL HEARINGS OF THE INTERNATIONAL COURT OF JUSTICE ON LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY (REQUEST FOR ADVISORY OPINION) THE HAGUE

Mr. President, distinguished members of the Court.

It is a great honour to appear before your Court in this advisory opinion procedure concerning the legal consequences of the construction of a Wall in the Occupied Palestinian Territory. On behalf of Malaysia, I would like to record Malaysia's highest regard for the International Court of Justice as the principal judicial organ of the United Nations.

The matter before the Court in this request for an advisory opinion is a very important one, since it concerns one of the earliest questions which the United Nations dealt with and which still remains unresolved. As one of the co-sponsors of the Draft Resolution of the United Nations General Assembly, which led to the request for this advisory opinion, and as Chairman of both the Non-Aligned Movement and the Organisation of the Islamic Conference, Malaysia participated actively in the General Assembly deliberations on this issue during the Tenth Emergency Session of the General Assembly in October 2003. Malaysia re-affirmed its well-known position that the solution of the question of Palestine requires a just, comprehensive and lasting settlement of the conflict on the basis of the implementation of relevant General Assembly resolutions and Security Council resolutions 242 (1967), 338 (1973), 1397 (2002) and 1515 (2003).

The General Assembly has come to the Court to seek and to obtain clarification on the legal consequences arising from the construction of the Wall being built by Israel, considering the rules and principles of international law, and to obtain further legal guidance that will assist the international community to determine its response. No institution is better placed than your Court to assess in an authoritative way the situation from an international law perspective.

Mr. President and distinguished members of the Court,

I stand before you today with the conviction that this Court is in the best position as the custodian of International Law, which binds us as a community of nations that stand together in order to promote justice, equality, peace, security and prosperity for mankind. Those of us that advocate the rule of law, human rights, freedom and democracy, are duty bound to ensure that these standards are also upheld at the international level without discrimination and exception.

We are here before the Court to uphold the sanctity of International Law. It is incumbent upon us with a feeling of mercy and compassion to ensure that in this new global order that we live in, we can instill a true sense of justice, equality, freedom and democracy. The multilateral system that is the very basis of the establishment of the United Nations should be the core principle that guides us to the sustainability of the Rule of Law and human rights. We should use the diversities of the world as our strengths to unite peoples and not divide us in conflicts that bring untold miseries and sufferings to humankind. As the custodian of international law, this Court is well disposed from a legal viewpoint to determine this important legal question.

Mr. President, distinguished members of the Court.

Section I of this oral statement will summarise briefly the position of Malaysia on the Wall and to emphasise its main legal concerns, while further developing some points outlined in our Written Statement - in particular by reference to what other States have advanced in their Written Statements. For reasons of time, Malaysia will focus upon some particular points, being conscious that other points are equally relevant and may be addressed by other delegations. Section II of my Statement deals with the competence of the General Assembly to request an advisory opinion and the propriety of such a request. Section III takes up what we consider to be the central point: the international legal status of the Occupied Palestinian Territory.

By way of a preliminary remark, Malaysia takes strong exception to the pejorative way in which Israel refers to Palestine all through its written statement, such as the use of inverted commas to refer to Palestine, the negation of its territorial integrity, the reference to what is universally recognised as Palestinian territory as though it were a "disputed" territory, and the grave accusation, without any evidence, that the Palestinian Authority bears responsibility for the terrorist attacks committed by Palestinians citizens. Malaysia firmly rejects what constitutes a factual negation of the right of the Palestinian people to self-determination.

I. Position of Malaysia on the Wall

Mr. President, distinguished members of the Court.

During the deliberations in the United Nations Security Council on 14 October 2003 and in the General Assembly on 20 October and 8 December 2003, Malaysia took the view that the Wall was illegal and must be dismantled, and that its further construction must be immediately discontinued. Allow me to summarise the main reasons for Malaysia to hold such views:

- The wall, sections of which are constructed deep inside the Occupied Palestinian Territory, departs from the Armistice Line of 1949 and therefore is illegal under international law. This implies the violation of the obligation to respect the territorial integrity of Palestine and the right of the Palestinian people to self-determination;

- The wall gravely violates the Fourth Geneva Convention in that it involves the illegal, de facto attempt at annexation of substantial parts of the Palestinian territory and its resources; the transfer of a large number of Palestinian civilians, and further deprivation of human rights of the Palestinians, resulting in further dire humanitarian consequences among an already deprived people;
- The wall constitutes a violation of freedom of access to holy places, including places of worship, of all religions in Jerusalem, embodied not only in human rights rules but also as an autonomous rule included in numerous UN Resolutions, beginning with General Assembly Resolution 181 (II).
- The wall constitutes a unilateral action. It harms the process of implementation of the Road Map. It undermines the effective creation of the Palestinian State. All of this implies a violation of the obligation to pursue negotiations in good faith.

