

## SEPARATE OPINION OF JUDGE AL-KHASAWNEH

*Concurs with Advisory Opinion — Agrees in general with reasoning — Separate opinion only aim is to elucidate some salient points — Status of territories as occupied rests on consistent opinio juris — Security Council and General Assembly resolutions — Opinion of High Contracting Parties to Fourth Geneva Convention — Position of ICRC — Position of States — Israeli recognition of applicability of Fourth Geneva Convention — Recent Israeli court decisions — Court however not content to merely reiterate such conclusion — Court independently reached similar conclusions on basis of interpretation of Fourth Geneva Convention — Court saw no reason to embark on ascertainment of prior legal status of occupied territories — Wise decision both as unnecessary and as having no impact on present status — Except in case those territories were terra nullius — Cannot be the case — Concept discredited and inapplicable to today's world — Incompatible with territory as mandatory territory — Principles of non-annexation and welfare of inhabitants continue even after termination of mandate — Until right of self-determination is achieved — Obstacle to that right now is prolonged Israeli occupation — Green Line originally an armistice line — Israeli jurists sought to give it more importance before 1967 war — Regardless of its present situation it represents the point from which Israeli occupation can be measured — Doubts about its status work both ways — Court right to refer to negotiation — Negotiations are means and not end — They should be grounded in law — Requirement of good faith should be reflected in abstaining from faits accomplis that prejudice outcome of negotiations.*

1. I concur with the Court's findings and agree in general with its reasoning. Certain salient points in the Advisory Opinion merit some elucidation and it is specifically with regard to those points that I append this opinion.

### **The international legal status of the territories presently under Israeli occupation**

2. Few propositions in international law can be said to command an almost universal acceptance and to rest on a long, constant and solid *opinio juris* as the proposition that Israel's presence in the Palestinian territory of the West Bank including East Jerusalem and Gaza is one of military occupation governed by the applicable international legal régime of military occupation.

3. In support of this, one may cite the very large number of resolutions adopted by the Security Council and the General Assembly often unanimously or by overwhelming majorities, including binding decisions of the Council and other resolutions which, while not binding, nevertheless produce legal effects and indicate a constant record of the international community's *opinio juris*. In all of these resolutions the territory in question was unfalteringly characterized as occupied territory; Israel's presence in it as that of a military occupant and Israel's compliance or non-compliance with its obligations towards the territory and its inhabitants measured against the objective yardstick of the protective norms of humanitarian law.

4. Similarly the High Contracting Parties to the Fourth Geneva Convention and the International Committee of the Red Cross “have retained their consensus that the convention”, i.e. the Fourth Geneva Convention of 12 August 1949, “does apply *de jure* to the occupied territories”<sup>1</sup>.

5. This has also been the position of States individually or in groups including States friendly to Israel. Indeed a review of the record would reveal that, as noted by France in its Written Statement:

“Israel initially recognized the applicability of the Fourth Convention: according to Article 35 of Order No. 1, issued by the occupying authorities on 7 June 1967, ‘[t]he Military Court . . . must apply the provisions of the Geneva Convention dated 12 August 1949, Relative to the Protection of Civilians in Time of War, with respect to judicial procedures. In case of conflict between this Order and said Convention, the Convention shall prevail . . .’” (P. 5.)

6. More recently Israel’s Supreme Court has confirmed the applicability of the Fourth Geneva Convention to those territories.

7. Whilst “that consistent record of the international community’s *opinio juris* cannot just be swept aside and ignored<sup>2</sup>”, the Court did not simply reiterate that *opinio juris*, instead, while taking cognizance of it, the Court arrived at similar conclusions regarding the *de jure* applicability of the Fourth Geneva Convention mainly on the basis of a textual interpretation of the Convention itself (paras. 86-98). Paragraph 98 reads:

“In conclusion, the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contending Parties. Israel and Jordan were parties to the Fourth Convention when the 1967 armed conflict broke out. The Court accordingly finds that the convention is applicable in the Palestinian territories which before the conflict lay to the east of the 1949 Armistice Demarcation line established between Israel and Jordan (The Green Line) and which were occupied during that conflict by Israel, there being no need for any enquiry into the precise prior status of these territories.”

