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Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004)

JOHN DUGARD

I. INTRODUCTION

THE DECISION OF the International Court of Justice (ICJ) in its 2004 Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*¹ ('the Wall') is the only authoritative judicial statement on many of the controversial questions of law that characterise the conflict between Israel and Palestine over the former mandate territory of Palestine. While the Opinion focuses on the legality of the wall, barrier, or fence that Israel is building on Palestinian territory, it also pronounces on a wide range of questions of international humanitarian law and human rights law that give it a general importance. Its unanimous findings on the illegality of settlements and the application of the Fourth Geneva Convention and multilateral human rights conventions in the Occupied Palestinian Territory (OPT) are particularly significant. Although the Opinion of the Court was unanimous on many of the key issues it has failed to win the same measure of support from the international community of states as the Advisory Opinion of the ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*,² which also dealt with legal questions arising from a disputed mandate territory of the League of Nations. Hopes that, like the latter Opinion, the *Wall* would guide the political organs of the United Nations in their search for a just and peaceful resolution of the Israel–Palestine conflict have not been realised. Nevertheless, it constitutes a significant statement of the law and provides a normative framework for the settlement of the conflict between Israel and Palestine. Moreover, it has inspired civil society to take concerted action to enforce international law. It is a landmark decision and one that may yet chart the course of events in the Middle East.

¹ [2004] ICJ Rep 136.

² [1971] ICJ Rep 16. See further J Crawford and P Mertenskötter, this volume, ch 11.

II. HISTORICAL BACKGROUND

The conflict between Israel and Palestine in the former mandate territory of Palestine is characterised by legal disputation. The United Kingdom had been entrusted with the mandate over Palestine by the League of Nations. After it made it clear that it was unable to determine the future of the territory, the General Assembly of the United Nations, as successor to the League of Nations, recommended in Resolution 181(II) that Palestine be partitioned into a Jewish state and an Arab state, with Jerusalem as an international city under UN administration. Whether the General Assembly enjoyed the legal competence to make such a recommendation was disputed then and is still disputed.³ A proposal that the question be referred to the ICJ for an advisory opinion was narrowly defeated.⁴ Subsequent political developments involving disputed questions of law have not been referred to the ICJ. These include the unilateral declaration of the State of Israel in 1948; the Armistice Agreements of 1949 that brought the hostilities between Arab states and Israel to an end after this declaration of independence; General Assembly Resolution 194(III) of 1948 on the subject of Palestinian refugees; the question whether Israel acted defensively or aggressively in the Six-Day War of 1967; the exact meaning of Security Council Resolution 242 calling for the withdrawal of Israel from the territories it had occupied; the annexation of East Jerusalem in 1980 condemned as invalid by the Security Council;⁵ the legality of settlements in the OPT; and the Oslo Accords of 1993. In 2002, Israel commenced building a wall mainly in Palestinian territory, ostensibly to protect Israelis from suicide bombers entering the territory in the course of the Second Intifada. It was only subsequently, in 2003, that the General Assembly, frustrated by Israel's apparent disregard for international law, decided to request an advisory opinion on a disputed question of law.⁶ In order to understand the historical and legal context in which the decision to build the wall was taken it is necessary briefly to outline the history of Israeli–Palestinian relations.⁷

From 1949 to 1967 the mandate territory of Palestine was divided between Israel, Jordan and Egypt. Jordan was the occupying power of East Jerusalem and the West Bank, while Egypt occupied Gaza. In 1967, following the Six-Day War, Israel occupied the Palestinian territories of East Jerusalem, West Bank and Gaza. Although it purported to annex East Jerusalem in 1980 it made no attempt to annex the

³ N Araby, 'Some Legal Implications of the 1947 Partition Resolution' (1968) 33 *Law and Contemporary Problems* 97.

⁴ For a full account of the attempt to secure an advisory opinion, see V Kattan, *From Coexistence to Conquest. International Law and the Origins of the Arab–Israeli Conflict, 1891–1949* (London, Pluto Press, 2009) 148–51. See further the separate opinion of Judge Elaraby in *Wall* (n 1) 246–48, [1].

⁵ UNSC Res 478 (1980) UN Doc S/RES/478.

⁶ UNGA Res A/RES/ES-10/14 of 8 December 2003.

⁷ For a historical account of the dispute from a legal perspective, see S Akram and M Lynk, 'The Arab–Israeli Conflict' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, vol I (Oxford, OUP, 2011) 499. For more general histories, see M Tessler, *A History of the Israeli–Palestine Conflict*, 2nd edn (Bloomington, Indiana University Press, 2009); I Pappé, *A History of Modern Palestine. One Land Two People*, 2nd edn (Cambridge, CUP, 2006); A La Guardia, *Holy Land, Unholy War / Israelis and Palestinians*, 3rd edn (London, Penguin Books, 2007); S Ben-Ami, *Scars of War, Wounds of Peace. The Israeli–Arab Tragedy* (London, Weidenfeld & Nicolson, 2005).

West Bank and Gaza, which it administered as occupying power. Despite the prohibition of the transfer of parts of its own civilian population into the occupied territories contained in Article 49(6) of the Fourth Geneva Convention of 1949, to which it is a party, Israel proceeded to establish Jewish settlements in the OPT.

Israel's repressive occupation and its expansion of settlements resulted in the First Intifada of 1987–88. This spontaneous uprising, mainly on the part of young Palestinians, took the form of civil disobedience, demonstrations, and stone-throwing. The Israeli Defense Forces (IDF) responded with force. Some 1200 Palestinians and 200 Israelis were killed. This uprising prompted a revival of the peace process and the United States and the Soviet Union co-sponsored peace talks in Madrid and Washington. These negotiations failed, but in 1993 the Palestine Liberation Organization (PLO) and Israel met secretly in Oslo to reach agreement on the Oslo Accords, in which the PLO recognised Israel and Israel agreed to the establishment of Palestinian self-government over the West Bank and Gaza. This interim arrangement would continue for five years and lead to a final status agreement.⁸

Both Israel and Palestine were dissatisfied with the Oslo regime. Israel complained repeatedly that the Palestinian Authority under Yasser Arafat failed to prevent acts of violence committed by Islamic Jihad and Hamas (which had been formed during the First Intifada). The Palestinians were aggrieved to find that the construction of settlements continued unabated and found the checkpoints that regulated their movements humiliating and harmful to the economy. Moreover, agreements reached with Israel under Oslo in respect of a permanent settlement, the economy, the transfer of territory, and prisoner release were not honoured.

In the final months of the Clinton administration in 2000 serious attempts were made to implement a final status agreement. President Clinton called a meeting at Camp David in July 2000 in which he, Chairman Arafat, and Prime Minister Barak participated. But the talks broke down, mainly on the issue of sovereignty over Haram al-Sharif, which accommodates the al-Aqsa Mosque, Islam's third most sacred site, and the Dome of the Rock. This site is also of special significance to Jews as it is claimed to be the place on which the Jewish Second Temple stood. For Jews it is known as the Temple Mount. Neither side was prepared to compromise on this issue.

Negotiations between the Israelis, Palestinians and Americans continued at Taba in January 2001 after the failure of Camp David as all parties were aware of President Clinton's determination to secure a peaceful settlement in the last months of his presidency.⁹ Parties came close to reaching an agreement but time ran out. President Clinton's term of office had come to an end and Israel faced an election in early February. On 6 February 2001 the Likud Party under Ariel Sharon defeated the Labour Party under Ehud Barak. Sharon announced that high-level talks between

⁸ For an account of the adoption of the Oslo Accords, see M Abbas, *Through Secret Channels* (Reading, Garnet Publishing, 1995).