These views I have just stated are also shared by the overwhelming majority of Member States of the United Nations, as reflected by the vote of GA Resolution A/ES-10/13, adopted by 144 votes to 4, with 12 abstentions. However, Israel ignores these and refuses to comply with this resolution. Israel is continuing, in fact is even accelerating, the construction of the Wall.

Mr. President, distinguished members of the Court.

I would like now to address the questions of the competence of the General Assembly to request an advisory opinion and the propriety to do so under these particular circumstances.

II. The competence of the General Assembly to request an advisory opinion and the propriety to do so

In our Written Statement, Malaysia has submitted that there are no compelling reasons which would justify refusal of the request to provide an advisory opinion, to paraphrase the words of your Court in the Application for Review (1987), the Western Sahara (1975) and the Nuclear Weapons (1996) advisory opinions. As a matter of fact, there are ample justifications and compelling reasons for the Court to exercise its advisory jurisdiction.

First, the request to render an urgent advisory opinion comes from the General Assembly, one of the two named principal organs of the United Nations which may request your Court to give an advisory opinion on "any legal question".

Secondly, the question put to you is clearly a legal one, framed as it is "...in terms of law and rai[sing] problems of international law...[and is by its] very nature susceptible of a reply based on law", to quote once again from the Court's advisory opinions in the Western Sahara and Nuclear Weapons advisory opinions.

Thirdly, the General Assembly has a special duty to deal with the Palestinian question. It may suffice here to recall the Assembly's intensive involvement with

Palestine over a long period of time since the United Kingdom unilaterally terminated its Mandate over Palestine and left responsibility for an adequate solution to the United Nations. In the International Status of South-West Africa advisory opinion (1950) the Court acknowledged that the General Assembly fulfils supervisory functions previously exercised by the League of Nations in the case of a Mandated Territory not placed under the UN Trusteeship System. From the early days the Assembly performed a special role with regard to Palestine and the Palestinian people, inter alia by adopting the so-called Plan of Partition in November 1947, providing for an independent Arab State and an independent Jewish State. Ever since, the Palestinian territory has a special status and the General Assembly has a special responsibility.

Fourthly, the General Assembly adopted on 21 October 2003 the above-mentioned resolution A/ES-10/13, co-sponsored by the European Union and its acceding and associated members. The Assembly demanded that Israel stop and reverse the construction of the Wall in the Occupied Palestinian Territory, considering that this construction is in contradiction with relevant provisions of international law and requested the Secretary-General to report on compliance with the resolution. The Security Council's failure to adopt a resolution to the same effect was only because of the exercise of a veto. On 24 November the UN Secretary-General submitted a very disturbing report on the non-compliance of Israel with the EU-initiated Assembly Resolution, describing the poor living conditions and deprivation of human rights of the Palestinian people and the failure to achieve a peaceful solution. Given this situation, it became imperative upon the Assembly to act.

Fifthly, contrary to what Israel seems to suggest, the Tenth Emergency Special Session was convened and reconvened in a lawful way. In Res. A/ES-10/2 of 2 April 1997, by a vote of 134 to 3, with 11 abstentions, the Assembly determined 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 peace and security".

Sixthly, the General Assembly, by requesting an advisory opinion, is certainly not trying to politicize the Court, but on the contrary to seek a legal interpretation from an international law perspective for one of the main obstacles to the settlement of the conflict: the construction of the Wall. Malaysia is quite astonished by the position adopted by some States that clearly hold the view that the construction of the Wall is contrary to international law, and yet at the same time request that the Court does not arrive at such a conclusion because the matter is "highly political". How can it be political when the question put before this Court is about the legal consequences of the construction of the Wall being built by Israel, while these States themselves have taken the view that this construction is contrary to international law? Such an evidently contradictory position may well explain the unfortunate absence of these States at this stage of the procedure.

Similarly, one cannot but be surprised on what is clearly a contradiction in Israel's view that constructing the Wall does not harm the Road Map to Peace, but at the

same time claiming that raising the question of the legal consequences of the Wall before the Court would harm the Road Map!

Here, Malaysia would like to emphasise that the question before the Court does not concern the question of how to resume negotiations between Israel and Palestine, or what is the best way to implement the Road Map. These would clearly be political rather than legal questions. Therefore, Malaysia finds it difficult to understand how the rendering of an advisory opinion, to state what a fact or situation is from an international law standpoint, could impair in any way the implementation of the Road Map.