8. The Court followed a wise course in steering away from embarking on an enquiry into the precise prior status of those territories not only because such an enquiry is unnecessary for the purpose of establishing their present status as occupied territories and affirming the *de jure* applicability of the Fourth Geneva Convention to them, but also because the prior status of the territories would make no difference whatsoever to their present status as occupied territories except in the event that they were *terra nullius* when they were occupied by Israel, which no one would seriously argue given that that discredited concept is of no contemporary application, besides being incompatible with the territories’ status as a former mandatory territory regarding which, as the Court had occasion to pronounce “two principles were considered to be of paramount

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<sup>1</sup>Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/2 of 25 April 1997, para. 21, A/165-10/6-S/1997/494.

<sup>2</sup>Sir Arthur Watts, CR 2003/3, p. 64.

importance: the principle of non-annexation and the principle that the well-being and development of . . . peoples [not yet able to govern themselves] form[ed] ‘a sacred trust of civilization’” (*International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 131).

9. Whatever the merits and demerits of the Jordanian title in the West Bank might have been, and Jordan would in all probability argue that its title there was perfectly valid and internationally recognized and point out that it had severed its legal ties to those territories in favour of Palestinian self-determination, the fact remains that what prevents this right of self-determination from being fulfilled is Israel’s prolonged military occupation with its policy of creating *faits accomplis* on the ground. In this regard it should be recalled that the principle of non-annexation is not extinguished with the end of the mandate but subsists until it is realized.

### **The significance of the Green Line**

10. There is no doubt that the Green Line was initially no more than an armistice line in an agreement that expressly stipulated that its provisions would not be “interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties” and that “the Armistice Demarcation Lines defined in articles V and VI of [the] Agreement [were] agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto” (Advisory Opinion, para. 72).

11. It is not without irony that prominent Israeli jurists were arguing before the 1967 war that the General Armistice agreements were *sui generis*, were in fact more than mere armistice agreements, could not be changed except with the acceptance of the Security Council. Whatever the true significance of that line today, two facts are indisputable:

- (1) The Green line, to quote Sir Arthur Watts, “is the starting line from which is measured the extent of Israel’s occupation of non-Israeli territory” (CR 2004/3, p. 64). There is no implication that the Green Line is to be a permanent frontier.
- (2) Attempts at denigrating the significance of the Green Line would in the nature of things work both ways. Israel cannot shed doubts upon the title of others without expecting its own title and the territorial expanse of that title beyond the partition resolution not to be called into question. Ultimately it is through stabilizing its legal relationship with the Palestinians and not through constructing walls that its security would be assured.

### **The role of negotiations**

12. The Court has included a reference to the tragic situation in the Holy Land . A situation that can be brought to an end “only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The Roadmap approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end.” (Advisory Opinion, para. 162.)

13. Whilst there is nothing wrong in calling on protagonists to negotiate in good faith with the aim of implementing Security Council resolutions and while recalling that negotiations have produced peace agreements that represent defensible schemes and have withstood the test of time, no one should be oblivious that negotiations are a means to an end and cannot in themselves

replace that end. The discharge of international obligations including *erga omnes* obligations cannot be made conditional upon negotiations. Additionally, it is doubtful, with regard to the Roadmap, when consideration is had to the conditions of acceptance of that effort, whether the meeting of minds necessary to produce mutual and reciprocal obligations exists. Be that as it may, it is of the utmost importance if these negotiations are not to produce non-principled solutions, that they be grounded in law and that the requirement of good faith be translated into concrete steps by abstaining from creating *faits accomplis* on the ground such as the building of the wall which cannot but prejudice the outcome of those negotiations.

(Signed) Awn AL-KHASAWNEH.

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