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## **Legal Consequences for Disregard of the World Court's Decision and the Continuing Construction of a Wall in the Occupied Palestinian Territory**

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# Legal Consequences for Disregard of the World Court's Decision and the Continuing Construction of a Wall in the Occupied Palestinian Territory

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**Abstract:** A decade after the delivery of the Advisory Opinion of the International Court of Justice (ICJ) in the case *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Request for advisory opinion) popular opinion appears to be that the advisory opinion has not produced any appreciable and positive outcome for and in the interest of the Palestinian people. This article discusses the issues surrounding the legal validity, authoritativeness and bindingness of advisory opinions and notes that although advisory opinions are not judgments but "merely opinions and merely advisory" they do carry a recognisable authority and are generally persuasive and followed by UN member States and even States that are not yet members as exemplified by Israel in relation to the Conditions of Admission of a State to Membership in The United Nations [1948].<sup>1</sup> The article considers the impact the wall has had over the last 11 years evaluates attempts to give effectiveness to the advisory opinion and makes suggestions as to the future. The article thus, lays the ground for the conclusion that the opinion in the case under discussion ought to be followed by Israel; that Israel bears international responsibility and liability for its action in defiance of the position of international law and particularly for large scale abuse of the rights of individuals and communities in Palestine as a result of the wall policy; and that all UN bodies particularly the Security Council should seek all ways to bring about the implementation of the Courts decision in this case. The reception of the opinion by various key stakeholders are evaluated and the major steps taken by the General Assembly to encourage compliance and to impose liability on the State of Israel are discussed along with suggestions on how to ensure that the legal opinion in this case is finally used as a basis to bring down the much criticised and illegal, approximately 700 km structure, which is a clog in the wheel of the general resolution of the problems surrounding the occupation of Palestinian territories and the law and politics of the Israeli-Palestinian issue in international relations.

**Key-words:** Palestinian territory, occupation, United Nations, advisory opinion

"With great power comes great responsibility"  
(Peter Parker's Uncle Ben in Spiderman)

## I. Introduction

A decade after the delivery of the advisory opinion of the International Court of Justice (ICJ) in the case *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Request for advisory opinion) popular opinion appears to be that the advisory opinion has not produced any appreciable and positive outcome for and in the interest of the Palestinian people.<sup>2</sup> The outcome of the case has been

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<sup>1</sup> [1948] ICJ Reports 57. Hereinafter referred to as the *Admissions Opinion*.

<sup>2</sup> ICJ Reports 2004, 136. Cases and other legal materials of the International Court of Justice are available at <http://www.icj-cij.org/homepage/index.php>, accessed 07 December 2014. Hereinafter referred to as the *Legal Consequences of Wall* case.

rejected and then ignored by the State of Israel and successive governments in Tel Aviv. Israel has adopted the stance of ‘real politick’ and refused blatantly to obey the legal courses of action indicated by the principal judicial organ of the UN. Indeed, recent years has witnessed a full-blown return by Israel to what Avi Shlaim terms the iron wall approach based on unilateralism not only in relation to the Palestinians but to the whole Arab world.<sup>3</sup> This policy is at its starkest in relation to the wall especially with the increasing resort to violence to increase and maintain it.

The question, thus, arises what are the legal implications of the continuous disregard of this important advisory opinion. Indeed what are the continuing consequences of the maintenance of the constructed wall in the occupied territories. The answer to that question necessarily arises from the question submitted to the World Court by the General Assembly as set forth in its resolution ES-10/14, adopted on 8 December 2003 at its Tenth Emergency Special Session.

The direct question implored of the Court was the following:<sup>4</sup>

“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?”

After readily founding jurisdiction to provide an answer in the case the Court’s responses were unambiguous and unequivocal:

- Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem and to dismantle forthwith the structure therein situated;
- Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem;
- 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 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.
- The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

The Palestinian question is for all intents and purposes one of the apparently ‘intractable’ disputes of our time and one for which several life times of academic publishing can be sustained. Adding to the inherent analytic difficulties of the pertinent issues are the dangers of labelling that may attach to scholars that venture into discourse around this difficult topic. Just as M. Litinov fearfully declared of the cold war era that, it was necessary to face the fact that there was not one world and “...only an angel could be unbiased in judging Russian affairs”,<sup>5</sup> any commentator on aspects of the Palestinian-Israeli relations and their international effects must be alert to the

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<sup>3</sup> Avi Shlaim, “The Iron Wall Revisited” *Journal of Palestine Studies* Vol. 41, No. 2 (Winter 2012) p. 80.

<sup>4</sup> Thus, Article 96 of the U.N. Charter provides: 1. “The General Assembly or Security Council may request the International Court of Justice to give an advisory opinion on any legal question. The founding of jurisdiction was based upon a two pronged consideration (a) whether the Court has jurisdiction to give the opinion requested to the organisation requesting it –the General Assembly and perhaps in this particular case more importantly (b) whether, there is any reason why it should decline to exercise any such jurisdiction.”

<sup>5</sup> T. A. Tarazono, *The Soviet Union and International Law* (New York: Macmillan Co., 1985) p. 296.

possibility of being labelled and pigeonholed. Despite this reality, it is important to ask the questions that we find imperative in this Article. One of the main questions that arose following the decision of the Court concerned the legal effect of its ruling under the advisory jurisdiction of the Court. This of course is tied to the more general question - what are the legal effects of advisory opinions of the World Court? What are the consequences of a continuous disregard of the Court's decision after it had so openly and clearly indicated that the existence of the wall was illegal and had to be brought to an end? The preceding queries are important legal questions and they can be satisfactorily answered despite the political aspects of the legal question and the political or social implications of any such intellectual effort. This article, however, limits itself to the consequences arising out of the existence of the wall rather than the entire 'Palestinian question' or indeed the occupation itself.

## II. Legal Effect of the Advisory Opinion

The term 'advisory opinion' has not been defined anywhere either in the League of Nations Covenant,<sup>6</sup> Charter of the United Nations,<sup>7</sup> PCIJ Statute<sup>8</sup> or the Statute of the ICJ.<sup>9</sup> However, advisory opinions have been considered by States as well as the international organisations to be authoritative statements of law. Ian Brownlie, defines Advisory Opinions from a functional point of view. He wrote: "The uses of the advisory jurisdiction are to assist the political organs in settling disputes and to provide authoritative guidance on points of law arising from the functions of organs and specialised agencies."<sup>10</sup> The Court itself in the *Certain Expenses case* as if in comparison with the term 'judgment.' noted that "the opinion which the Court is in course of rendering is an *advisory opinion*" (italics added).<sup>11</sup>

Advisory opinions are indeed not judgments but as older authorities on the Court like Prataap<sup>12</sup> have bluntly put it "... opinions are therefore, 'precisely what they purport to be; they are advisory... they are merely opinions and merely advisory'.<sup>12</sup> Thus, it is clear that advisory opinions have slightly different judicial characteristics from judgments in the contentious jurisdiction of the Court. The main difference from the procedural point of view, between the two is that in the advisory jurisdiction of the Court there are technically no "parties" and there are no binding "decisions." The individual State's role in advisory cases is essentially that of supplying "information" as may be required by the Court, and also under *amicus curiae* functions so to speak.<sup>13</sup>

It appears, therefore, that the reasonable view is that an advisory opinion is an authoritative statement of law and fact, given by the ICJ in response to a request from an authorised body on specific issues.<sup>14</sup> It is worthy of note that the Court has

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<sup>6</sup> League of Nations, Covenant of the League of Nations, 28 April 1919, available at: <http://www.refworld.org/docid/3dd8b9854.html>, accessed 27 December 2014.

