

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

**(REQUEST FOR ADVISORY OPINION)**

**Written statement addressed to the International Court of Justice  
by the Swiss Confederation  
pursuant to the Order of the Court of 19 December 2003**

*[Translation]*

1. On 8 December 2003 the United Nations General Assembly adopted resolution A/RES/ES-10/14 (A/ES-10/L.16) by which it decided, in accordance with Article 96 of the Charter of the United Nations and pursuant to Article 65 of the Statute of the Court, to request the International Court of Justice 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?”

2. By an Order of 19 December 2003, the International Court of Justice (“Court”) decided: “that the United Nations and its Member States are 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”.

3. The Court fixed 30 January 2004 as the time-limit for submission of written statements.

4. Switzerland wishes to take advantage of this possibility and submits the following observations to the Court within the time-limit and in due form.

**I. Preliminary observations**

**(a) Brief recapitulation of Switzerland’s position**

5. Switzerland has stated its position on the legality of the barrier<sup>1</sup> on a number of occasions. At the tenth emergency special session, it voted in favour of General Assembly resolution ES-10/13 (A/RES/ES-10/13) concerning the “illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory”; this resolution was adopted by the General Assembly, on 21 October 2003, by 144 votes to 4 with 12 abstentions. In paragraph 1 of the resolution, the General Assembly “[d]emands that Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law”.

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<sup>1</sup>Switzerland is aware of the current discussion about the correct term for the structure in question. For the purposes of this communication, Switzerland will use the term “barrier” for the reasons set forth in the report of the Secretary-General of 24 November 2003 prepared pursuant to General Assembly resolution ES-10/13.

6. Switzerland fully supports this demand. On 2 December 2003 it explained its position in greater detail in a statement to the General Assembly by its Permanent Representative to the United Nations in New York<sup>2</sup>.

7. However, in the vote on resolution A/RES/ES-10/14, which is the source of the request for an advisory opinion, Switzerland decided to abstain, considering it inappropriate in the current circumstances to bring before a judicial authority a question in respect of which highly political implications predominate.

8. The resolution was adopted by the General Assembly, on 8 December 2003, by 90 votes to 8 with 70 abstentions. The matter has therefore been referred to the Court. In Switzerland's view, the present situation is thus different from that prevailing during the political debate in the General Assembly.

9. Switzerland, which attaches very great importance to public international law and judicial settlement procedures, wishes to contribute, in whatever way it can, to the response to questions submitted to the Court. The Swiss position is based, in particular, on respect for international humanitarian and human rights law. The Court has the opportunity for the first time to rule on their applicability in occupied territories. Its conclusions will therefore set a precedent, beyond the context of the present case, for the status of occupation in general. Switzerland is aware that the Court's advisory opinion will constitute only one part, albeit an important one, of a process that has long occupied the attention of both the General Assembly and the Security Council and will continue to do so in the future. Switzerland hopes that the Court's advisory opinion will guide the General Assembly and the Security Council in their action on the matter and will enhance the role of the United Nations in the peace process.

#### **(b) Competence of the Court**

10. Pursuant to Article 65, paragraph 1, of its Statute, 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 request by the General Assembly contained in resolution ES-10/14 was made under Article 96, paragraph 1, of the Charter of the United Nations, pursuant to which the General Assembly may request the International Court of Justice to give an advisory opinion on any legal question.

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<sup>2</sup>On that occasion, after reviewing the obligations and responsibilities of the Palestinian Authority, Switzerland stated:

“Israeli actions in violation of international law, including extrajudicial executions, the building of a separation wall, the demolition of houses and the expansion of settlements, only increase the distress of the Palestinians, who are already facing a disastrous economic situation.”

And further on:

“Israel undoubtedly has an inalienable right to fight terrorism. However, the disproportionate use of armed force only worsens the vicious cycle of violence. As for the construction of the separation wall, this structure gravely jeopardizes the vision of two States living side by side in peace. The wall, which has been constructed beyond the Green Line, encroaches considerably on the territories occupied in 1967 and paves the way for confiscations that are contrary to international humanitarian law, notably to the Fourth Geneva Convention, and to the agreements signed between the Israelis and Palestinians. That obstacle to the peace process must be dismantled. It is contrary to the road map.”