⁹ See G Sher, *The Israeli–Palestinian Peace Negotiations, 1999–2001. Within Reach* (Abingdon, Routledge, 2004). See further on this period, AD Miller, *The Much Too Promised Land. America's Elusive Search for Arab–Israeli Peace* (New York, Bantam Books, 2009).

the Israelis and Palestinians would be discontinued. In the meantime the Second Intifada had started.

On 28 September 2000 Ariel Sharon, leader of the Likud Party, accompanied by a large party of Likud supporters, visited the Haram al-Sharif/Temple Mount. The ostensible purpose of the visit was to assert the right of Israelis to visit the Temple Mount, but it was generally believed that the main purpose was to show that under a Likud government the Temple Mount would remain under Israeli sovereignty. Reluctantly the Barak Government gave permission to Sharon's visit to dispel any suggestion that it was prepared to compromise Israeli sovereignty over the Temple Mount. Fearing that the visit would raise tensions among the Palestinians, Arafat and other Palestinian leaders called on Sharon not to go.

As predicted, the visit was followed by protests and demonstrations in the Old City of Jerusalem, in which seven Palestinians were killed and some 300 wounded. Spontaneous demonstrations erupted all over the West Bank and Gaza prompted by disillusionment over the Oslo Accords, the brutality and humiliation of the occupation, poverty and the miserable conditions in the refugee camps. Protests and demonstrations were soon accompanied by stone-throwing and lethal force. The response of Israeli Defense Forces (IDF) was to use tear gas, rubber bullets and live fire in a display of excessive force.

Whereas the First Intifada remained a popular uprising characterised by demonstrations, stone-throwing and acts of civil disobedience, the Second Intifada became a low-level civil war. Both sides employed armed force of different kinds resulting in thousands of deaths and injuries.¹⁰ On the Palestinian side, suicide bombings resulting in the deaths of many innocent Israelis, stone-throwing, armed force and rocket fire from Gaza joined protests and peaceful demonstrations as features of the uprising. Over 1,000 Israelis were killed. The IDF, supported by settlers, responded aggressively. Ground forces confronted mass protests and demonstrations with live fire supported by F16 fighter aircraft and Apache gunship helicopters. Helicopters were used for targeted assassinations of militants with little regard for 'collateral damage' to civilians near to the selected militant. The Israeli human rights non-governmental organisation B'Tselem estimated that from 2000 to April 2008, when the Second Intifada came to an end, some 4,475 Palestinians were killed, of whom most were civilians. Thousands of Palestinians were arrested, detained and tortured. Over 4,000 houses were demolished, agricultural land was stripped of trees and crops, free movement was seriously restricted by checkpoints and curfews, the coast of Gaza was blockaded, and hospitals and schools were attacked.

Suicide bombers that struck in the cities of Israel, killing and wounding hundreds of Israelis, had a devastating impact on Israeli society.¹¹ Ostensibly in response to these bombings, Israel commenced construction of the wall.

¹⁰ For an account of the Second Intifada, see A Bregman, *Cursed Victory. A History of Israel and the Occupied Territories* (London, Penguin Books, 2014) Ch 12–14.

¹¹ For an account of these suicide attacks, see Written Statement of the Government of Israel to ICJ in the *Wall* (30 January 2004) 40–55. Some of the worst suicide bombings are described by Bregman, *Cursed Victory* (n 10) 270, 275, 286.

III. THE CONSTRUCTION OF THE WALL

In 2002 Israel began construction of a wall or barrier to separate the West Bank from Israel.¹² When finished it will run for about 700 kilometres. In places, particularly in urban areas, the wall takes the form of an eight-metre-high concrete wall. However, most of the structure is a barrier some 60–100 metres wide comprising three fences, of which the outer two are protected by coils of barbed wire while the inner fence has electronic equipment which allows intruders to be detected. There are patrol roads on either side of the outer fence and a trace road, which is a strip of sand that allows footprints to be detected. Sometimes the barrier includes trenches. There are fortified guard towers at regular intervals. Israel describes the structure as a ‘fence’ while the UN Secretary-General preferred to use the term ‘barrier’. Within Palestine it is known as the wall, or more frequently the ‘Apartheid wall’. In its Advisory Opinion on the *Wall* the ICJ preferred to describe it as a ‘wall’ to conform with the terminology employed by the General Assembly.¹³ I shall follow this terminology.

The declared object of the wall was to prevent suicide bombers from entering Israel, but the fact that the wall did not follow the Green Line—the Armistice Line of 1949—and instead entered the West Bank and encircled Israeli settlements, made it clear that the wall was intended to serve another purpose as well, namely the incorporation of settlements into Israel itself. It was, arguably, a pretext for annexation of Palestinian territory under the guise of security.

When the construction of the wall began I was serving as Special Rapporteur on the Human Rights Situation in the Occupied Palestinian Territories to the United Nations Commission on Human Rights (replaced in 2006 by the Human Rights Council). In this capacity I was required to visit the OPT twice a year and to report to the Commission itself and to the Third Committee of the General Assembly. I followed the construction of the wall from the very beginning.

In 2002 I was taken to see paint marks or rocks on hills near Qalqiliya and Tulkarm which had been made by Israel to indicate the course of the wall. In June 2003,¹⁴ some 150 kilometres had been completed. At that stage it intruded six to seven kilometres into Palestine, but today it extends over 20 kilometres into Palestinian territory. Most of the wall is built in Palestinian territory, on the Palestinian side of the Green Line, the internationally recognised border between Israel and Palestine. It seizes over 10 per cent of Palestinian land, including some of its most fertile agricultural land and water resources. The wall incorporates most of Israel’s settlements in the West Bank, with over 80 per cent of the settler population. It includes 42 Palestinian villages with a population of some 56,000 into the ‘seam zone’ or ‘closed area’, that is, the area between the wall and the Green Line. In some places it completely encircles Palestinian villages, separating them from the West Bank and

¹² For an account of the wall, its route, and impact, see *Wall* (n 1) 168–71, [79]–[85]. See too R Dolphin, *The West Bank Wall. Unmaking Palestine* (London, Pluto Press, 2006).

¹³ *Wall* (n 1) 164, [67].

¹⁴ See my report to the Commission on Human Rights, E/CN.4/2004/6 of 8 September 2003.

converting them into isolated enclaves. Qalqiliya, a city with a population of over 40,000, is completely surrounded by the concrete wall and residents are allowed to leave only through checkpoints.

Those living on the West Bank side of the wall require permits to access their own agricultural land on the other side of the wall in the 'seam zone'. Permits for farmers are not readily granted; the process of application is humiliating; gates are few and often do not open as scheduled; and those passing through the gates are subject to harassment and abuse.

Jerusalem has been radically affected by the wall. Many villages or suburbs previously within the Governate of Jerusalem are placed on the West Bank side of the wall, which means that Palestinians living in these villages can only access their schools, hospitals, universities and holy places through checkpoints. In some places the wall runs through Palestinian communities, separating neighbours and families. It is difficult to understand what security purpose could possibly be served by building a wall through a Palestinian community.

In 2003 I sought to draw public attention to the wall. In August, I wrote an op-ed for the *International Herald Tribune*¹⁵ which stated that the wall was 'manifestly intended to create facts on the ground' and that it constituted an act of annexation. 'Annexation of this kind', I said, 'goes by another name in international law—conquest'. My written report to the United Nations of September 2003 was equally strong and declared 'that what we are presently witnessing in the West Bank is a visible and clear act of territorial annexation under the guise of security',¹⁶ an accusation that was repeated in my oral report to the Third Committee in October. The Third Committee referred the matter to the General Assembly.