Mr. President, Members of the Court,

Malaysia cannot but reach the ironic conclusion that the attempt to request the Court to refrain from exercising its discretionary power to render an advisory opinion for other than legal arguments is tantamount to an attempted "politicisation" of the Court.

The Court is presented by the General Assembly with an unambiguously legal question, and nothing more than a legal question. It is not for the Court to scrutinise possible scenarios about the political consequences of an advisory opinion with regard to a particular situation or to consider whether a State, which has disregarded innumerable United Nations resolutions, will be pleased or not with the advisory opinion. This has never been the role of the Court. The Court has never acted in such a manner. Those inviting it to adopt such an attitude are, in Malaysia's view, seriously damaging the Court's function, integrity and credibility.

Lastly, in response to Israel's claim that the General Assembly raised only "half" of the question, Israel's Written Statement, para. 1.7. Malaysia would like to state the following. Mr President, in all cases in which the General Assembly requests an advisory opinion, there is no other way but to raise particular points of what may well be a larger overall question. If the Court would kindly recall for a moment the questions raised by the General Assembly with regard to the Reparation of Damages, the Voting Procedure, the Admissibility of Hearing of Petitioners, Certain Expenses or Western Sahara, just to mention some requests for advisory opinions, it would well be possible to identify a host of related, if not underlying principal questions. Did this ever prevent the Court from rendering an advisory opinion? The answer is plainly "no".

Moreover, the other so-called "half" of the question, that is the struggle against terrorism, was raised by Israel to justify the construction of the Wall. As reiterated in our Written Statement, Malaysia has always and consistently condemned all forms and manner of terrorism. Internationally, its unequivocal position on terrorism is well-known and on record. But Malaysia has also consistently reaffirmed that the struggle against terrorism must be accomplished within the realm of international law and not in violation thereof. As demonstrated in Malaysia's written statement, the construction of the Wall in the Occupied Palestinian Territory cannot be justified

on the ground of self-defence, the only circumstance precluding wrongfulness invoked by Israel. Indeed, no any other circumstance precluding wrongfulness could be rightly raised. The conditions required by the Draft Articles on State Responsibility adopted by the International Law Commission to invoke such circumstances as necessity, distress or counter-measures, are clearly not met here. To mention just one reason, the construction of the Wall constitutes a violation of peremptory norms of international law, such as the right to self-determination of peoples and the respect of the territorial integrity of other countries. Palestine is already such a fragile and small entity and there should be no further encroachment of its territory and its natural resources.

Equally, in terms of the law of armed conflict there is no military necessity for Israel to build a Wall in a territory it already occupies. From a human rights law perspective the Wall cannot justify the non-compliance with core human rights that are of a non-derogatory nature, even during a state of public emergency. Assuming that the Wall is being constructed in order to protect Israeli citizens within Israel, the Wall should be built on Israeli territory. Furthermore, if an additional main concern is to provide security to the Israeli citizens illegally settled on occupied Palestinian territory, then the best way is to withdraw from those illegal settlements. In any event, to accommodate the security concerns of these illegal Israeli settlements can never be to the detriment of the security and living conditions of the Palestinian people within their own territory and lands.

Mr. President, distinguished members of the Court.

While thus already touching on the substance of the request for an advisory opinion as submitted to the Court, let me now take up the central point of that part of Malaysia's Written Statement to the Court.

III. The central point: the international legal status of the Occupied Palestinian Territory

Here Malaysia wishes to concentrate this part of its oral statement on the nature of the territory upon which Israel is constructing the main part of its Wall. This is an essential point which the Court has to address with regard to both the admissibility of the request and the merits of the advisory opinion.

In our written statement Malaysia elaborated the main argument why the Court should comply with the General Assembly's request for an advisory opinion. It is also the main reason why the construction of the Wall is illegal: the Occupied Palestinian Territory is one under international supervision, for which the United Nations in general and the General Assembly in particular have a special responsibility. This responsibility will last until the whole of the former British Mandated territory achieves a final status, that is, by the effective existence of two States—one Arab and the other Jewish—living side by side in peace.