<sup>7</sup> Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: <http://www.refworld.org/docid/3ae6b3930.html>, accessed 27 December 2014.

<sup>8</sup> League of Nations, Statute of the Permanent Court of International Justice, 16 December 1920, available at: <http://www.refworld.org/docid/40421d5e4.html>, accessed 27 December 2014. Amended by the Protocol of 14 September 1929.

<sup>9</sup> The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. The Court's seat is at the Peace Palace in The Hague (Netherlands). It began work in 1946, when it replaced the Permanent Court of International Justice (PCIJ) which had functioned in the Peace Palace since 1922. It operates under a Statute largely similar to that of its predecessor, which is an integral part of the Charter of the United Nations. Website: <http://www.un.org/en/documents/charter/>.

<sup>10</sup> Ian Brownlie, *Principles of Public International Law*, Third ed. (Oxford: E.Q.B.S., 1979) p. 728.

<sup>11</sup> ICJ Reports (1962), p. 168.

<sup>12</sup> See also Dharma Prataap, *The Advisory Jurisdiction of the International Court* (Oxford: Clarendon Press, 1972) pp. 230, 231.

<sup>13</sup> Shabtai Rosenne, *The World Court: What it is and How It Works*, (New York: A.W. Sijthoff - Leiden Oceana Publication Inc. 1973) p. 81.

<sup>14</sup> Gbenga Oduntan, *Law and Practice of the International Court of Justice a Critique of the Contentious and Advisory Jurisdictions* (Enugu, Nigeria: Fourth Dimension Publications, 1999) p. 133; Aaron Korman & Giselle Barcia, "Rethinking Climate Change: Towards an International Court of Justice Advisory Opinion", Vol. 37 *The Yale Journal of International Law* (2012) pp. 36, 39, 42;

assimilated its advisory procedure to its contentious procedure as closely as practicable.<sup>15</sup> This is because the origins of many requests are in actuality disputes, and the very nature of the judicial function, has given a somewhat contentious aspect to advisory proceedings.<sup>16</sup>

### III. The Reception of the Opinion

Upon its issuance, this Advisory Opinion was given a mixed reception. Certainly, a mixed reception was to be expected; the Opinion attempted to resolve an issue at the heart of a political maelstrom, and represented an early foray into controversial debates about the obligations of occupying powers and the self-defence entitlements of States in the face of terrorist activity; the Opinion precipitates a number of exciting developments in international humanitarian and human rights law, and leaves no lingering uncertainty as to the Court's vision for these developments. Irrespective of any remaining weaknesses, this newfound authoritativeness ought to be welcomed.<sup>17</sup>

In terms of formal or diplomatic reception of the opinion rendered by the court it has to be pointed out that, although it will be very unusual to do so, there is no legal obligation either on the part of the organ requesting the opinion or of the States which may be concerned to accept and give effect to the opinion in practice. They usually may be favourably received but they may even be disregarded. In considering the reception of the opinion, regard must be given to the practice that opinions directly requested by the General Assembly or Security Council are formally received and taken note of by these primary organs of the UN. If requested by another 'authorised body' within the UN, the Secretary-General simply communicates it to the organisation concerned; or he/she may be directed by the Assembly or the Council to communicate it to the administrative head of any concerned bodies or subsidiary organs.

In the vast majority of cases it may, however, be satisfactorily noted that the Court's opinion has been accepted by the body which requested them, namely by the General Assembly and other specialised agencies such as I.L.O., U.N.E.S.C.O. and I.M.C.O without any controversies. The acceptance of the opinion can usually be seen in the resolutions they adopt in the aftermaths of the rendering of the opinion. In other words there is evidence of a next-step practice or doctrine of 'conforming resolutions' which acknowledge the opinion of the Court in a manner that suggests that the emergent and clarified legal position will be made to affect the pertinent situation. For instance, in accepting the opinion in the *Admissions Opinion*, the General Assembly in its resolution passed a recommendation that each member of the Security Council and General Assembly should act in accordance with the opinion. Further in the same resolution, the General Assembly "noted" the opinion and asked the Security Council to reconsider the previous application for membership. In its resolution in the *Reparation Case*,<sup>18</sup> the General Assembly, "having regard to" the opinion, authorised the Secretary-General to bring international proceedings against any State with the view to receive reparation for damage to the United Nations or to the individual in the service of the organisation. Indeed early writers on the advisory jurisdiction were quick

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Mahasen Mohammad Aljaghoub, *The Advisory Function of the International Court of Justice 1946 – 2005* (Berlin: Springer-Verlag, 2006) pp. 8, 153, 253.

<sup>15</sup> J. Sloan, "Advisor, Jurisdiction of the International Court of Justice", 38 *California Law Review* (1950) p. 848.

<sup>16</sup> Thus, Article 68 of the Statute makes applicable to advisory procedure the provisions of the Statute relating to contentious cases 'to the extent to which it recognises them to be applicable.' Article 102 of the 1978 Rules constitutes a corresponding provision that enables the application of the contentious procedure. Brownlie, *op. cit.*, p. 729.

<sup>17</sup> Leah Friedman, "Case Notes: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), International Court of Justice", 9 July 2004, Vol. 27 *Sydney Law Review* p. 715.

<sup>18</sup> *Reparation for injuries suffered in the service of the Nations*, Advisory Opinion, [1949] ICJ Rep 174 *supra* note 1.

to acknowledge that these sorts of resolutions indicate implied acceptance of the Advisory Opinions.<sup>19</sup> Another case in point is the *I.L.O. Administrative Tribunal Case*.<sup>20</sup> The case was submitted to the Court for advisory opinion at the request of the General Assembly of the United Nations. The question was whether the Assembly had the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent. The Court replied in the negative and said the General Assembly could not refuse the award. It was contended on behalf of the General Assembly that it has no legal power under the Charter to establish a tribunal competent to render judgments binding on the United Nations. In point of fact, authority may exist for the conclusion that respect for the Court's decision may be conferred by others under basis other than the Charter and the Statute. This is because following the Court's decision in this case the Executive Board of U.N.E.S.C.O. took note of the opinion and authorised the Director-General to pay the sum awarded by the tribunal.