IV. REQUEST FOR AN OPINION AND PROCEEDINGS BEFORE THE COURT

Meeting in its Tenth Emergency Special Session, the General Assembly adopted a resolution demanding that Israel 'stop and reverse construction of the wall in the Occupied Palestinian Territory' on the ground that it constituted a departure from the Armistice Line of 1949 and was a violation of international law.¹⁷ The resolution requested the Secretary-General to report on compliance with the resolution and on 24 November the Secretary-General reported that Israel had failed to comply. While I was in New York to present my report to the Third Committee I suggested to delegates that it might be appropriate for the General Assembly to request an advisory opinion from the ICJ on the legality of the wall if Israel failed to comply with the resolution of the General Assembly. I was later approached by Nasser Al Kidwa,

¹⁵ 2–3 August 2003.

¹⁶ E/CN.4/2004/6 of 8 September 2003, para 6.

¹⁷ Res A/Res/ES-10/13 of 21 October 2003.

the Palestinian ambassador to the United Nations about the form the question to the Court might take. I advised him to formulate any such request to the ICJ along the lines of the question posed to the Court in the 1971 *Namibia* Opinion; that is, to stress the legal consequences flowing from the construction of the wall. On 8 December 2003 the General Assembly adopted a resolution which welcomed my report of 8 September 2003¹⁸ and asked the Court to pronounce 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.¹⁹

Forty-nine states and regional organisations made written representations to Court and 15 addressed the Court in the oral hearings. The United States submitted a written representation questioning the propriety of giving an opinion but with no comment on the merits. EU member states provided written submissions but did not participate in the hearings. Palestine was given permission by the Court to make a written statement and to address the Court in the oral hearings. Israel chose to ignore the proceedings after submitting a written statement in which it contested the jurisdiction of the Court and the propriety of giving an opinion. Although Israel chose not to appoint an ad hoc judge, Judge Owada expressed the view that it would have been entitled to do so, in which case considerations of fairness might have required Palestine to also make such an appointment.²⁰ Strangely, although the UN Secretary-General submitted a written statement to the Court, the Legal Counsel of the United Nations did not make oral representations to the Court, despite the fact that this had been done in the *Namibia* Opinion of 1971. This suggested that the UN Secretariat were unhappy about the decision of the General Assembly to ask for an Opinion. This was later confirmed by senior members of the Secretariat in private conversations.

On 30 June 2004, nine days before the ICJ handed down its Opinion, the Israeli Supreme Court, sitting as the High Court of Justice, gave its judgment on a number of petitions challenging the construction and routing of the wall.²¹ This court held that while in many instances the IDF had routed the wall to cause disproportionate harm to the Palestinian population, some deviation from the Green Line was permissible. In so deciding the Court accepted that the military had acted rationally in order to attain the military objective of the wall.²²

¹⁸ E/CN.4/2004/6 of 8 September 2003.

¹⁹ UNGA Res A/RES/ES-10/14. The United States, the Russian Federation and the European Union abstained from voting on this resolution.

²⁰ *Wall* (n 1) separate opinion [19].

²¹ *Beit Sourik Village Council v Government of Israel* (2004) 43 ILM 1099.

²² *ibid*, 1120, [57].

V. THE COURT'S OPINION

A. Jurisdiction

The Court had little difficulty in deciding that it had jurisdiction to give an opinion.²³ In a unanimous decision it found that the General Assembly was competent to request an advisory opinion despite the fact that the question of Israel–Palestine was before the Security Council as an attempt to persuade the Council to condemn the construction of the wall had been vetoed in October 2003 by a permanent member, the United States.²⁴ This meant that in terms of General Assembly resolution 377 A(V), the Uniting for Peace Resolution, the General Assembly was competent to take such action.²⁵ The suggestion that the matter involved a political dispute and not a legal question was also rejected.²⁶

B. Propriety

Next the Court turned to a number of arguments that had been raised that it would be improper for it to give an opinion as this would be inconsistent with the Court's judicial function. First, the Court dismissed the argument that it was precluded from rendering an opinion because Israel had refused to consent to adjudication, holding that the request did not concern a bilateral matter between Israel and Palestine only but one of broader concern to the international community.²⁷ Second, it held that the Security Council's decision in Resolution 1515 (2003) of 19 November 2003 to empower a Quartet, comprising the United Nations, the European Union, the Russian Federation and the United States, to engage in peace-making in the region by means of a Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict was not an obstacle to the rendering of an opinion.²⁸ Third, the Court rejected Israel's argument that the Court did not have sufficient information before it, especially in respect of Israel's security needs, to make a decision. Here the Court held that it had been provided with adequate information by the Secretary-General, UN special rapporteurs, and parties appearing before the Court.²⁹ Finally, it dismissed the arguments that an opinion would serve no purpose³⁰ and that Palestine had not come to Court with 'clean hands' as a result of its violent acts in the course of the Second Intifada.³¹ By 14 votes to one (Judge Buergenthal of the United States

²³ For criticism of the Court's decision on jurisdiction, see J Alvarez, 'Interpretation and Change, the Limits of Change by Way of Agreements and Practice' in G Nolte (ed), *Treaties and Subsequent Practice* (Oxford, Oxford University Press, 2013) 127.

²⁴ *Wall* (n 1) 146, [20].

²⁵ *ibid.*, 151, [31].

²⁶ *ibid.*, 155, [41].

²⁷ *ibid.*, 157–69, [46]–[50].

²⁸ *ibid.*, 159–60, [51]–[54].

²⁹ *ibid.*, 160–62, [55]–[58].

³⁰ *ibid.*, 162–63, [59]–[62].

³¹ *ibid.*, 163–64, [63]–[64].

dissenting) the Court found that ‘there was no compelling reason’ for it to use its discretionary power not to give an opinion.³²

C. Merits

The ICJ has often used advisory opinions to consider and clarify legal issues that go beyond a narrow answer to the question asked. In so doing, it has contributed substantially to the development of the law. The advisory opinions on the *International Status of South West Africa* of 1950³³ and *Namibia* of 1971³⁴ are examples of such a broad approach to the advisory function. On the other hand, an opinion like *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*³⁵ confines itself to a strict and limited answer to the question posed. Although Judge Higgins accuses the Court of not having ‘followed the tradition of using advisory opinions as an opportunity to elaborate and develop international law’,³⁶ the *Wall* Opinion does do more than merely answer the question before it. In examining the legal norms that render the construction of the wall illegal, the Court elaborates on a number of issues that arise in the course of its reasoning. Some of these issues are dealt with thoroughly, others abruptly.³⁷ In the result the Opinion falls midway between the approaches adopted in *Namibia* and *Kosovo*.

The Court’s Opinion is divided into two parts: a consideration of the illegality of the wall and the consequences of such illegality.³⁸

The first part commences with an examination of the status of the Occupied Palestinian Territories which traverses the history of the OPT from the adoption of the Mandate for Palestine in 1920 to the Oslo Accords of 1993 and the Peace Treaty with Jordan of 1994.³⁹ This brief history falls short of the contextual history of the dispute pleaded for by Judge Higgins.⁴⁰ The Court then examines the construction, route and impact of the wall. In so doing it considers both the present structure of the wall and Israel’s plans for the future course of the wall.⁴¹

After this introduction the Court turns to the applicable law. Here it considers norms contained in UN Charter, the General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States⁴²

³² *ibid*, 164, [65].

³³ [1950] ICJ Rep 128.

³⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970) [1971] ICJ Rep 16.

³⁵ [2010] ICJ Rep 403.

³⁶ *Wall* (n 1) 212–13, [23].

³⁷ See I Scobbie, ‘Words My Mother Never Taught Me—In Defense of the International Court’ (2005) 99 *AJIL* 76, 80; D Kretzmer, ‘The Advisory Opinion: The Light Treatment of International Humanitarian Law’ (2005) 99 *AJIL* 88; A Imseis, ‘Critical Reflections on the International Humanitarian Law Aspects of the ICJ *Wall* Advisory Opinion’ (2005) 99 *AJIL* 102, 103.

³⁸ *Wall* (n 1) 164, [68].

³⁹ *ibid* 165–68, [70]–[79].

⁴⁰ *ibid* 210–12, [14]–[18]. This view is shared by Judge Kooijmans, 221, [7].

⁴¹ *ibid* 168–71, [79]–[85].

⁴² UNGA Res 2625 (XXV).

of 1970, international humanitarian law contained in the Hague Regulations of 1907 and Fourth Geneva Convention of 1949, and human rights law set out in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child.⁴³

The Court next considers whether the construction of the wall violates these principles.⁴⁴ Here it finds that the incorporation of Palestinian land and people into the 'seam zone' and the inclusion of Jewish illegal settlements in this area severely impede the exercise of the right of the Palestinian people to self-determination and therefore constitutes a breach of Israel's obligation to respect this right.⁴⁵ The Court notes Israel's assurance that the wall is only a temporary measure and does not amount to annexation but declares that it 'cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudice the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access'.⁴⁶ However, although it finds that the wall and its associated regime may create a *fait accompli* that could become permanent, and tantamount to annexation, it fails actually to find that the wall constitutes an act of annexation.⁴⁷ That the Court was reluctant to go so far as to find that the construction of the wall was an act of annexation appears from the separate opinion of Judge Elaraby in which he declares that the Court should have been more explicit on this subject which should have been reflected in a finding on the prohibition of annexation in the *dispositif*.⁴⁸ The Court's ambivalent statement suggests that at this stage, so shortly after the start of the construction of the wall, it was prepared to give Israel the benefit of doubt about its intentions.⁴⁹

An examination of international humanitarian law leads the Court to conclude that the wall violates Articles 46 and 52 of the Hague Regulations of 1907 and Article 53 of the Fourth Geneva Convention requiring private property to be respected. Relying on UN reports, including my Special Rapporteur's report of 8 September 2003,⁵⁰ the Court finds that the wall results in the seizure of agricultural land and water resources, restrictions on freedom of movement and the right to work and denial of access to schools and health services in violation of the international human rights covenants. These measures violate the right to an adequate standard of living and result in internal displacement of the Palestinian people in violation of Article 49 of the Geneva Convention.⁵¹ Such measures cannot be justified

⁴³ *Wall* (n 1) 171–81, [86]–[113].

⁴⁴ *ibid* 181–95, [114]–[142].

⁴⁵ *ibid* 183–84, [120], [122].

⁴⁶ *ibid* 184, [121].

⁴⁷ *ibid*. Judge Koroma in his separate opinion had no hesitation in describing the construction of the wall as an act of annexation: 204, [2].

⁴⁸ *ibid* 253, [2.5].

⁴⁹ See on the ambiguities in the Court's finding on annexation, Kretzmer, 'The Advisory Opinion' (n 37) 94, 96.

⁵⁰ E/CN.4/2004/6.

⁵¹ *Wall* (n 1) 189–92, [133]–[134].

by military necessity or emergency measures.⁵² Nor can Israel rely on self-defence under Article 51 of the UN Charter or on a state of necessity to preclude the wrongfulness of the construction of the wall.

The Court concludes by stating that it is not convinced that the 'specific course Israel has chosen for the wall was necessary to attain its security objectives'.⁵³ It finds that the wall seriously infringes a number of human rights of Palestinians living in the OPT and constitutes a breach by Israel of various of its obligations under international humanitarian law and human rights law.⁵⁴ On this basis it rules that Israel is obliged to comply with its obligation to respect the right to self-determination of the Palestinian people and its obligations under international humanitarian law and human rights law; to cease forthwith construction of the wall; and to make reparation for all damage caused by the construction of the wall in the OPT.⁵⁵ This decision was reached by 14 votes to one with Judge Buergenthal again dissenting.

Judge Buergenthal's dissent is based largely on the absence of sufficient evidence of Israel's security concerns. He acknowledges that Israel was itself mainly to blame for this by its refusal to cooperate with the Court in the provision of evidence but reasons that in advisory proceedings, unlike contentious proceedings, there is an obligation on the Court to satisfy itself that it has sufficient evidence on which to base an opinion.⁵⁶ Unfortunately Judge Buergenthal fails to address the generous finding of the Court that the construction of the wall did not constitute an act of annexation which was largely based on respect for Israel's statements, unaccompanied by evidence, that the wall was a temporary measure to combat terrorist attacks.⁵⁷

The Court finds that Israel is obliged to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law.⁵⁸ The Court also holds that Israel is obliged to cease forthwith the construction of the wall and to dismantle all sections of the wall in Palestinian territory;⁵⁹ to make reparation to all property owners whose properties have suffered and to compensate all natural and legal persons for any form of material damage incurred as a result of construction of the wall.⁶⁰

The Court finds that Israel has violated *erga omnes* obligations requiring it to respect the right of the Palestinian people to self-determination and certain obligations under international humanitarian law. This leads it to hold that:

All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation

⁵² *ibid* 192–93, [135]–[136].

⁵³ *ibid* 193, [137].

⁵⁴ *ibid*.

⁵⁵ *ibid*, 197–98, [149]–[153]; 201–02, [163(3)] A–C.

⁵⁶ Declaration by Judge Buergenthal, especially 240–41, 243, 245, [1], [3.7], [10]). In his separate opinion Judge Owada suggests that the Court should have made an in-depth investigation *proprio motu* into the facts surrounding the wall: 270–71, [30].

⁵⁷ *Wall* (n 1) 182, [116]; 184–85, [121].

⁵⁸ *ibid*, 197, [149].

⁵⁹ *ibid*, 197–98, [151].

⁶⁰ *ibid*, 198, [152]–[153].

created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.⁶¹

This decision was taken by 13 votes to two, with Judges Buergenthal and Kooijmans dissenting. Judge Kooijmans's principal complaints were that in this case the General Assembly had requested an opinion on the legal consequences of an act of a state and not, unlike the 1971 *Namibia* Opinion, an opinion on the legal consequences for States of the conduct of a state;⁶² and that the finding of a duty not to recognise an illegal situation failed to specify what states were expected to do or not to do.⁶³ It is difficult to follow Judge Kooijmans reasoning. First, the legal consequences for States as a result of a finding that the wall was illegal was surely implied in the question put to the Court. Second, the duty of non-recognition coupled with the obligation not to render aid or assistance in maintaining the situation created by the construction of the wall makes it clear that states should desist from any action that might be construed as recognition of the wall or any consequences resulting from the construction of the wall.

Finally, the Court ruled by 14 votes to one (Judge Buergenthal dissenting) that the United Nations, and especially the Security Council and General Assembly, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall.⁶⁴

VI. SIGNIFICANT AND CONTESTED FINDINGS

The main focus of the *Wall* Opinion and its principal significance, obviously, is the finding on the illegality of the wall Israel is constructing on Palestinian territory. But, in reaching its conclusion, the Court examines a number of other issues, some essential for its finding and others, perhaps, only tangential to this finding. Some of these issues raise important questions of law that had been the subject of dispute for many years. All have important political consequences. The decision of the Court on these issues therefore adds to the significance of the Opinion.