(General Assembly, fifty-eighth session, agenda item 37, *The situation in the Middle East*, statement made on 2 December 2003 by H.E. Mr. Jenö C.A. Staehelin, Permanent Representative of Switzerland to the United Nations.)

11. The question submitted by the General Assembly is formulated in legal terms and raises an issue of international law, that of the “legal” consequences arising from the construction of the wall by Israel. The fact that this question also has political aspects does not deprive it of its legal character<sup>3</sup>. Likewise, the contingency that there may be factual issues underlying the question posed does not alter its character as a “legal question” as envisaged in Article 96 of the Charter<sup>4</sup>.

12. In Switzerland’s opinion, the Court is competent to respond to the request.

**(c) Propriety of the exercise of competence**

13. Article 65, paragraph 1, of the Statute stipulates that: “The Court *may* give an advisory opinion . . .” (emphasis added). It follows that the Court has discretionary power to decide whether or not it wishes to give the advisory opinion requested. It has always been aware of its responsibilities in this regard as the “principal judicial organ of the United Nations” (Charter, Article 92). It has stated the following: “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 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 19; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 86; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155; and *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 189.)<sup>5</sup>

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<sup>3</sup>In the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court confirmed its practice in this regard. In paragraph 13 of the Opinion it states:

“The fact that this 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 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, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 233, para. 13).

<sup>4</sup>In the Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the Court has already held that:

“In the view of the Court, the contingency that there may be factual issues underlying the question posed does not alter its character as a ‘legal question’ as envisaged in Article 96 of the Charter. The reference in this provision to legal questions cannot be interpreted as opposing legal to factual issues. Normally, to enable a court to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues.”

(*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).

<sup>5</sup>*Legality of the Treat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 235, para. 14.

14. According to the established jurisprudence of the Court, only “compelling reasons” might induce it to decline to respond to a request from the General Assembly<sup>6</sup>. There has been no refusal, based on the discretionary power of the Court, to act upon a request for advisory opinion in the history of the present Court<sup>7</sup>.

15. The question arises, therefore, whether any such “compelling reasons” exist in the present case. Three grounds might qualify for consideration in this regard:

- (a) lack of consent (see paras. 16 to 18 below);
- (b) lack of the necessary factual information (see para. 19) and
- (c) political impropriety (see paras. 20 to 24).

16. With regard to the first ground, lack of consent, the Court held, in the Advisory Opinion on *Western Sahara*, that

“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. If such a solution should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction.”<sup>8</sup>

17. But the circumstances facing the Court as a result of the request made in resolution ES-10/14 are not those contemplated in the passage cited above. The request in question cannot be viewed as a circumvention of the principle of consent applicable to requests from States. First, the question of the legal consequences arising from the construction of the barrier in the Palestinian Territory occupied by Israel cannot be reduced to a dispute having an exclusively bilateral dimension; it has a bearing on the issue of the *erga omnes* (or *erga omnes partes*) effects of the right in question. Moreover, Palestine is not recognized as a State by the international community, nor indeed by Israel. It follows that it has no *locus standi* before the Court. Hence there can be no question of circumvention of the requirement of consent.

18. Furthermore, in the Advisory Opinion on the *Western Sahara*, the Court stated the following:

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<sup>6</sup>See *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion, I.C.J. Reports 1956, p. 86; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, I.C.J. Reports 1962, p. 155; *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; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1973, p. 183; *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 21; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, I.C.J. Reports 1989, p. 191, and *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), p. 235, para. 14.

<sup>7</sup>*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), p. 235, para. 14.

<sup>8</sup>*Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 25, para. 33.