Despite this reality it must be conceded that the view of UN member States as to the authority of the opinions has not been one of uncritical acceptance. In the shadow of the Cold War, the Soviet Union and other communist countries, not only regularly objected to requests for advisory opinions, but after opinions had been given, often asserted that the Court was not competent to give the opinion or that the opinion should be ignored, or that it was contrary to the Charter. Delegates of other countries on the other hand, would typically state that they would accept "unreservedly" the advisory opinion of the Court. Sir G. Fitzmaurice, the United Kingdom delegate, on one occasion said that it could not be argued that the opinion of the Court was wrong from the legal standpoint or that the Assembly did not argue with the Court in its finding, because the Assembly could only accept or reject the opinion.<sup>21</sup>

Criticism of ICJ advisory opinions and opposition to their adoption by the General Assembly have not been limited to representatives of communist countries, but sometimes also emanate from other States when the opinions or the nature of the question posed to the Court have not been in tune with their national views or interests.

With regard to the action of the State concerned, there have been some opinions of the ICJ in respect of which states concern were expected to take action individually. In over half of the 26 advisory cases handled by the Court some States have opposed the resolutions requesting the opinion and/or consequently refused to implement them. In the *Peace Treaties Case*<sup>22</sup> the three States that were mainly concerned - Bulgaria, Hungary, and Romania - declared in advance that they would not be bound by the opinion, and continued to maintain the same attitude even after its delivery. Romania contended that the Court in assuming jurisdiction in the case had acted in violation of international law because it had taken upon itself the right to express an opinion on the question, without the Romanian government's consent. Similar views were expressed by Bulgaria and Hungary.<sup>23</sup>

Also on the celebrated South West Africa case,<sup>24</sup> the South African government expressly refused to accept the opinions and had consistently maintained the position that the mandate over the territory had lapsed; that the United Nations has no Jurisdiction over the former mandated territory; that it was under no obligation to submit information under Article 73(e) of the Charter; and that the mandate for the territory had been created by the Allied and Associated powers of the first World War. South Africa would accordingly negotiate a settlement with the remaining principal Allied and Associated powers.<sup>25</sup>

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<sup>19</sup> Renouff, "Reception of Advisory Opinion by the General Assembly of the United Nations", 28 *Canadian Bar Review* (1950) pp. 424-5.

<sup>20</sup> *UN Administrative Tribunal case* (1954), ICJ 47.

<sup>21</sup> Prataap, *op. cit.*, p. 245.

<sup>22</sup> *Interpretation of Peace Treaties case* [1950] ICJ 65; 17 ILR 331.

<sup>23</sup> M. O. Hudson, "The Twenty-Ninth Year of the World Court", in *British Yearbook of Int. Law.*, (1958) p. 10.

<sup>24</sup> *International Status of South West Africa*, Advisory Opinion, [1950] I.C.J. Rep. 128,

<sup>25</sup> Prataap, *op.cit.* pp. 245-6.

#### IV. (Non) binding but Authoritative and Persuasive Effects of the Opinion

Although it is argued below that the opinion of the World Court may be akin to a declaratory judgment on the issue, we must be very careful to point out *ab initio* the fact that the opinion itself is not binding. The law and practice of the advisory jurisdiction should in this respect be contrasted with certain provisions of the Charter and Statute relating to the Court's contentious jurisdiction. As to the bindingness of the judgments of the court in its contentious jurisdiction there is no doubt whatsoever.

For instance, Article 94 paragraph I provides as follows:

"Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

Likewise, Article 59 of the Statute states:

"The decision of the Court has no binding force except between the parties and in respect of that particular case."

The important thing to garner here, therefore, is that judgments awarded by the Court to parties are binding at least in respect of that case and in relation to the parties before the Court. But then that is true only as per "judgments" passed on "parties", and only then in respect of contentious cases. How about "advisory opinions" given to "authorised bodies."?

As stated earlier advisory opinions are in fact devoid of any binding force. The Court itself has explicitly stated this in the *Peace Treaties Case*<sup>26</sup> in the *South West Africa Cases*<sup>27</sup> and others.<sup>28</sup> In the *Peace Treaties Case* it pronounced: "The Court's reply is only of an advisory character as such it has no binding force."<sup>29</sup> It would seem writers too, have agreed on this point.<sup>30</sup>

In fact there is no obligation on the body requesting the opinions to give effect to them. Still less are the States likely to be affected legally bound to implement them in action. The opinions are not binding upon the States individually even if accepted by the requesting body. This would seem clear from the reception of the opinions in the *South West Africa Cases* by the General Assembly and by the Union of South West Africa.<sup>31</sup>

Opinions of the Court are not binding in the sense of *res judicata* (that is, following the principle that an issue decided by a court should not be reopened); neither are they binding *stare decisis* (that is following the principle that a tribunal should follow its own previous decisions and those of other tribunals of equal or greater authority).

However, there is a persuasive argument put forward in various quarters that the Court's Opinions are binding in a negative sense. As noted by Gore-Booth

"... Advisory Opinions may be negatively binding in the sense that if the Court were to indicate that a certain course of action would be definitely illegal or that, of various courses of actions proposed only one would be legal, it would be difficult in practice for the organ requesting the opinion not to follow the course advocated by the Court."<sup>32</sup>

It would appear, that even though there is no automatic prohibitive force attaching to advisory opinions, it is astute from an international policy point of view that concerned persons and authorities must refrain from adopting any prohibited course indicated in the Courts reasoning and advice. However, it is very unlikely that

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<sup>26</sup> *Peace Treaties Case* (Advisory Opinion) ICJ Reports (1949), p. 109.

<sup>27</sup> *South West Africa Cases* (Preliminary Objections) ICJ Reports (1962), p. 337.

<sup>28</sup> E.g. *I.L.O. Administrative Tribunal Case* ICJ Reports, (1956), p. 47.

<sup>29</sup> *Western Sahara Advisory Opinion*, ICJ Reps, 1975, 12 at 24, para.31.

<sup>30</sup> On this issue, see the following: Prataap, *op. cit.*, p. 227; Rosenne, (1973) ICJ, *op. cit.*, p. 441; The World Court, *op. cit.*, p. 83; Hans Kelsen, *The Law of the United Nations; A Critical Analysis of Its Fundamental Problems* (New York: Frederick A. Praeger, Inc. 1950, p. 486; Gore-Booth ed. *Sir Ernest Satow Guide to Diplomatic Practice* (London: Longman 1979), p. 367.

<sup>31</sup> Prataap *op. cit.*, p. 367.

<sup>32</sup> Gore-Booth, *op. cit.*, p. 367.