General Assembly and Security Council resolutions have clearly and insistently determined that the West Bank, including East Jerusalem, is Occupied Palestinian Territory. Israel simply cannot validly deny these determinations made by the United Nations in discharge of the Organisation's special responsibilities for a territory under international supervision. Hence, in this case the Court is not facing a bilateral boundary dispute, or even less, an attempt to request the Court to consider a boundary dispute in another guise, as some have liked us to believe. See the intervention of the representative of Singapore at the 23rd meeting of the UNGA Tenth Emergency Special Session of 8 December 2003, in A/ES-10/PV.23, p. 22. In its Written Statement, Israel deliberately misrepresented what Malaysia stated in the General Assembly, in order to prove that the intention of the request for an advisory opinion is to solve a bilateral dispute between Palestine and Israel in favour of the former. No, Mr President, it is not a bilateral dispute, it is the continuous defiance by Israel of the whole international community with regard to a territory for which the United Nations has a special responsibility and on which the entire international community has a particular interest. Yes, Mr. President, we would like to say again and again: "justice must be done in Palestine". This refers primarily to the respect for international law.

Israel has adopted a position with regard to the legal status of the Palestinian territory akin to that followed by South Africa with regard to Namibia during the period of the unlawful occupation of Namibia. Israel assumes (without legal justifications) to have "rights" over the territory. Legally, the Palestinian situation is even more straightforward than those in the Namibia and Western Sahara advisory opinions. Initially, South Africa had a legal title to administer South West Africa as a Mandatory Power, until this Mandate was validly revoked by the General Assembly in 1966. GA Resolution 2145 (XXI) of 27 October 1966. In the case of the Western Sahara, Spain was recognised as the Administering Power of a Non-Self Governing Territory. In the case of the Occupied Palestinian Territory none of this has occurred. Israel simply has no legal title to administer a territory under international supervision. It is merely a belligerent occupier. Israel is in a pure de facto situation.

The Court will have no difficulty in finding as legal consequences of the construction of the Wall that it neither affects Palestinian sovereignty over the territory lying between the Wall and the Green Line nor creates any territorial right whatsoever in favour of Israel. See points (5) and (6) of Malaysia's written submissions. Moreover, Israel itself, in trying to justify the construction of the Wall, has recognised that the "fence", as Israel calls it, does not "annex any Palestinian lands" and "does not establish a border". See Document N° 4 of the List of Documents provided by Malaysia to the Registrar with its Written Statement. Hence, since the territories lying between the Green Line and the Wall are internationally recognised as being Palestinian territory, since they have not been claimed as Israeli territory and since they have come under Israeli control only by virtue of military occupation in 1967, the construction and maintenance of the Wall does not affect Palestinian sovereignty and does not create any territorial right in favour of Israel.

Indeed, Israel has spoken about "Palestinian lands". But a distinction must be made here. They are not only Palestinian lands, but also Palestinian territory. The former refers to private property or ownership, the latter to sovereignty. Malaysia wishes to

add one further legal consequence to those already mentioned at pages 55 and 56 of our written statement:

- the construction and maintenance of the Wall in the Occupied Palestinian Territory does not affect in any way the private or public property of land situated between the Green Line and the line followed by the Wall.

Thus, in Malaysia's view, the findings of the Court will have nothing to do with the establishment of the borders between Israel and Palestine in future. The two States should be able to determine their boundaries in the normal way States decide upon them: by negotiation, and in the case of disagreement, by adjudication.

Israel argues that the request for an advisory opinion is an attempt to consider the Green Line as [quote] "the presumptive and immutable border of a putative Palestinian State" [unquote]. Israel's Written Statement, paras. 2.9 and 3.45. However, Israel is unable to quote any single example of somebody having stated that the Green Line is immutable. Both States are entirely free to determine their boundaries as they think fit. It is not a secret that during negotiations in Camp David and Taba, as well as the recent civil society initiative of the Geneva Agreement, an exchange of territories was envisaged in order to delineate the permanent boundary. This is not under discussion in this procedure. The advisory opinion does not concern the establishment of boundaries. What it will address is the situation as it is at present and the legal consequences of the construction of the Wall in the Occupied Palestinian Territory.

The only agreed existing international line is the demarcation line of 1949. It was adopted pursuant to Security Council Resolution 62 (1948) which called upon the establishment of an armistice in all sectors of Palestine, including [quote] "the delineation of permanent armistice demarcation lines" [unquote]. As elaborated in Malaysia's Written Statement, See Malaysia's Written Statement, p. 37, para. 100. there has been no overriding event, which has altered or modified the position of the 1949 Armistice Line.

Consequently, the Green Line should be the starting point of any legal analysis regarding the construction of the Wall. Not because the Green Line is a boundary line, but because it is the only existent, agreed and internationally recognised separation line. Upon receipt of the advisory opinion given by the Court, there will be no obstacle whatsoever to the parties continuing negotiations and even keeping their present positions further along the trajectory of the Road Map procedures.