“The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court’s opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions . . .”<sup>9</sup>

19. A second ground that might lead the Court to decline to act on a request for an advisory opinion from the General Assembly would be “the actual lack of ‘materials sufficient to enable it to arrive at any judicial conclusion upon the question of fact’”<sup>10</sup>. The response to the question raised by the General Assembly obviously calls for an in-depth examination of the facts. The report of the Secretary-General of 24 November 2003 prepared pursuant to General Assembly resolution ES-10/13 (A/ES-10/248) is clearly useful in this regard. Otherwise, it is for the Court itself to determine whether it has sufficient materials to enable it to respond favourably to the request submitted to it by the General Assembly.

20. A third ground on which the Court might decide not to act on the request would be political impropriety. During the General Assembly debate on resolution ES-14/10, Switzerland itself expressed doubts about the propriety “in the current circumstances” of bringing before the International Court of Justice “a subject in which highly political implications predominate”. Switzerland considers that there is an urgent need to relaunch negotiations. It approves of all efforts to implement the road map, which it firmly supports. At the same time, it welcomes the private initiatives by Israelis and Palestinians — such as the “Geneva Initiative” or the so-called “Nusseibeh-Ayalon” initiative, which are complementary to the road map and offer a way out of the present impasse and ways of resolving issues relating to the final status of Jerusalem, settlements and refugees. In Switzerland’s opinion, the parties must without fail resume the negotiations and Switzerland hopes that all available resources will be appropriated to that end. As stated above, the adoption of resolution ES-10/14 has altered the situation. Switzerland noted that in adopting resolution ES-14/10 the majority of States said they were convinced of the usefulness of an advisory opinion of the Court on the subject.

21. In the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court observed that “[t]he General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.”<sup>11</sup>

22. It went on to say that:

“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.”<sup>12</sup>

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<sup>9</sup>*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 26, para. 39.

<sup>10</sup>*Ibid.*, p. 28, para. 46.

<sup>11</sup>*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 238, para. 16.

<sup>12</sup>*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 238, para. 17.

23. In the Advisory Opinion on the *Western Sahara*, the Court made the following observation:

“In any event, to what extent or degree its opinion will have an impact on the action of the General Assembly is not for the Court to decide. The function of the Court is to give an opinion based on law, once it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect and, consequently, are not devoid of object or purpose.”<sup>13</sup>

24. Switzerland fully endorses these findings. The International Court of Justice will doubtless see to it that the conditions set forth in its jurisprudence are all satisfied in the case concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

25. Switzerland therefore takes the view that there are no compelling reasons for the Court to decline to give an opinion. Consequently, Switzerland states its position below on the merits of the case. However, its observations are confined to the question of the applicability of the Fourth Geneva Convention of 1949 and human rights treaties.

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## II. Legal consequences

### (a) General observations

26. The law of armed conflict strikes a balance between humanitarian demands and military needs. It seeks to limit the consequences of armed conflict, not only for wounded combatants, prisoners or the sick but also for civilian populations in the States involved in such conflicts. Hence every step taken in the context of hostilities, of a military, security or administrative character, must respect the principle of necessity, proportionality and humanity; it must be reasonable in terms of intensity, duration and scale. In the context of an occupation, international humanitarian law ensures consistency between humanitarian aims and the occupier's security needs and reduces the risk of a deterioration in relations between the occupying Power and the occupied. Any examination of necessity and proportionality in circumstances of prolonged occupation when hostilities have ceased must be more rigorous, since stricter conditions govern the imposition of restrictions in such circumstances on the fundamental rights of protected persons.

27. Israel has legitimate security concerns and considerable latitude in selecting and implementing the means required. Nevertheless, its actions on the grounds of self-defence or national security must respect international humanitarian and human rights law. Respect for such norms is essential in order to improve the humanitarian situation of persons living under prolonged occupation and to bring about a just and lasting peace.

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<sup>13</sup>*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 37, para. 73.