States and international organisations will adopt such a course for reason of the undisputable judicial and authoritative character of the opinions.<sup>33</sup>

Although the opinions are merely advisory they cannot be regarded as legal advice in the ordinary sense. They are not like views expressed by counsel for guidance of clients, but are judicial pronouncements. The Court has repeatedly stated that it is a judicial body and that in rendering advisory opinions it performs a judicial function.<sup>34</sup> Underlying this assertion is the fact that the Court has "... assimilated its advisory procedure to its contentious procedure as closely as practicable."<sup>35</sup>

## V. The Persuasive Force of Advisory Opinions

Again, one should note that though the advisory opinions are not binding, "their persuasive character and substantive authority is great."<sup>36</sup> This is because they are judicial pronouncements of the highest international tribunal and the statements of law contained in them are of the same high quality as of those contained in the judgments.<sup>37</sup> Their moral and legal weight and influence, therefore, is great.<sup>38</sup> The 1978 Rules of Court also states that "[t]he advisory opinion shall contain ... a statement as to the text of the opinion which is authoritative". This the Court has done in paragraph 163 of the opinion of 9 July 2004.

An advisory opinion is no less law on any issue than a judgment. The Court itself has always treated the opinions as being of equal authority with the judgments. For instance, the P.C.I.J. recognised that answering the questions put to it in the *Eastern Carelia Case* would be "... substantially equivalent to deciding the dispute between the parties."<sup>39</sup> Prataap also points out that the way in which the Court cites its opinions in subsequent decisions - whether opinions or judgments, clearly shows that it regards them as equally authoritative. It makes no distinction between the two in this connection.<sup>40</sup>

The bodies requesting opinions from the ICJ usually regard such opinion as authoritative expressions of law. Moreover, the opinions are "authoritative in the sense that their legal correctness cannot be officially or formally questioned by the organ to which they are rendered acting in its corporate capacity."<sup>41</sup>

On the similarities that exist between Advisory Opinions and Declarative Judgments Prataap correctly posits as follows:

"The advisory opinions have been considered so authoritative by jurists as to be likened to declaratory judgments. The declaratory judgments on the other hand have been thought to be an indirect method of obtaining advisory opinions by States. In fact, there is hardly any distinction in substance and effect of the opinions and the judgments whether declaratory or otherwise. There are however formal differences between the two. The non-binding character of the opinions is an important difference, but too much emphasis must not be placed on the aspect. For although judgments are formally binding, their execution is not automatic and there is no certainty that they will be executed at all. There is no machinery in international law for enforcing them directly."<sup>42</sup>

Advisory opinions with binding force do exist. This developed as a form of 'advisory arbitration' under the League of Nations, where some organisations were authorised to request advisory opinions, in case of disputes in which the organisation is

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<sup>33</sup> Prataap, *op. cit.*, p. 230.

<sup>34</sup> See Paul Reuter, *International Institutions*, (London: Allen & Unwin, 1958) p. 274.

<sup>35</sup> Prataap *op. cit.*, p. 230.

<sup>36</sup> *Ibid.*, p. 231. See also G. Fitzmaurice "The Law and Procedure of the International Court of Justice: International Organs and Tribunals", 29 *B.Y.I.L.*, (1952), p. 55.

<sup>37</sup> S. Rosenne, *The International Court of Justice*. (2d ed. 1961) p. 113.

<sup>38</sup> Prataap, *op. cit.*, p. 231.

<sup>39</sup> P.C.I.J. Series B., No. 5, p. 29.

<sup>40</sup> *Op. cit.*

<sup>41</sup> Fitzmaurice, *op. cit.*, p. 54.

<sup>42</sup> Prataap, *op. cit.*, pp. 232-233.



one party and a State the other. In such instances the parties to the dispute are required to accept the opinion as binding. Furthermore in the UN era, this type of provision may be contained in a convention, bilateral or multilateral treaty or a constituent instrument drawn up to regulate relations between States and international bodies. Thus, Article VIII, Section 30 of the General Convention on the Privileges and Immunities of the United Nations<sup>43</sup> provides as follows:

"If a difference arises between the United Nations on the one hand and a member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

This system of advisory arbitration is seen in certain quarters as "... an attempt to overcome the procedural incapacity of international organisations to appear before the Court in disputes with States."<sup>44</sup>

The strong attitudes and *a priori* policies that States may have with respect to a question before the advisory jurisdiction of the court may not turn them into parties in a case brought before the Court. Bringing these principles home in respect of the *Legal Consequences of Wall* case, it is necessary to point out that the opinion is both authoritative and persuasive in relation to the pertinent issues discussed under it and applies in effect to all concerned States and affected persons *instanter* upon its pronouncement by the Court. It is important to note that in this case the Court observed that the lack of consent to the Court's contentious jurisdiction by interested States has no bearing on the Court's jurisdiction to give an advisory opinion. In this sense there were no parties capable of interfering with the Court's jurisdiction in the case in question. Similarly the Court did not consider that the subject-matter of the General Assembly's request can be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it was the Court's view that the construction of the wall must be deemed to be directly of concern to the United Nations in general and the General Assembly in particular.<sup>45</sup>

Perhaps nothing does more to acknowledge the moral and legal value of the advisory opinion in this particular case than the wordings of the defence in the Israel domestic *Alian case*.<sup>46</sup> The Supreme Court had urged the State of Israel to address it specifically on the potential implications that the ICJ advisory opinion may have for the *Alian* proceedings. Although the response reiterated the non-bindingness of ICJ advisory opinions, it refrained from relying upon this formality as a ground for dismissing its legal significance altogether. Instead, it acknowledged that:

The Court's stature attributes considerable weight to interpretations of international law it renders. Israel is committed to respect international law. Hence, even if the advisory opinion is non-binding, one should investigate the status of the legal findings it includes, as far as they interpret international law.<sup>47</sup>

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<sup>43</sup> Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the United Nations on 13 February 1946 adopted by the General Assembly on 13 February 1946, by Res. 22 A(I); it went into force on 17 September 1946. I. U.N.T.S. 15.

<sup>44</sup> See Rosenne (1961), *op. cit.*, p. 452; H. Kelsen, *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems*, (New York: Frederick A. Praeger, 1964). p. 486; Prataap, *op. cit.*, pp. 47-8.

<sup>45</sup> See Para 50 where the court noted that "The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute."

<sup>46</sup> In this case the petitioners challenged the lawfulness of the route of the separation barrier running in proximity to- Boudrous and Shukba -two West Bank Palestinian villages (located roughly 20 km north-west of Ramallah). The argument was raised that the construction of the barrier in this area will cut off agricultural land and deprives local residents of their source of livelihood. Hence, to the degree that the route deviates from the Green Line and traverses into the West Bank it is both unnecessary and disproportional. See Shany *op.cit.*, pp. 4-5.

<sup>47</sup> *Alian v. Prime Minister*, H.C.J. 4825/04, Written Response, 23 February 2005, at para. 266 (unofficial translation) cited in Yuval Shany, "Head Against the Wall? Israel's Rejection of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories" Vol. 7, *Yearbook of International Humanitarian Law*, 2004.