A. Self-determination and Independence

The right of the Palestinian people to self-determination is today universally recognised. As the Court stressed in the *Wall*, even Israel recognises such a right.⁶⁵ The *Wall* Opinion therefore attaches great importance to this right which it describes

⁶¹ *ibid*, 202, [163(3)D].

⁶² *ibid*, [1], [39].

⁶³ *ibid*, [1], [44].

⁶⁴ *ibid*, 202, [163(3)E].

⁶⁵ *ibid*, 182–83, [118].

as a right with an *erga omnes* character.⁶⁶ All states, the Court declares, are under an obligation 'to see to it that any impediment resulting from the construction of the wall to the exercise of the Palestinian people of its right to self-determination is brought to an end'.⁶⁷ The importance of this right is echoed by several judges in their separate opinions⁶⁸ and by Judge Buergenthal in his declaration.⁶⁹

But does the Court recognise that a necessary consequence of this right is an independent Palestinian state? Yes, say Judges Higgins and Elaraby in their separate opinions. According to Judge Higgins 'the Palestinian people are entitled to their territory, to exercise self-determination, and to have their own State'.⁷⁰ Judge Elaraby goes further and states that 'the United Nations is under an obligation to pursue the establishment of an independent Palestine'.⁷¹

The judgment of the Court is not so clear. In paragraph 88 of its Opinion the Court purports to cite with approval a passage from the 1971 Advisory Opinion on *Namibia* that in the light of developments in the past 50 years the ultimate objective of the sacred trust referred to in Article 22 of the Covenant of the League of Nations establishing the mandates system 'was the self-determination and *independence* of the peoples concerned' (italics added).⁷² Yet in its citation of this dictum of 1971 in the *Wall*, the Court omits the word *independence* and simply states that the ultimate objective of the sacred trust in the mandates system 'was the self-determination ... of the peoples concerned'.⁷³ One can only assume that this omission was deliberate. But no reason is advanced for this omission. Was it because the Court was too timid to commit itself on such a controversial issue?

The statehood and independence of Palestine is disputed in some quarters.⁷⁴ The United States and Israel vehemently oppose such a notion, and most European States follow their lead. But over 130 states today recognise Palestine as an independent state and on 29 November 2012 Palestine was recognised an non-member observer state by the United Nations General Assembly by a two-thirds majority vote.⁷⁵ This resolution is generally regarded as recognition of Palestinian statehood, which has been confirmed by Palestine becoming a party to many multilateral treaties, including the Rome Statute of the International Criminal Court. Only the veto of the United States stands in the way of its admission to the United Nations. One can only speculate whether a bold assertion of Palestine's right to an independent state as a component of the right to self-determination in the *Wall* would have had any impact on Palestine's claim to statehood.

⁶⁶ *ibid*, 199, [156]–[157].

⁶⁷ *ibid*, 200, [159].

⁶⁸ *ibid*, Judges Higgins, 211–12, [18]; Elaraby, 250, [2.2]–[2.3]; Kooijmans, 228–29, [31]–[33].

⁶⁹ *ibid*, 241, [4].

⁷⁰ *ibid*, 211–12, [18].

⁷¹ *ibid*, 251–52, [2.3].

⁷² [1971] ICJ Rep 31, [53].

⁷³ *Wall* (n 1) 171–72, [88].

⁷⁴ See further on this subject, J Quigley, *The Statehood of Palestine. International Law in the Middle East Conflict* (New York, CUP, 2010).

⁷⁵ Resolution 67/19.

B. Fourth Geneva Convention

Israel became a party to the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War in 1951. Following its occupation of the Palestinian territories occupied by Jordan and Egypt in 1967, Israel refused to acknowledge the applicability of the Convention to these territories, preferring to view them as 'liberated', 'disputed' or 'administered' territories to which, as a matter of policy but not law, it was prepared to extend the humanitarian provisions of the Convention.⁷⁶ Although the political aspirations of those who yearn for a Greater Israel were largely responsible for this decision, there is no doubt that Israel was unwilling to commit itself to the obligation contained in Article 49(6) of the Convention to refrain from transferring part of its civilian population into the Palestinian territories. The political decision not to apply the Convention is backed by sophisticated legal argument. The principal argument maintains that Article 2(2) of the Fourth Geneva Convention applies the Convention only to cases of 'occupation of the territory of a High Contracting Party' and that the Palestinian territories were, prior to 1967, under the occupation of Jordan and Egypt and were consequently not the territory of a High Contracting Party. There was no sovereign power in the Palestinian territories to which the territory might be returned on the conclusion of a peace treaty.⁷⁷ A secondary argument, advanced by Stephen Schwebel, later to become President of the ICJ, was that the territories had been acquired in self-defence in the Six-Day War which meant that Israel's title was better than that of Jordan or Egypt which had occupied the territories unlawfully as aggressors in 1948. This gave Israel title by 'defensive conquest',⁷⁸ which could not be characterised as belligerent occupation. The Supreme Court of Israel carefully refrained from pronouncing on the applicability of the Fourth Geneva Convention.⁷⁹

The Court dismissed the first of Israel's arguments after an examination of the Fourth Geneva Convention and the practice of states and international organisations. It emphasised that Article 2(1) of the Convention made it clear that all that was required to make the Convention applicable was the existence of an armed conflict between two or more of the contracting parties. (Israel, Jordan, and Egypt were all contracting parties.) In such a case the Convention applied in any territory occupied in the course of the conflict by one of the parties. The purpose of Article 2(2) was not to exclude from the scope of application of the Convention territories not falling under the sovereignty of one of the parties. Rather, the intention of the drafters of the Convention, said the Court, was 'to protect civilians who find themselves, in whatever way, in the hands of the occupying Power' regardless

⁷⁶ See D Kretzmer, *The Occupation of Justice. The Supreme Court of Israel and the Occupied Territories* (Albany, State University of New York, 2002) 32–34.

⁷⁷ See Y Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria' (1968) 3 *Israel Law Review* 279; M Shamgar, 'The Observance of International Law in the Administered Territories' (1971) *Israel Year Book of Human Rights* 262.

⁷⁸ S Schwebel, 'What Weight to Conquest?' (1970) 64 *AJIL* 344.

⁷⁹ Kretzmer, *The Occupation of Justice* (n 76) 54.

of the status of the occupied territories.⁸⁰ This interpretation was confirmed by the *travaux préparatoires* of the Convention and had subsequently been confirmed by states parties to the Convention, the International Committee of the Red Cross, the General Assembly and the Security Council.⁸¹ The Court concluded that ‘the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties’.⁸² As Israel, Jordan, and Egypt were all contracting parties it followed that the Convention is applicable to the occupied territories to the east of the Green Line.⁸³ The finding of the Court on the applicability of the Fourth Geneva Convention in the OPT was unanimous.⁸⁴

Israel’s second argument based on ‘defensive conquest’ was not considered.⁸⁵ To do so would have required the Court to examine the history of the Palestinian territories between 1948 and 1967, which it had refrained from doing, much to the annoyance of Judge Kooijmans.⁸⁶ Was this a deliberate omission to avoid commenting on the reprehensible conduct of Jordan, which had tried unsuccessfully to annex the West Bank and East Jerusalem? Or did it wish to avoid challenging the view of a former colleague, Judge Schwebel, despite the fact that it was patently wrong. First, because his argument assumed that Israel acted in self-defence in 1967 in the face of much evidence to the contrary.⁸⁷ Second, because it failed to acknowledge that title to territory may not be acquired by the use of force, whether used defensively or aggressively.