**(b) Applicability of the Fourth Geneva Convention of 1949**

28. Israel asserts “that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip”<sup>14</sup>; it also acknowledges the customary nature of the rules contained, notably, in the Hague Convention and its 1907 Regulations relating to occupied territories<sup>15</sup>. But the applicability *de jure* of the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War<sup>16</sup> is contested by Israel. Having ratified the Convention on 6 July 1951, Israel decided to apply *de facto* the “humanitarian parts” of the Convention<sup>17</sup>. The Israeli High Court of Justice thus applies international humanitarian law “as reflected in the Fourth Geneva Convention”<sup>18</sup>.

29. Article 2 of the Fourth Geneva Convention of 1949 stipulates that its provisions are applicable to armed conflict and also in all cases of occupation. Furthermore, there is a very broad international consensus on the applicability of the Fourth Geneva Convention of 1949 to the Occupied Palestinian Territory. The United Nations Secretary-General, in his report of 26 June 1997 to the General Assembly and the Security Council pursuant to General Assembly resolution ES-10/2, reached the following conclusion:

“The Government of the State of Israel has not, as of 20 June 1997, accepted the *de jure* applicability of the Fourth Geneva Convention of 1949 to all territories occupied since 1967. All other High Contracting Parties, as well as the International Committee of the Red Cross, have retained their consensus that the Convention does apply *de jure* to the occupied territories.”<sup>19</sup>

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<sup>14</sup>See Annex I to the report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13, A/ES-10/248, 24 November 2003, p. 8.

<sup>15</sup>See judgment in the *Ajuri v. IDF Commander in West Bank* case of 3 September 2002 before the High Court of Justice in Israel (HCJ 7015/02).

<sup>16</sup>*United Nations Treaty Series*, Vol. 75, pp. 287-417.

<sup>17</sup>See also Shamgar, “The Observance of International Law in the Administered Territories”, *Israel Yearbook of Human Rights*, 1971, p. 262.

<sup>18</sup>See judgment in the *Ajuri v. IDF Commander in West Bank* case of 3 September 2002 before the High Court of Justice in Israel (HCJ 7015/02).

<sup>19</sup>Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/2 of 26 June 1997, para. 21, A/ES-10/6, S/1997/494.

30. The United Nations General Assembly<sup>20</sup> and the Security Council<sup>21</sup> confirm the *de jure* applicability of the Convention to occupied territories and have stated on a number of occasions that it should be applied to the territories occupied by Israel in June 1967, including Jerusalem. They thus confirm Israel's responsibilities in this regard.

31. It should also be noted that, pursuant to the General Assembly's recommendation in resolution ES-10/6 of 9 February 1999, a Conference of High Contracting Parties to the Fourth Geneva Convention was held for the first time on 15 July 1999. The Conference discussed action to be taken to apply the Convention in the Occupied Palestinian Territory, including East Jerusalem, and to ensure respect for its provisions in accordance with common Article 1 of the four Geneva Conventions. On 5 December 2001 a Conference of High Contracting Parties to the Fourth Geneva Convention was held in Geneva and concluded that it was necessary to ensure the application of the Convention in the Occupied Palestinian Territory, including East Jerusalem, and to provide for follow-up to the Conference Declaration<sup>22</sup>.

32. Switzerland therefore takes the view that the Fourth Geneva Convention of 1949 is applicable to the Occupied Palestinian Territory<sup>23</sup>.

