

SEPARATE OPINION OF JUDGE KOROMA

Construction of wall and annexation — Validity of Court's jurisdiction — Functions of Court in advisory proceedings — Findings on basis of applicable law — Erga omnes character of findings — Respect for humanitarian law — Role of General Assembly.

1. While concurring with the Court's findings that the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime are contrary to international law, I nevertheless consider it necessary to stress the following points.

2. First and foremost, the construction of the wall has involved the annexation of parts of the occupied territory by Israel, the occupying Power, contrary to the fundamental international law principle of the non-acquisition of territory by force. The Court has confirmed the Palestinian territories as occupied territory and Israel is therefore not entitled to embark there on activities of a sovereign nature which will change their status as occupied territory. The essence of occupation is that it is only of a temporary nature and should serve the interests of the population and the military needs of the occupying Power. Accordingly, anything which changes its character, such as the construction of the wall, will be illegal.

3. Understandable though it is that there may be a diversity of legal views and perspectives on the question submitted to the Court, namely, the rights and obligations of an occupying Power in an occupied territory and the remedies available under international law for breaches of those obligations — a question which, in my view, is eminently legal and falls within the advisory jurisdiction of the Court — the objection is not sustainable that the Court lacks competence to rule on such a question, as determined under the United Nations Charter (Art. 96 — functional co-operation on legal questions between the Court and the General Assembly), the Statute of the Court (Art. 65 — discretionary power; and Art. 68 — assimilation with contentious procedures), the Rules of Court (Art. 102, para. 2 — assimilation with contentious proceedings), and the settled jurisprudence of the Court. Also not sustainable is the objection based on judicial propriety, which the Court duly considered in terms of its competence and of fairness in the administration of justice. In this regard, the question put to the Court is not about the Israeli-Palestinian conflict as such, nor its resolution, but rather the legal consequences of the construction of the wall in the occupied territory. In other words, is it permissible under existing law for an occupying Power, unilaterally, to bring about changes in the character of an occupied territory? An eminently legal question, which, in my view, is susceptible of a legal response and which does not by necessity have to assume the nature of an adjudication of a bilateral dispute; it is a request for elucidation of the applicable law. It is to that question that the Court has responded. It was therefore appropriate for the Court to exercise its advisory jurisdiction in this matter. The jurisdictional basis of the Court's Advisory Opinion is thus firmly anchored in its jurisprudence.

4. The function of the Court in such proceedings is to ascertain and apply the law to the issue at hand. To reach its findings, the Court has applied the relevant rules of the international law of occupation as it pertains to the Palestinian territories. Applying these rules, the Court has found that the territories were occupied territory and thus not open to annexation; that any such annexation would be tantamount to a violation of international law and contrary to international peace. Under the régime of occupation, the division or partition of an occupied territory by the occupying Power is illegal. Moreover, in terms of contemporary international law, every State is under an obligation to refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

5. The Court has also held that the right of self-determination as an established and recognized right under international law applies to the territory and to the Palestinian people. Accordingly, the exercise of such right entitles the Palestinian people to a State of their own as originally envisaged in resolution 181 (II) and subsequently confirmed. The Court has found that the construction of the wall in the Palestinian territory will prevent the realization of such a right and is therefore a violation of it.

6. With respect to humanitarian and human rights law, the Court has rightly adjudged that both these régimes are applicable to the occupied territories; that Israel as the occupying Power is under an obligation to respect the rights of the Palestinian population of the occupied territories. Accordingly, the Court has held that the construction of the wall in the occupied territories violates the régime of humanitarian and human rights law. To put an end to such violations, the Court has rightly called for the immediate cessation of the construction of the wall and the payment of reparation for damages caused by the construction.

7. Equally important is the finding that the international community as a whole bears an obligation towards the Palestinian people as a former mandated territory, on whose behalf the international community holds a “sacred trust”, not to recognize any unilateral change in the status of the territory brought about by the construction of the wall.

8. The Court’s findings are based on the authoritative rules of international law and are of an *erga omnes* character. The Court’s response provides an authoritative answer to the question submitted to it. Given the fact that all States are bound by those rules and have an interest in their observance, all States are subject to these findings.

9. Just as important is the call upon the parties to the conflict to respect humanitarian law in the ongoing hostilities. While it is understandable that a prolonged occupation would engender resistance, it is nonetheless incumbent on all parties to the conflict to respect international humanitarian law at all times.

10. In making these findings, the Court has performed its role as the supreme arbiter of international legality and safeguard against illegal acts. It is now up to the General Assembly in discharging its responsibilities under the Charter to treat this Advisory Opinion with the respect and seriousness it deserves, not with a view to making recriminations but to utilizing these findings in such a way as to bring about a just and peaceful solution to the Israeli-Palestinian conflict, a conflict which has not only lasted for far too long but has caused enormous suffering to those directly involved and poisoned international relations in general.

(Signed) Abdul G. KOROMA.