C. Settlements

Article 49(6) of the Fourth Geneva Convention prohibits an occupying power from transferring parts of its own civilian population into territory it occupies. According to the *Commentary* of the International Committee of the Red Cross this clause was intended to prevent a practice adopted by some states during the Second World War of transferring their own population into occupied territory ‘to colonize those territories’. Such transfers, said the *Commentary*, ‘worsened the economic situation of the native population and endangered their separate existence as a race’.⁸⁸

That Article 49(6) prohibits Israel from establishing settlements in the Palestinian Occupied Territories and from colonising such territories is accepted by the United

⁸⁰ *ibid* 174–75, [95].

⁸¹ *ibid* 175–76, [96]–[99].

⁸² *ibid*, 177, [101]. On the subject of the Green Line, see the separate opinion of Judge Al-Kwasawneh, 238, [11].

⁸³ *ibid*, 177, [101].

⁸⁴ For Judge Buerghenthal’s endorsement of the applicability of the Convention, see *ibid*, 240, [2].

⁸⁵ See Imseis, ‘Critical Reflections’ (n 37) 105.

⁸⁶ *Wall* (n 1) separate opinion, 221–22, [8]–[10].

⁸⁷ See J Quigley, *The Six-Day War and Israeli Self-Defense, Questioning the Legal Basis for Preventive War* (New York, CUP, 2013).

⁸⁸ J Pictet (ed), *Commentary, IV Geneva Convention* (Geneva, International Committee of the Red Cross, 1958) 283.

Nations, the International Committee of the Red Cross and states (including the United States).

Only Israel disputes the illegality of Jewish settlement in the OPT.

Initially Israel claimed that it had established settlements in order to defend its occupation of the OPT.⁸⁹ This pretext has, however, long been abandoned. Today settlements range in nature from small hilltop outposts to large cities with populations of many thousands, serving the needs of Zionists determined to occupy what they regard as Greater Israel—*Eretz Israel*—and ordinary civilians who treat settlements as towns and cities for suburban living, replete with schools, university, hospitals, supermarkets, sports grounds and parks. No longer able to justify settlements as a security measure, Israel has argued that it is not bound by the Fourth Geneva Convention and that, even if it were, these settlements are not prohibited by Article 49(6) as the inhabitants have moved voluntarily to the settlements and not been transferred by the government of Israel.⁹⁰ The Israel Supreme Court has studiously refrained from pronouncing on the legality of settlements.⁹¹

The ICJ had no difficulty in finding—unanimously⁹²—that settlements in the OPT (including East Jerusalem) are illegal. In support of this finding it invokes repeated resolutions of the Security Council.⁹³

D. Human Rights Conventions

The applicability of the Fourth Geneva Convention and a number of multilateral human rights conventions in the OPT is fundamental to the Court's Opinion, as the finding on the illegality of the wall is based on the violation of these conventions. Although Israel is a party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child, it maintains, first, that these covenants do not have extraterritorial application to the OPT, and, second, that international humanitarian law is *lex specialis* governing the situation in the OPT to the exclusion of human rights conventions.⁹⁴

Relying on its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,⁹⁵ the Court finds, unanimously,⁹⁶ that the three human rights conventions in question have extraterritorial application and do not cease in time of armed conflict, in which case they apply together with international humanitarian law.

⁸⁹ See the decisions of the Israel Supreme Court upholding this argument, Kretzmer (n 76) 81–90.

⁹⁰ Y Dinstein, *The International Law of Belligerent Occupation* (Cambridge, CUP, 2009) 240, [576].

⁹¹ Kretzmer (n 76) 77–78, 99; S Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford, OUP, 2014) 105–21; *Mara'be v The Prime Minister of Israel* (2006) 45 ILM 202, 210, [19].

⁹² See Judge Buergenthal's endorsement of the illegality of settlements, *Wall* (n 1) 244, [9].

⁹³ *ibid*, 183–84, [120].

⁹⁴ These arguments are set out clearly by M Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 *AJIL* 119.

⁹⁵ [1966] ICJ Rep 226, 240, [25].

⁹⁶ See Judge Buergenthal's declaration, *Wall* (n 1) 240, [2].

The practice of the monitoring committees of the two International Covenants confirms this conclusion.⁹⁷

E. Prolonged Occupation

International humanitarian law contemplates that a state of occupation will be of short duration. However, in 2004 the occupation of the Palestinian territories was already in its thirty-seventh year. In 2002 the Israeli Government had claimed that the prolonged nature of the occupation had resulted in fewer [or: less onerous] legal obligations for it as occupying power. In response, in my Special Rapporteur's report of that year, I had refuted this claim, arguing that the full protection of the Fourth Geneva Convention was still required.⁹⁸ The implications of the prolonged occupation were not raised in the proceedings before the Court in the *Wall* case. Consequently, the Court's strange pronouncement on this subject came as a surprise.

Article 6(3) of the Fourth Geneva Convention provides that:

In the case of an occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 53, 59, 61 to 77, 143.

In paragraph 125 of its Opinion the Court interpreted Article 6 to mean that all the provisions of the Convention remain in force 'during military operations *leading to occupation*' (italics added), whereas only the specified provisions of the Convention remain in force a year after this event. Such an interpretation, which introduces a qualification on military operations (see the italicised phrase above) not found in the Convention itself seriously 'reduces the scope of the protection that the population enjoys under the Convention'.⁹⁹ Inter alia, it precludes the operation of the enforcement provisions of the Convention contained in Articles 146 and 147. This interpretation takes no account of the fact that 'because of the sheer length of the occupation and the continued conflict in the region, countless military operations have taken place in the OPT, only one of which can actually be said to have led to the occupation of that territory (1967)'.¹⁰⁰ In the words of Professor Yoram Dinstein, it is a 'bewildering statement' as it 'suggests that the clock of the one-year rule of Article 6 (third paragraph) started ticking as soon as the Israeli occupation began, in June 1967'.¹⁰¹

⁹⁷ *Wall* (n 1) 177–81, [102]–[113].

⁹⁸ J Dugard, *Question of the violation of human rights in the occupied Arab territories, including Palestine*, E/CN.4/2002/32 (6 March 2002) 7, [7].

⁹⁹ Dinstein, *Belligerent Occupation* (n 90) 283, [679].

¹⁰⁰ Imseis (n 37) 108.

¹⁰¹ Dinstein (n 90) 283, [679].

F. Self-Defence

Undoubtedly the most controversial part of the Court's Opinion is that dealing with self-defence. In a terse, unreasoned dictum, the Court dismissed Israel's argument that the construction of the wall was justified as self-defence under Article 51 of the UN Charter. First, the Court held that Article 51 recognises the inherent right of self-defence only 'in the case of an armed attack by one State against another State' and Israel 'does not claim that the attacks against it are imputable to a foreign State'.¹⁰² Second, the Court held that because Israel exercises control over the OPT and the threat which it regarded as justifying construction of the wall originated from within that territory, the situation was different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001) which Israel had invoked to support its argument of self-defence.