In sum, in Malaysia's view the advisory opinion will not result in any change in the international legal status of the territory between the Green Line and the Wall. By basing its analysis on the status of the territory as Occupied Palestinian Territory, the Court will not be making any new pronouncement on the legal situation. The General Assembly and the Security Council, the two main organs of the United Nations competent to deal with this territory under international supervision, have adopted a large number of resolutions to this effect. See Malaysia's Written Statement, para. 86.

Moreover, it is an indisputable fact that Israel did not claim any title to the West Bank before 1967. Even in the aftermath of the Six-Day War, and with the exception of Jerusalem, there was [quote] "no claim to annexation or title" [unquote], as Judge Rosalyn Higgins rightly pointed out in an article written after that war. Rosalyn Higgins, "The June War: The United Nations and Legal Background", in: J.N. Moore (ed.), *The Arab-Israeli Conflict, Readings and Documents. Abridged and Revised Edition* (Princeton, 1977), p. 553.

If Israel wishes to obtain part of the West Bank during negotiations, it can attempt to do so. Nothing precludes one State to propose to another a territorial arrangement. It will be for the parties to agree or not. The Israeli Government should realise that its defiance to the international community by insisting on the "disputed" nature of Palestinian territory could work against its own interests: if the West Bank and Gaza are to be regarded as "disputed" territories, equally the rest of the territory of the former British Mandate of Palestine is to be regarded as "disputed territory". If the Israeli position were to be consistent, why should only the whole West Bank and Gaza Strip be considered as "disputed territory" and not the territory lying between the Green Line and the Partition Plan Line contained in General Assembly Resolution 181, for example? The sole purpose of mentioning this is to show the inherent weakness of Israel's argument in advocating that the Court must not exercise its advisory jurisdiction. In fact, there is no need and no reason for the Court to deal with these issues. The Court's sole function is to ascertain the current situation based on the relevant Security Council and General Assembly resolutions, the relevant international agreements to which Israel is a party and customary international law. All of these lead to the recognition of the Green Line as the only existing line – a line that can be modified, but only by agreement. Israel itself, when showing that the Green Line is not immutable, offers the Court only examples of modifications made by agreement between Israel and Jordan before 1967! Israel's Written Statement, para. 3.48

Indeed, by establishing a de facto unilateral demarcation line by constructing the Wall, Israel is also violating the obligation to respect the Green Line. As explained in Malaysia's written statement, whatever the intention of the construction of the Wall, it clearly purports to establish a new separation line. Israelis have freedom of movement west of the Wall but Palestinians need a permit. One of the justifications advanced in the Israeli written statement is another clear evidence of this. I quote: "the fence will be moved to reflect any agreement between the parties" [end of quotation]. Ibid., 1.8. If this will be the case, then the construction of the wall is nothing else than a unilateral demarcation line imposed upon the other party now, until "any agreement between the parties" will be reached. Moreover, it could be difficult to find any stronger evidence that the Wall is not a simple "temporary measure against terrorism", but a true de facto separation line aimed at annexation of Palestinian territory than that provided by the official website of the Ministry of Foreign Affairs of Israel. It refers to the "Western, or Israeli side of the security fence"! Malaysia's Written Statement, p. 34, para. 92, document 4 of those provided to the Registrar

The insistence of Israel in comparing its "fence" in the West Bank, including in and around Jerusalem, with those existing at the borders with Egypt, Jordan and Lebanon, provides yet other striking evidence that the Israeli government's purpose in constructing the Wall is not simply to prevent terrorism, but to establish a physical line separating two different areas of exercise of territorial control. Israel's Written Statement, para. 1.8. Whilst not insisting here upon the "unilateral disengagement plan" as announced by the Israeli Prime Minister, this plan proves indisputably the intentions of the Government of Israel in constructing the Wall. Malaysia's Written Statement, p. 38, para. 105, document 3 of those provided to the Registrar.

Conclusion

Mr. President and distinguished members of the Court,

It is plain that the situation in one of the territories for which the United Nations bears special functions and responsibilities, is today plunged in darkness. No other organ within or outside the United Nations system is better placed than the Court to bring to this situation the light of the Law, the common language of Nations.

Malaysia feels compelled to add its voice to those that are addressing this Court on this important question given its strong commitment to the question of Palestine and a just and durable peace in the Middle East, consistent with United Nations resolutions and the principles of international law and natural justice, as well as its position as the current Chairman of both the Non-Aligned Movement and the Organisation of Islamic Conference.

Malaysia respectfully requests the Court to render an advisory opinion which identifies the legal consequences of the Israeli construction of a Wall on Occupied Palestinian Territory as elaborated in both Malaysia's written and oral statements.

I thank you for your attention.