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<sup>20</sup>See, for example, the following General Assembly resolutions: A/RES/36/15 of 3 November 1981, A/RES/36/226 of 17 December 1981, A/RES/36/120 of 10 December 1981, A/RES/36/173 of 17 December 1981, A/RES/36/150 of 16 December 1981, A/RES/36/147 of 16 December 1981, A/RES/37/123 of 16 December 1982, A/RES/37/88 of 10 December 1982, A/RES/37/120 of 16 December 1982, A/RES/37/122 of 16 December 1982, A/RES/37/135 of 17 December 1982, A/RES/39/101 of 14 December 1984, A/RES/39/99 of 14 December 1984, A/RES/39/146 of 14 December 1984, A/RES/40/161 of 16 December 1985, A/RES/41/162 of 5 December 1986, A/RES/41/69 of 3 December 1986, A/RES/41/63 of 3 December 1986, A/RES/43/21 of 3 November 1988, A/RES/43/54 of 6 December 1988, A/RES/43/58 of 6 December 1988, A/RES/43/57 of 6 December 1988, A/RES/44/2 of 6 October 1989, A/RES/44/40 of 4 December 1989, A/RES/44/47 of 8 December 1989, A/RES/44/48 of 8 December 1989, A/RES/45/83 of 13 December 1990, A/RES/46/46 of 9 December 1991, A/RES/46/1991 of 20 December 1991, A/RES/46/76 of 11 December 1991, A/RES/46/82 of 16 December 1991, A/RES/47/69 of 14 December 1992, A/RES/47/70 of 14 December 1992, A/RES/47/172 of 22 December 1992, A/RES/47/170 of 22 December 1992, A/RES/47/64 of 11 December 1992, A/RES/47/63 of 11 December 1992, A/RES/48/59 of 14 December 1993, A/RES/48/40 of 10 December 1993, A/RES/48/41 of 10 December 1993, A/RES/48/212 of 21 December 1993, A/RES/49/36 of 9 December 1994, A/RES/49/35 of 9 December 1994, A/RES/50/22 of 4 December 1995, A/RES/50/29 of 6 December 1995, A/RES/50/129 of 20 December 1995, A/RES/50/22 of 4 December 1995, A/RES/51/128 of 13 December 1996, A/RES/51/131 of 13 December 1996, A/RES/51/132 of 13 December 1996, A/RES/51/133 of 13 December 1996, A/RES/51/190 of 16 December 1996, A/RES/51/223 of 13 March 1997, A/RES/ES-10/2 of 25 April 1997, A/RES/ES-10/3 of 15 July 1997, A/RES/52/65 of 20 February 1998, A/RES/52/66 of 20 February 1998, A/RES/53/54 of 10 February 1999, A/RES/54/77 of 22 February 2000, A/RES/54/78 of 22 February 2000, A/RES/54/79 of 22 February 2000, A/RES/54/80 of 22 February 2000, A/RES/55/131 of 28 February 2001, A/RES/56/56 of 14 February 2002, A/RES/56/62 of 14 February 2002, A/RES/56/59 of 14 February 2002, A/RES/56/60 of 14 February 2002, A/RES/56/61 of 14 February 2002, A/RES/56/204 of 21 February 2002, A/RES/ES-10/10 of 14 May 2002, A/RES/ES-10/11 of 10 September 2002, A/RES/57/188 of 6 February 2003, A/RES/57/121 of 24 February 2003, A/RES/57/124 of 24 February 2003, A/RES/57/125 of 24 February 2003, A/RES/57/126 of 24 February 2003, A/RES/57/127 of 24 February 2003, A/RES/57/269 of 5 March 2003, A/RES/58/97 of 17 December 2003, A/RES/58/98 of 17 December 2003, A/RES/58/99 of 17 December 2003.

<sup>21</sup>See, for example, the following Security Council resolutions: S/RES/452 of 20 July 1979, S/RES/465 of 1 March 1980, S/RES/468 of 8 May 1980, S/RES/469 of 20 May 1980, S/RES/471 of 5 June 1980, S/RES/476 of 30 June 1980, S/RES/478 of 20 August 1980, S/RES/484 of 19 December 1980, S/RES/497 of 17 December 1981, S/RES/592 of 8 December 1986, S/RES/605 of 22 December 1987, S/RES/607 of 5 January 1988, S/RES/636 of 6 July 1989, S/RES/641 of 30 August 1989, S/RES/672 of 12 October 1990, S/RES/681 of 20 December 1990, S/RES/694 of 24 May 1991, S/RES/726 of 6 January 1992, S/RES/799 of 18 December 1992 and S/RES/904 of 18 March 1994.

<sup>22</sup>See [www.eda.admin.ch/4ge](http://www.eda.admin.ch/4ge).

<sup>23</sup>Israel also ratified, on 3 October 1957, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict; this Convention is applicable in cases of total or partial occupation of a territory (see Article 5, *United Nations Treaty Series*, Vol. 249, pp. 240-357).