Neither of the reasons provided by the Court for rejecting Israel's argument is convincing. The first is incorrect. As pointed out by Judges Higgins,¹⁰³ Kooijmans¹⁰⁴ and Buergenthal,¹⁰⁵ and by academic critics,¹⁰⁶ Article 51 does not restrict the right of self-defence to attacks on a state by another state. The second reason hints at the correct reason but is side-tracked into drawing an unsatisfactory distinction between the situation in the OPT and that contemplated by Security Council resolutions 1368 and 1373. Resolutions 1368 and 1373, which were adopted in the wake of the attack on the World Trade Center on 11 September 2001, do not deal with an armed attack on the United States by another state. Instead they recognise the right of a state to respond in self-defence to acts of international terrorism without any suggestion that there need be an armed attack by a state. They are concerned with acts of international terrorism that constitute a threat to international peace and security. According to Judge Kooijmans, 'they therefore have no immediate bearing on terrorist acts originating within a territory which is under control of the State which is also the victim of these acts'.¹⁰⁷ This is the explanation for the Court's statement that the situation before the Court is different from that contemplated by resolutions 1368 and 1373 and why Israel may not invoke Article 51.

The real reason that resolutions 1368 and 1373 do not apply, unfortunately not mentioned by the Court, is that Israel is essentially engaged in a policing operation as occupying power of the OPT. Israel is not the victim of an armed attack that allows it to invoke Article 51 and the sympathy of the world. It is an occupying power that is building a wall to maintain its occupation. This is made clear by the

¹⁰² *Wall* (n 1) 194, [139].

¹⁰³ *ibid*, 215, [33].

¹⁰⁴ *ibid*, 229–30, [35].

¹⁰⁵ *ibid*, 242–43, [6].

¹⁰⁶ R Wedgwood, 'The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense' (2005) 99 *AJIL* 52, 58; S Murphy, 'Self-Defense and the Israeli Wall Advisory Opinion: An *Ipse Dixit* of the ICJ?' (2005) 99 *AJIL* 62, 64. For a contrary academic opinion, see O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford, Hart, 2010) 196.

¹⁰⁷ *Wall* (n 1) 230, [36].

Supreme Court of Israel in its two major decisions on the legality of the wall—*Beit Sourik Council v Government of Israel*¹⁰⁸ and *Mara'abe v the Prime Minister of Israel*.¹⁰⁹ Both these decisions hold that international humanitarian law allows Israel to construct a security wall to protect its army and settlers as part of its duty as occupying power to maintain order in the occupied territory.¹¹⁰ Moreover, both decisions acknowledge that the legality of the wall and its route are to be judged by the rules of international humanitarian law, as found by the ICJ.¹¹¹

There is a reluctance on the part of states to treat the occupation of Palestine as an occupation similar to other occupations in history.¹¹² Had Germany built a wall between itself and France in response to the ‘terrorist activities’ of the French resistance, it is unlikely that Germany would have justified its action as an act taken in self-defence. It would rather have seen such a wall as part of its actions to maintain control over an occupied territory whose citizens had resisted the occupation by violent means.

VII. AFTERMATH

The *Wall* Opinion was handed down on 9 July 2004. On 20 July the General Assembly adopted resolution ES-10/15 by 150 votes to six with 10 abstentions. Member states of the European Union and the Russian Federation voted in favour of the resolution while Israel and the United States voted against. The resolution ‘acknowledged’ the Opinion, ‘demanded’ that Israel ‘comply with its obligations as mentioned in the advisory opinion’, called upon member states to ‘comply with their obligations as mentioned in the advisory opinion’ and requested the Secretary-General ‘to establish a register of damages caused to all natural or legal persons’ by the construction of the wall. Since then both the General Assembly and the Human Rights Council have regularly passed resolutions approving the Opinion and calling for its implementation.

The Security Council has neither acknowledged nor approved the Opinion. Since November 2003,¹¹³ when it endorsed the creation of the Quartet, comprising the United Nations, the European Union, the Russian Federation and the United States, to pursue a solution to the conflict in the Middle East premised on a Roadmap for peace, the Security Council has largely left the conflict between Israel and Palestine to this Quartet.¹¹⁴ The Quartet issues regular press statements, addressed to the

¹⁰⁸ (2004) 43 ILM 1099, 1107, [23]–[25].

¹⁰⁹ (2006) 45 ILM 202, 207–16, [14]–[30].

¹¹⁰ See further Scobbie, ‘Words My Mother Never Taught Me’ (n 37) 82–83.

¹¹¹ *Wall* (n 1) 189–92, [133]–[134].

¹¹² See the separate opinion of Judge Elaraby, *ibid* 254 I, [3.1].

¹¹³ UNS Res 0 1515.

¹¹⁴ See further on the Quartet, J Dugard and A Vermeer-Kunzli, ‘The Elusive Allocation of Responsibility to Informal Organizations: The Case of the Quartet on the Middle East’ in M Ragazzi, *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (Leiden, Martinus Nijhoff, 2013) 261; K Elgindy, ‘The Middle East Quartet: A Post Mortem’, The Saban Center for Middle East Policy at Brookings, Analysis Paper No 25, 8 February 2012.

President of the Council about its concerns relating to events in the Middle East. It has only once mentioned the *Wall* Opinion and not suggested that it might be a useful guide to peace in the region.¹¹⁵ This is due to the pivotal role in the Quartet played by the United States, which has made it clear from the outset that it was opposed to the Opinion and would ensure that it was not implemented.¹¹⁶ The member states of the European Union, the Russian Federation and the United Nations have all expressed support for the Opinion in some way but they are powerless to persuade the Quartet to approve or to implement the Opinion.

An advisory opinion is by definition advisory. Clearly the opinion itself is not binding on states.¹¹⁷ On the other hand, states are bound by the Fourth Geneva Convention, the Hague Regulations of 1907, the International Covenants and customary international law upon which the Opinion is based. While not bound by the Opinion itself, states, including Israel and the United States, are nonetheless bound by the obligations upon which it relies. The Opinion has simply elucidated and confirmed these obligations. It is not therefore correct to describe the Opinion as ‘merely advisory’ as far as states are concerned.

Predictably, the Israeli government rejected the Opinion. This was followed by a decision of the Israeli Supreme Court in *Mara’abe v Prime Minister*¹¹⁸ which ruled that the construction of the wall within Palestinian territory was justified as a security measure to protect both Israel itself and the safety of Jewish settlers. The Court held that the ICJ’s opinion was flawed by reason of its failure to have access to the full facts surrounding the wall and accepted without serious examination the assurances of the Israeli military that the wall was constructed for security purposes.¹¹⁹ My view that the wall also served a political purpose, namely to seize land and to incorporate settlements into Israel, was expressly rejected.¹²⁰ The court accepted that settlers were entitled to protection but refused to consider the legality of settlements!¹²¹

States in the main have not complied with the obligations found by the Court to be binding on them in the *Wall* Opinion. Most recognise the illegality of the wall; but, under the influence of the United States, accept that Israel will be allowed to retain Palestinian land incorporated by the wall that accommodates Israeli settlements in any future peace agreement. In these circumstances it is hard to say that states have refused ‘to recognize the illegal situation resulting from the construction of the wall’ or that they have not rendered assistance in maintaining the illegal situation created by the wall—as required by the Court.¹²² Moreover, states parties to the Fourth Geneva Convention have not put pressure on Israel to comply with the provisions of humanitarian law embodied in that Convention. On the contrary,

¹¹⁵ Statement of 23 September 2004 (SG/2091).

¹¹⁶ See Elgindy, ‘The Middle East Quartet’ (n 114) 46.

¹¹⁷ *cf* R Ago ‘“Binding” Advisory Opinions of the International Court of Justice’ (1991) 85 *AJIL* 439.

¹¹⁸ (2006) 45 *ILM* 202.

¹¹⁹ *ibid*, 226–29, [62]–[65]; 231–32, [70]–[74].

¹²⁰ *ibid*, 221, [43]–[44]; 22–227, [61], [63].