Clearly, therefore, there is evidence that Israel is aware of the legal validity that attached to the Court's opinion in the *Legal Consequence of the Construction of a wall* case and its authoritative value as regards principles of international law as applied in the case.

## VI. The Declaratory and Law Making Effect of Advisory Opinions

As is the case with the ICJ's contentious jurisdiction, the primary and immediate effect of an advisory opinion lies in the resolution of the legal issues put before it. At the same time, however, it is true that there are also other long-range effects that necessarily flow from the authoritative character of the World Court's opinions, one of which is the progressive development of international law.<sup>48</sup> It is also true that "in applying general rules of law to the particular cases, it is inevitable that the Court would by so doing perform a law making function."<sup>49</sup> Like many other international courts, the ICJ, both in its contentious and advisory jurisdictions, performs a law making function. As one writer correctly notes "one could say that international judicial law-making is not only beyond dispute in the sense of being an undeniable facet of global governance, but also in terms of being removed from politico-legislative processes and from challenge in the court of public opinion".<sup>50</sup>

Despite these considerations, the fact that the issuance of an opinion does not immediately result in compliance with the Court's views under the Statute and the Charter has fuelled a perception, echoed by early scholars, that the effect of the opinions given by the Court has been negligible. For instance, Prataap notes that the first opinion on the *Admissions Opinion* had no influence on the final resolution of the problem at hand. The essential question posed to the Court was whether UN members when voting on admission of a State to membership in the United Nations, could make their consent dependent on conditions not expressly provided the Charter such as the admission to membership of certain other States. Since it rejected the Soviet Union's argument that the UN was entitled to subordinate the admission of certain States to the condition of the simultaneous admission of certain other States, the Opinion in that case did not have the slightest chance of being adopted and put into effect by the Security Council.<sup>51</sup>

If, as it was thought, the aim of those requesting the opinion was to obtain a ruling regarding admission of new members that would have compelled the Soviet Union to conform to a view more amenable to the interests of Western States than that intention largely failed as in the end it was a "package deal" that was negotiated to solve the impasse. By a resolution of December 14, 1953, sixteen new members were admitted into the UN. The Court had dutifully said in its opinion that the provisions of Article 4 were exhaustive, and if a member State made its consent to the admission of a new State dependent on the admission of others, it would be introducing extraneous conditions in violation of the Charter. The prevailing view of the period, therefore, was that the opinion contributed little towards resolving the political problem of the admission of new members because the problem "did not originate in the explanations given for the negative vote, but in the underlying political situation in which these votes were merely an expression."<sup>52</sup> It would appear that there is no good reason not to believe that the existence of the *Admissions Opinion* did not actually assist both the West and the USSR to achieve the political solutions that eventually resolved the

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<sup>48</sup> Prataap, *op. cit.*, p. 246.

<sup>49</sup> *Ibid.*

<sup>50</sup> Armin von Bogdandy & Ingo Venzke, "Beyond Dispute: International Judicial Institutions as Lawmakers" Vol. 12 *German Law Journal* No. 05 (2011) p. 980; See further Karin Oellers-Frahm, *Lawmaking through Advisory Opinions?*, in this issue. For elaboration of the impact of each opinion, see Robert Howse & Ruti Teitel, *Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by its Ruling on Kosovo?*, 11 *German Law Journal* 841 (2010); *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory*, 99 *AJIL* 1 (2005).

<sup>51</sup> 1948 I.C.J. 57 p. 58; Prataap *op.cit.*, p. 250.

<sup>52</sup> *Ibid.*, p. 250.

admissions to the UN controversies. Having set out the relevant international law on the matter, the opinion would necessarily have factored into the necessary compromises that removed the political impasse.

Significantly, the second advisory opinion rendered by the Court *the Reparations Case* concerned the State of Israel and by all accounts this opinion was certainly effective because the Secretary-General was successful in recovering the United Nations claim for pecuniary reparation from the government of Israel.<sup>53</sup> The case concerned the murder of a Swedish national, Count Bernadotte, the United Nations' mediator in Palestine who was assassinated while serving as the UN in the city of Jerusalem then under Israel's control. The strict question of law was whether the UN could itself claim for reparations against Israel in respect of the Count's death. It has been said that Israel at that time was in a difficult position. That it paid the reparation because it could not have afforded to be recalcitrant to resolutions of the organisation that created it. Israel's obedience in this case was even more remarkable given that it was not at the material time even a member of the United Nations.<sup>54</sup> Other States concerned did not pay, contesting the basis for the calculation for damages.<sup>55</sup> Again this is a pointer to the fact that Israel as a State does understand the authoritative value of ICJ advisory opinions and their legal validity.

Other significant effects of advisory opinions lie in their disguised but effective treatment as precedents in all but name. Under the Statute of the ICJ, the Court has complete discretion not to treat its own judgments as precedent. Nevertheless, in several instances the Court has demonstrated that it follows the law it has laid down in earlier judgments. For instance, the Court's findings in the *Nuclear Weapons* case,<sup>56</sup> that there are 'intransgressible principles of international customary law' helped shed some light on the understanding of the *erga omnes* nature of breaches identified in the latter *Legality of the Construction of Wall Opinion*. The Court also refers to its previous opinions as basis for its conclusions in subsequent advisory and contentious cases and makes no difference for this purpose between advisory opinions and judgments. In this manner advisory opinions also help make international law.

The emerging conclusions, therefore, are that: (a) advisory opinions are formally non-binding; (b) they nevertheless have a clarifying, authoritative, persuasive and even declaratory effect upon legal situations; (c) refusal to abide by advisory opinions if this leads to further or consequential legal harm would create legal responsibility under international law for which legal persons whose rights and interests are injured may seek redress under law and under the principle *ubi jus ibi remedium*.<sup>57</sup> At first glance, these conclusions may appear to be contradictory, but they in fact are not. An advisory opinion may have a declaratory effect, which can affirm international responsibility and, therefore, trigger relevant international legal consequences, including damages and compensation.

Perhaps a bit more needs to be said about the declaratory effect of the opinion on at least two of these constituencies. With regards to the first group the international community -all States were found to be 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 created by such construction"; Furthermore all States parties to the Fourth Geneva Convention of 1949 are as a result of the opinion obligated to "ensure compliance by Israel with international humanitarian law as embodied in that Convention".<sup>58</sup> The UN on its part was as a result tasked with

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<sup>53</sup> Karin Oellers-Frahm, "Lawmaking Through Advisory Opinions?" Vol. 12 *German Law Journal* No. 05 (2011) p. 1042.

<sup>54</sup> J. Craig Barker, *International Law and International Relations (International Relations for the 21st Century)* (New York: Continuum-3PL, 2000) pp. 46, 68.

<sup>55</sup> *Prataap*, op.cit., p. 251.