**(c) Applicability of human rights instruments**

33. Switzerland considers that in a situation of armed conflict, the special, complementary and parallel character of protective norms, especially the norms of international humanitarian and human rights law, are particularly important. Moreover, a number of international courts and tribunals have implicitly or explicitly affirmed the applicability of human rights in occupied territories<sup>24</sup>. The International Court of Justice, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*<sup>25</sup> observes in abstract terms that the protection of the International Covenant on 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. In particular, respect for the right to life is not a norm that can be derogated from. The right not arbitrarily to be deprived of one's life thus 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. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided, according to the Court, by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself. Better protection for individuals in an armed conflict calls for the application of international humanitarian law and its complementarity with other legal régimes, particularly that of human rights.

34. The construction of the barrier in the Occupied Palestinian Territory has legal consequences not only in respect of international humanitarian law but also in respect of international human rights law. Israel ratified the International Covenant on Economic, Social and Cultural Rights of 16 December 1966 on 3 October 1991<sup>27</sup>. The Covenant is applicable to all territories and populations over which a State party exercises control. The treaty has no provision for derogation in the event of domestic tension or armed conflict. The Committee on Economic, Social and Cultural Rights, which has responsibility for reviewing reports submitted by States parties under Articles 16 and 17 of the Covenant, considers that it is applicable to occupied territories<sup>28</sup>.

35. Israel also ratified the International Covenant on Civil and Political Rights of 16 December 1966 on 3 October 1991<sup>29</sup>. In its report of 4 December 2002 to the Human Rights Committee, which has responsibility for reviewing reports submitted by States parties under Article 40 of the Covenant, Israel argued that the Covenant was not applicable to areas that were not subject to its territorial sovereignty and jurisdiction, and that the Committee's mandate did not extend to events in the West Bank and the Gaza Strip because "they are part and parcel of the context of armed conflict as distinct from a relationship of human rights"<sup>30</sup>. The Committee, however, adheres to its previous opinion that the applicability of the régime of international humanitarian law at a time of armed conflict does not as such preclude the application of the Covenant, including Article 4, which reserves the possibility of derogation for cases in which a

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<sup>24</sup>See Adam Robert, "Prolonged military occupation" in *American Journal of International Law*, Vol. 84, 1990, p. 44; see Walter Kälin (ed.), *Human Rights in Times of Occupation: The case of Kuwait*, Berne, 1994.

<sup>25</sup>*I.C.J. Reports 1996 (I)*, para. 25.

<sup>26</sup> Israel also ratified, on 3 October 1957, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict; this Convention is applicable in cases of total or partial occupation of a territory (see Article 5, *United Nations Treaty Series*, Vol. 249, pp. 240-357).

<sup>27</sup>See *United Nations Treaty Series*, Vol. 993, p. 3.

<sup>28</sup>See E/C.12/1/Add.27 of 4 December 1998, para. 8.

<sup>29</sup>See *United Nations Treaty Series*, Vol. 999, p. 171.

<sup>30</sup>See CCPR/C/ISR/2001/2 of 4 December 2002.

public emergency threatens the life of the nation<sup>31</sup>. Nor does the applicability of the régime of international humanitarian law preclude accountability of States parties under Article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territory, including in occupied territories. For even though extraterritorial responsibility does not follow clearly from the wording of Article 2, paragraph 1, of the Covenant, the interpretation of the latter, in the light of its object and legislative history, as well as the Committee's established practice<sup>32</sup>, justify the assertion that such is the case. In the case of Kuwait, the General Assembly<sup>33</sup>, unanimously except for Kuwait itself, and the Commission on Human Rights<sup>34</sup> explicitly endorsed the Committee's practice<sup>35</sup>.

36. In the context of the Occupied Palestinian Territory, the Committee notes the duration of Israel's presence in the territories, Israel's ambiguous attitude to their future status, and the *de facto* jurisdiction exercised there by the Israeli security forces<sup>36</sup>. The Committee therefore considers that, 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<sup>37</sup>.