¹²¹ *ibid*, 210, [19].

¹²² *Wall* (n 1) 202, [163 D].

Israel persists in its argument that it is not bound by the Fourth Geneva Convention and no meaningful steps have been taken by state parties to ensure compliance. At the same time Israel continues to maintain that human rights conventions do not apply in the OPT.

Much has been written about the legal consequences for states of advisory opinions in the light of the fact that only judgments in contentious proceedings are designated as binding by Article 59 of the Court's Statute, and enforceable in terms of Article 94 of the Charter. On the other hand, Shabtai Rosenne maintains that the 'practical difference' between the two is 'not significant' as both depend on the *auctoritas* of the same court.¹²³ If there is little 'practical difference' between the consequence of judgments in contentious proceedings and advisory opinions for *States* there should be no difference at all as far as the consequences for the *United Nations* are concerned. After all, the ICJ is the judicial arm of the United Nations and it would seem that the organisation must be bound by an advisory opinion requested by one of its own organs and approved by that organ. In the words of Sir Hersch Lauterpacht, an opinion requested and approved by the General Assembly is 'the law recognized by the United Nations'.¹²⁴ Despite this the Secretary-General and the Secretariat of the United Nations have done little to ensure compliance with the *Wall* Opinion.

That the Secretariat was unenthusiastic about the request for the *Wall* Opinion was confirmed in private meetings I held with senior members of the Secretariat in my capacity as Special Rapporteur. This is reflected in the failure of successive Secretaries-General to express any support for the Opinion in the statements issued by the Quartet. They have simply acquiesced in the determination of the United States to kill the Opinion. Further evidence of this lack of enthusiasm is provided by the delay in the establishment of the office to handle the Register of Damages mandated by the General Assembly in resolution ES-10/15 of 20 July 2004 and the failure to authorise this body to secure compensation for those who have suffered damage as a consequence of the construction of the wall.

The Secretary-General has been encouraged to do nothing by his legal office. On 10 August 2004 Ralph Zacklin of the Office of the UN Legal Adviser gave an opinion to Kieran Prendergast, Under Secretary-General for Political Affairs, which declares that Secretary-General need not take action on the Opinion because the Secretariat 'is not a direct addressee of any of the legal consequences determined by the Court to arise from the construction of the wall'¹²⁵ and 'the Advisory Opinion itself is not binding'. Whether the Secretary-General should take action to implement the Opinion was a political decision which 'was legally ... not called for'.¹²⁶

¹²³ S Rosenne, *The Law and Practice of the International Court, 1920–2005*, vol 3 (Procedure), 4th edn (Leiden, Martinus Nijhoff, 2006). See, too, K Keith, *The Extent of Advisory Jurisdiction of the International Court of Justice* (Leiden, AW Sijthoff, 1971) 221–22; M Pomerance, *The Advisory Function of the International Court in the League and UN Eras* (Baltimore, John Hopkins University Press, 1973) 371.

¹²⁴ Admissibility of Hearings of Petitioners by the Committee on South West Africa [1956] ICJ Rep 46.

¹²⁵ See J Dugard, 'Advisory Opinions and the Secretary-General with Special Reference to the 2004 Advisory Opinion on the *Wall*' in L Boisson de Chazournes and M Kohen, *International Law and the Quest for its Implementation. Liber Amicorum Vera Gowlland-Debbas* (Leiden, Brill, 2010) 403, 409.

¹²⁶ *ibid.*

Israel, states and the United Nations have not heeded the call of the ICJ for respect for humanitarian law and human rights law in the OPT. This has allowed Israel to proceed with the construction of the wall and the expansion of settlements. In 2004 the length of the wall was 180 kilometres.¹²⁷ Today it is over 500 kilometres long. In 2004 the settlement population numbered some 400,000.¹²⁸ Today there are almost 8,000 Jewish settlers in the West Bank and East Jerusalem: 400,000 in the West Bank and over 300,000 in East Jerusalem. (Israel withdrew its settlements from Gaza in 2005.) The settlement of Beitar Illit has grown to become a city with a population of 45,000, while Ariel has a population of 18,000. Fifty-six settlements, accommodating nearly 80 per cent of the settler population, are in the 'seam zone' between the Green Line and the wall. Not only has the United States blocked compliance with the *Wall* Opinion; it has also prevented action from being taken to curb the expansion of settlements: in February 2011 it vetoed a proposal to condemn the construction of settlements in the OPT. On 23 December 2016, however, the United States abstained from voting on Security Council Resolution 2334 condemning settlements.

The colonisation of the West Bank and East Jerusalem continues unabated and increasingly it is argued that Israel's settlement enterprise has resulted in a system akin to that of apartheid in which a discriminatory legal order favours settlers above Palestinians.¹²⁹

That the wall will annex Palestinian land taken by the wall is no longer seriously contested. The United States, the principal 'peace broker', accepts that the wall will in large part become the future border between Israel and Palestine and has given assurances to Israel that it will be allowed to keep settlements encircled by the wall.¹³⁰ Israeli politicians now openly assert that a future border will follow the route of the wall. The claim that the wall is designed to serve as a security wall has become secondary. In 2005 the Minister of Justice, Tzipi Livni, declared that the wall would serve as 'the future border of the state of Israel'.¹³¹ This prompted the Israeli High Court to express concerns that it had been misled by the government on the purpose the wall was intended to serve.¹³²

The wall has become a *fait accompli*. The opposition of the United States to the *Wall* Opinion, the failure of the Quartet to make any attempt to secure compliance with the Opinion, the readiness of European states to fall in line with the United States on this issue, and the reservations of the Secretariat of the United Nations mean that the wall has ceased to be a matter of contention between the international community of States and Israel. If world politics is defined in terms of relations between states and the actions of international institutions, the *Wall* has been a political failure. The manner in which states and the United Nations have ignored

¹²⁷ *Wall* (n 1) 170, [82].

¹²⁸ See Report of Special Rapporteur on Question of the violation of human rights in the occupied Arab territories, including Palestine, E/CN.4/2004/6, [37].

¹²⁹ See J Dugard and J Reynolds, 'Apartheid, International Law and the Occupied Palestinian Territory' (2013) 24 *EJIL* 867.

¹³⁰ Bregman (n 10) 295.

¹³¹ Y Yoaz, 'Justice Minister: West Bank Fence is Israel's Future Border', *Haaretz*, 1 December 2005.

¹³² *Head of the Azzun Municipal Council, Abed Alatif Hassin and others v State of Israel and the Military Commander of the West Bank*, HCJ.2733/05.

the Opinion has undoubtedly affected the credibility of the Court. This does not appear to trouble those states which most strongly express respect for the Rule of Law in international affairs.

Any peaceful settlement of the seemingly intractable dispute between Israel and Palestine will have to be guided by international law. The *Wall* Opinion provides a normative framework for such a resolution of the conflict. This is realised by civil society which has invoked the Opinion as its lodestar for action towards the just settlement of the conflict. *BDS*—boycott, divestment, and sanctions—a civil society initiative to boycott Israel along the same lines as apartheid South Africa, was started on 9 July 2005, exactly one year after the *Wall* Opinion was handed down, invoking the Opinion as a justification for its action. Other civil society action is also premised on the Opinion. The decision of the European Union to require goods produced on settlements in the West Bank to be labelled as coming from the West Bank and not Israel¹³³ is based on the illegality of settlements confirmed by the ICJ in the *Wall*. In the short term the *Wall* Opinion may have been a failure. The long-term implications of the Opinion are probably still to be felt.

¹³³ *New York Times International*, 12 November 2015, 1.