<sup>56</sup> *Legality of the threat or use of nuclear weapons advisory opinion* [1996] I ICJ Rep 226, at para. 157.

<sup>57</sup> The Latin legal maxim *ubi jus ibi remedium* expresses the principle that "where there is a right, there must be a remedy".

<sup>58</sup> The clear majority of the Court apart from Judges Higgins and Kooijmans, maintained the view that the consequences for other States flows from the *erga omnes* character of the obligations breached.

considering what further action was required “to bring to an end the illegal situation resulting from the construction of the wall and the associated régime”.

On the part of Israel there are at least two immediate effects. First, it is now to be deemed that Israel from the day of the rendering of the Opinion of 9 July 2004 has knowledge of the illegality of its actions under international law even though it may have reasons that it considers binding upon it not to give effect to the imperatives of the opinion. Israel can, thus, no longer claim that it is not aware of the legal consequences of its actions in relation to the building and maintenance of the wall in the occupied territories. Second, the refusal of Israel to comply with the imperatives of the opinion gives rise to international responsibility. It is also of significance that the writings of highly qualified jurists are considered a source of Public International Law, have also accorded respect to advisory opinions. James Crawford, Special Rapporteur on State Responsibility from 1997–2001 has indicated in no uncertain terms that “States are responsible for acting in accordance with international law, despite the formally non-binding nature of the Advisory Opinion”.<sup>59</sup>

## VII. Reception and Continuing Legal Effects of the Opinion of 9 July 2004

The reception of the Court’s opinion may be analysed from a multiple stakeholder perspective and they all come together to paint a picture of authority, importance and significance for all concerned even from those quarters that were highly critical of the Court’s decision to exercise jurisdiction over the case. The more immediate stakeholders here include the Palestinian people, the State of Israel, The United States of America, the General Assembly, the Security Council and then of course the general international community.

### a) *Palestinian authorities*

With respect to the Palestinian people it is quite recognisable that because of the existential threat to the very survival of many Palestinian communities that the wall represents there has been before and after the Opinion, various forms of popular resistance to the wall by Palestinians living in the occupied territories. Cases have been brought up in Israeli courts; and externally by aggrieved persons and political activists. Hundreds of demonstrations against the wall have occurred since 2002. These events have been mostly designed to attract local and international media attention to the wall and its consequences despite the fear of repressions and adverse repercussions.<sup>60</sup> In response to many of these demonstrations and acts of rebellion, the Israeli military’s has been routinely forceful and harsh, including the use of armed raids, shooting of unarmed protesters with live ammunition, curfews, and mass arrests leading to deaths and injuries. As Suhail Khalilieh, head of the Urbanization Monitoring Department at the Applied Research Institute–Jerusalem (ARIJ) has pointed out: “at the end of the day, the West Bank is governed by the Israeli army and the civil administration, so it’s

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Obligations like these that are confirmed as owed *erga omnes* in previous case law include respect for the right of self-determination, and certain sacrosanct rules of International Humanitarian Law. *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep102 at 29. See also *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep at 79.

<sup>59</sup> James Crawford SC, *Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories* (July, 2012) p. 6, available at <http://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf>, accessed 14 December 2014; Clifford J. Hynning, “Sources of International Law” Vol. 34 *Chicago-Kent Law Review*, Issue 2 (1956) p. 129.

<sup>60</sup> As an activist put it Palestinians find it difficult to demonstrate about the wall, “because they don’t want to be in trouble with the occupation.” See Ben White, *Five Years After ICJ Ruling, Israel Expands Its Illegal Wall Onto More Palestinian Land*, Washington Report on Middle East Affairs, July 2009 available at <https://www.globalpolicy.org/international-justice/the-international-court-of-justice/48068-five-years-after-icj-ruling-israel-expands-its-illegal-wall-onto-more-palestinian-land.html>, accessed on 17 December 2014.

subject to military law. The Israeli army can simply override any court decision by saying they are doing it for military or security purposes.”<sup>61</sup>

Despite this harsh reality there appears to be a lack of coherent strategy by successive Palestinian leaders to exploit the Opinion rendered by the Court as a specific legal basis for seeking the destruction of the wall and reversal of the damage caused to the Palestinian people as a result of its introduction. Even supporters of the Palestinian cause have concluded that the Palestinian leadership has largely failed to meaningfully capitalise upon what is a significant legal endorsement of the Palestinian position.<sup>62</sup>

*b) Israel's Reaction*

As stated earlier, Israel not only rejected the Court's jurisdiction as well as the decision reached but it has embarked upon a brutal campaign of forceful actions to continue construction of the wall. It refrained from attempts at asking the court for appointment of an *ad hoc* judge – a fact that Judge Owada correctly noted would have greatly enhanced the task of “the Court in maintaining the essential requirement for fairness in the administration of justice”.<sup>63</sup> It declined to participate at the oral stage of the proceedings. Its written pleadings addressed only the jurisdictional aspects of the advisory procedure (with some allusions to few substantive arguments).<sup>64</sup>

It will, however, appear that after the Opinion was rendered by the Court Israel varied the direction and location of the wall in ways it (unilaterally) regarded as reducing the severity of the effects of the wall on the Palestinians.

As an observer of the Israeli policy on the wall put it:

“The ICJ's opinion stated that the barrier will de facto annex 16.6 percent of the territory of the West Bank – home to 237,000 Palestinians – and will limit the movement of 160,000 additional Palestinians. At the same time, 320,000 Israeli settlers would be situated west of the barrier. However, as a result of changes in the route of the barrier, introduced mainly after the decision of the HCJ in Beit Sourik, the swathe of West Bank land severed by the barrier has decreased to eight percent of the area, in which no more than 30,000 Palestinians reside (excluding East Jerusalem residents and territory). Furthermore, the military announced its intention to improve passage through the numerous gates spread along the route of the barrier.”<sup>65</sup>

Since the general attitude of the State of Israel to the Opinion is that of rejection and refusal to give effect to it, it is difficult to see how much credit if any can be given to it for attempting to give effect to the opinion. Israel indeed advised its Supreme Court that the ‘advisory opinion has no bearing upon the claims at hand, and the claims should be adjudicated in accordance with the factual and normative framework designed by the Supreme Court, prior to the request for the opinion as manifested in the domestic *Beit Sourik case*.<sup>66</sup> The refusal to grant substantive recognition to the Court's opinion is indeed recognisably in line with the modern character of Israel as a State with a determinably obtuse relationship with international laws. As a writer attests: “The decision of Israel to reject the relevance of the Advisory Opinion for domestic law purposes perhaps comes as no surprise to observers of Israel's ambivalent attitude towards international bodies”.<sup>67</sup> At any rate the wall still

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<sup>61</sup> Quoted in *ibid*.

<sup>62</sup> This is a view even held by senior figures within the Palestinian Authority such as Sameeh al-Naser, erstwhile deputy governor of Qalqilya. *ibid*.