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<sup>31</sup>See HRI/GEN/1/Rev.5/Add.1 of 18 April 2002.

<sup>32</sup>See CCPR/C/79/Add.93 of 18 August 1998; CCPR/CO/78/ISR of 21 August 2003; *López Burgos v. Uruguay* and *Lilian Celiberti v. Uruguay*, both of 29 July 1981, UN Doc. A/36/40, Annexes XIX and XX; Report on the situation of human rights in Kuwait under Iraqi occupation, prepared by Mr. Walter Kälin, Special Rapporteur, E/CN.4/1992/26 of 16 January 1992, para. 57; CCPR/C/79/Add.93 of 18 August 1998; CCPR/CO/78/ISR of 21 August 2003.

<sup>33</sup>A/RES/46/135.

<sup>34</sup>Resolutions 1991/67 and 1992/60.

<sup>35</sup>See Walter Kälin (ed.), *op. cit.*, pp. 84-86.

<sup>36</sup>See CCPR/C/79/Add. 93 of 18 August 1998, para. 10. See also the Report on the situation of human rights in Kuwait under Iraqi occupation, prepared by Mr. Walter Kälin, Special Rapporteur, E/CN.4/1992/26 of 16 January 1992.

<sup>37</sup>See CCPR/CO/78/ISR of 21 August 2003, para. 11.

<sup>38</sup>See CCPR/C/79/Add. 93 of 18 August 1998, para. 10. See also the Report on the situation of human rights in Kuwait under Iraqi occupation, prepared by Mr. Walter Kälin, Special Rapporteur, E/CN.4/1992/26 of 16 January 1992.

37. Switzerland shares the view of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights that the two Covenants are applicable to the Occupied Palestinian Territory<sup>39</sup>.

### III. Conclusions

38. Switzerland requests the Court to rule, in its Advisory Opinion, on the question of the applicability of the Fourth Geneva Convention and of human rights treaties in the particular context of the construction of the barrier in the Occupied Palestinian Territory and to confirm the applicability of the said Convention and of those treaties.

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<sup>39</sup>Israel ratified the International Convention on the Elimination of All Forms of Racial Discrimination of 3 January 1979 on 7 March 1996 (see *United Nations Treaty Series*, Vol. 660, p. 14). In accordance with the principle of effective control, the Convention is applicable to occupied territories. The applicability of a human rights treaty to the whole of the territory subject to the jurisdiction of a State party was also confirmed by the Committee responsible for reviewing reports submitted by States parties to the Convention on the Elimination of All Forms of Discrimination against Women on 18 December 1979 (see A/52/38/Rev.1, Part II, of 12 August 1997, para. 170). Israel ratified that Convention on 3 October 1991 (see *United Nations Treaty Series*, Vol. 1249, p. 13). Israel ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 10 December 1984 (see *United Nations Treaty Series*, Vol. 1465). The applicability of this Convention for persons to occupied territories seems to have been acknowledged (see the third periodic report of Israel of 4 July 2001, CAT/C/54/Add.1, and the concluding observations of the Committee against Torture of 8-22 May 1998, A/53/44, paras. 232-242). As torture and other cruel, inhuman or degrading treatment or punishment are prohibited by international humanitarian law, Article 2, paragraph 2, of the Convention, confirming that prohibition, is applicable not only in time of war but also where there is a threat of war, internal political instability or any other state of emergency. Israel ratified the Convention on the Rights of the Child of 20 November 1989 on 3 October 1991 (see *United Nations Treaty Series*, Vol. 1577, p. 3). The Committee on the Rights of the Child, which is responsible for reviewing the reports submitted by States parties, has reaffirmed the applicability of the Convention to occupied territories (see the concluding observations of the Committee on the Rights of the Child of 9 October 2002, CRC/C/15/Add.195). See also Jakob Kellenberger, President of the International Committee of the Red Cross, *Protection through Complementarity of Law*, 27th Annual Round Table, "International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence", San Remo, Italy, 4-6 August 2003, [www.icrc.org](http://www.icrc.org).