<sup>63</sup> Separate Opinion of Judge Owada, para 19.

<sup>64</sup> As Shany explains: “This limited cooperation approach was designed to reconcile a few conflicting policies: the political futility of ignoring the proceedings altogether and the need to exercise damage control, on the one hand, and the reluctance to legitimate the outcome of the proceedings by way of active engagement, on the other hand” Shany *op.cit.*, pp. 3-4.

<sup>65</sup> *Ibid* p. 7.

<sup>66</sup> *Beit Sourik Village Council v. Government of Israel*, H.C.J. 2056/04, 2004(2) Takdin- Supreme 3035.

<sup>67</sup> Shany *op.cit.*, p. 1; Cf. J. Dugard, ‘The Implications for the Legal profession of conflicts between international law and national law’, 46 *South Texas LR* (2005) pp. 579-594, at p. 586.

stands and more portions are still being added to it even as at time of this publication.<sup>68</sup> It remains considerably intrusive and continues to have very serious humanitarian and territorial implications as outlined above. The refusal to recognise the Opinion for domestic purposes (the only place where it really matters) is most devastating to the Palestinians. Indeed the only genuine and enduring value of the Opinion ought to be in the lives and properties it saves and/or enriches 'on the ground' and in the occupied territories.

*c) Security Council*

Despite complaints from the representatives of the Palestinian peoples and other concerned governments and States since the very beginnings of the creation of the wall<sup>69</sup> and annually since the advisory opinion was rendered,<sup>70</sup> the Security Council has been largely paralyzed by the politics of things. The Security Council has done nothing meaningful to bring about compliance with the advice given by the court whereas it is the very body charged with the primary responsibility for the maintenance of international peace and security (Article 24, UN Charter). The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security (Article 34, UN Charter). Accordingly the Security Council may, at any stage of a dispute recommend appropriate procedures or methods of adjustment. When acting in this manner, the Security Council is expected to take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties (Article 36). Although in this particular case the dispute was not sent for judicial consideration by 'parties', the only appropriate and reasonable view is that the Security Council ought to take into account the procedure adopted by the General Assembly by way of the request for advisory opinion which had been granted.

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<sup>68</sup> Peter Beaumont, "Israel Resumes Work on Controversial Separation Wall in Cremisan Valley", *Guardian*, Tuesday 18 August 2015, available at <http://www.theguardian.com/world/2015/aug/18/israel-resumes-work-controversial-separation-wall-cremisan-valley>, accessed 05 September 2015.

<sup>69</sup> International opinion coalesced quite quickly against plans for the wall. The Chairman of the Arab Group, the Non-Aligned Group, the Islamic Republic of Iran and the Organization of the Islamic Conference respectively requested an urgent meeting of the Council to discuss the Israeli decision to construct a wall in the occupied Palestinian territory in letters as far back as October 2003 (S/2003/974 and S/2003/977, S/2003/973, S/2003/973); See Security Council, Chapter X Consideration of the provisions of Chapter VI of the Charter pp. 848-849, available at [http://www.un.org/en/sc/repertoire/2000-2003/00-03\\_10.pdf](http://www.un.org/en/sc/repertoire/2000-2003/00-03_10.pdf), accessed 19 December 2014.

<sup>70</sup> A full decade after the ICJ deemed illegal the situation arising from Israel's construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, the Palestinian Rights Committee, at a special meeting, reaffirmed the Court's findings and made a call on Israel to immediately dismantle its system of walls and fences and to compensate aggrieved Palestinians that had sustained damages as a result of its actions. General Assembly, "Israelis, Palestinians Must Find Path to Peace 'Before Hope and Time Run Out', Says Secretary-General at Meeting to Observe Day of Solidarity Committee on the Inalienable Rights of the Palestinian People" 367th Meeting 24 November 2014 GA/PAL/1320. Similarly the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, in 2014 noted that the Special Committee was appalled by the humanitarian impact of recent escalation of violence. It pointed out again that the ongoing construction of the wall was illegal See "Palestinian Rights Committee Members Urge Removal of Barrier Wall Creating Situation Deemed Illegal 10 Years Ago by International Court of Justice" 9 July 2014 GA/PAL/1308 available at <http://www.un.org/press/en/2014/gapal1320.doc.htm>, accessed 25 December 2014; Note also references to the illegal wall during other discussions at the General Assembly "Flouting International Law, Racism Pervades All Countries, Third Committee Hears at Start of Debate" Sixty-ninth session, General Assembly 37th & 38th Meetings 3 November 2014 GA/SHC/4115, available at <http://www.un.org/press/en/2014/gashc4115.doc.htm>, accessed 27 December 2014; See further the following S/PV.6363, p. 6; S/PV.6623, pp. 3-5 Part I Repertoire of the Practice of the Security Council 17th Supplement 2010-2011 Department of Political Affairs - Security Council Affairs Division Security Council Practices and Charter Research Branch. Available at [http://www.un.org/en/sc/repertoire/2010-2011/Part%20I/2010-2011\\_palestine\\_rev.pdf](http://www.un.org/en/sc/repertoire/2010-2011/Part%20I/2010-2011_palestine_rev.pdf), accessed 19 December 2014.

It is obviously reasonable to expect the Security Council to do much more given the legal duties placed on it under the Charter and given that Article 36 (3) of the Charter crucially provides that the Security Council “should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court”. In discharging the duties of the Security Council it is expected to act in accordance with the purposes and principles of the United Nations, one of which surely is giving and according respect to the decisions of the World Court.<sup>71</sup>

Thus, despite the opportunity provided by the opinion rendered in this case, the Security Council has done little of importance to grapple with the grave situation posed by the Israel-Palestine conflict since Resolutions 242<sup>72</sup> and 338.<sup>73</sup> To explain these incongruous situations, we may need to consider the influence of the United States of America on the entire Israel-Palestinian process and of course its own peculiar reception of the opinion in this case. It is generally recognised that the US has generally kept the issue off the Security Council's agenda.<sup>74</sup> Whenever Council members have introduced resolutions, responding to periodic crises, the US has repeatedly applied considerable diplomatic pressure to prevent progress on the matter in the one avenue where it matters most. This of course brings us to the need to briefly also consider the reactions of the United States to the Opinion of the Court in this case.

#### d) *United States of America*

It is pertinent to note that the US and Israel and only 6 other States out of the then 191 members of the UN voted against the General Assembly resolution that requested the Advisory Opinion in this particular case in the first place. The US indeed exercised its veto in the Security Council when a resolution on construction of the wall was introduced. This resolution (sponsored by Syria, Pakistan, Malaysia and Guinea on 14 October 2003), the operative paragraph of which simply wanted the Security Council to decide “that the construction by Israel, the occupying Power, of a wall in the Occupied Territories departing from the armistice line of 1949 is illegal under relevant provisions of international law and must be ceased and reversed”.<sup>75</sup> If of course the Security Council had allowed this proposed resolution to pass in a meaningful sense, there would have been very little need if any for the ICJ to render an opinion on the legal issues.

The US expressed the view that the draft resolution as put forward was unbalanced and did not condemn terrorism in explicit terms. After the Opinion was rendered, reactions emanating from the US government and politicians of both the Republican and Democratic parties<sup>76</sup> were of rejection of the opinion. The US House

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<sup>71</sup> This is a general principle of UN practice as the ICJ is the principal judicial organ of the UN. See also generally Dapo Akande, *The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?* Vol. 46, *International and Comparative Law Quarterly*, (1997) *et seq.*

<sup>72</sup> S/RES/242 (1967) 22 November 1967. This resolution demanded *inter alia*: (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict; (ii) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.

<sup>73</sup> Adopted at the 1747th meeting by 14 votes to none. S/RES/338 (1973) 22 October 1973. This resolution given in 1973 essentially only reiterated the duty upon the parties concerned to immediately start implementation of Security Council resolution 242 (1967) in all of its parts.

<sup>74</sup> GPF, “Israel, Palestine and the Occupied Territories” Global Policy Forum <https://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/israel-palestine-and-the-occupied-territories.html>, accessed December 2014.

<sup>75</sup> The resolution was supported by 10 out of the 15 members of the Security Council. This includes the sponsors and Angola, Chile, China, France, Russia and Spain. Although only the US opposed and exercised the veto, the UK abstained, along with Bulgaria, Cameroon and Germany. David Morrison, “Wall illegal, says ICJ” *Labour & Trade Union Review* August 2004 available at <http://www.david-morrison.org.uk/palestine/wall-illegal.htm>, accessed on 26 December 2014.

<sup>76</sup> The day the ICJ Opinion was pronounced New York's two senators, Democrats Hillary Clinton and Charles Schumer, joined Israel's UN Ambassador, Danny Gillerman, at a press conference in front of UN headquarters in New York to denounce it. Clinton was of the view that: “It makes no sense for

of Representatives on 15 July passed a resolution clearly criticising the ICJ decision by a 361-45 majority. The majority commended “the President and the Secretary of State for their leadership in marshalling opposition to the misuse of the ICJ in this case”.<sup>77</sup> The resolution deplored “the misuse of the International Court of Justice (ICJ) by a majority of members of the UN General Assembly for the narrow political purpose of advancing the Palestinian position” and went on to warn that States “risk a strongly negative impact on their relationship with the people and government of the United States should they use the ICJ’s advisory judgment as an excuse to interfere in the Roadmap process”.<sup>78</sup> The US went ahead to make written statements submitted to the Court asking to the court not to follow the requests by the UN General Assembly to render advisory opinions on the *Legality of the Construction of Wall Opinion*.<sup>79</sup> It is, a curious but significant fact, however, that before the Opinion was given by the Court, the erstwhile President of the US, George Bush had admitted that: “I think the wall is a problem, and I have discussed this with Ariel Sharon. It is very difficult to develop confidence between the Palestinians and the Israelis ... with a wall snaking through the West Bank.”<sup>80</sup>

The US Senate soon thereafter introduced an even more biased resolution on 20 July when it announced that it was in support of the construction by Israel of a security fence and condemned “... the decision of the International Court of Justice on the legality of the security fence, and urging no further action by the United Nations to delay or prevent the construction of the security fence”.<sup>81</sup>

e) *The General Assembly*

From an international perspective there was an enthusiastic reception of the advisory opinion in this case as would be expected. The first reaction of the General Assembly was in the form of the adoption of Resolution ES-10/15 on 2 August 2004.<sup>82</sup> The 150 States that voted in favour of UN General Assembly resolution ES-10/15 had certainly by implication acknowledged the duty of Israel and all UN Member States to “comply with their legal obligations as mentioned in the advisory opinion.”<sup>83</sup> This resolution achieved a number of important things *inter alia*, it: (a) reaffirmed the right of the Palestinian people to self-determination (preambular provision) (b) specifically acknowledged the opinion rendered by the court (para. 1); (c) demanded, that Israel comply with its legal obligations as had been enumerated by the Court (Para 2);<sup>84</sup> (d) called upon Member States to comply with obligations that the Court had pronounced were incumbent upon them; (e) identified the duty imposed upon all States party to the Geneva Convention IV to ensure that Israel respect the provisions of the Convention (para. 7); (f) invited Switzerland, the depository State of the Geneva Conventions, to immediately engage in consultations on this matter and report back to the General Assembly (para. 7); and (g) requested the Secretary-General to establish a register of

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the United Nations to vehemently oppose a fence which is a non-violent response to terrorism rather than opposing terrorism itself”. Senator John Kerry in similar vein stated: “I am deeply disappointed by today’s International Court of Justice ruling related to Israel’s security fence. Israel’s fence is a legitimate response to terror that only exists in response to the wave of terror attacks against Israel. The fence is an important tool in Israel’s fight against terrorism. It is not a matter for the ICJ”. See Morrison, *op.cit.*

<sup>77</sup> Quoted in *ibid.*

<sup>78</sup> U.S. House of Representatives, House Resolution 713, 108th Congress, 2nd Session. Accessed at: [www.israelisgorges.org/hres713.html](http://www.israelisgorges.org/hres713.html);

<sup>79</sup> Written Statement of the Government of the United States of America, 20 June 1995 at 3-4 available at <http://www.icj-cij.org>, accessed 05 September 2015.

<sup>80</sup> K. Gajendra Singh, “*Middle East Commentary: Treating the Symptoms Instead of the Cause*”, available at [http://www.atimes.com/atimes/Middle\\_East/EG31Ak02.html](http://www.atimes.com/atimes/Middle_East/EG31Ak02.html), accessed on 27 December 2014; also quoted in *ibid.*

<sup>81</sup> Quoted in *ibid.*

<sup>82</sup> 31 UN Doc.A/RES/ES-10/15 (2 Aug. 2004).

<sup>83</sup> Mondoweiss Editors, “*10 Years after the Advisory Opinion on the Wall in Occupied Palestine: Time for Concrete Action*” on July 9, 2014; Available at at: <http://mondoweiss.net/2014/07/occupied-palestine-concrete#sthash.fr2n8UIR.dpuf>, accessed 1 December 2014.

<sup>84</sup> Supra note 82, operative para. 2.



damage caused to all natural or legal persons as the result of the construction of the wall.

The establishment of the register of damage deserves special attention as a matter of fact and law and because of its future financial ramifications to the State of Israel and its value as precedent. Within 6 months of the mandate received under Resolution ES-10/15 of 2 August 2004, the General Assembly in another resolution A/RES/ES-10/17 of January 2007 created the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory (UNRoD).<sup>85</sup>

Subsequent legal analysis of Israeli violations and their consequences for Palestinian human rights have reaffirmed and complemented the ICJ Advisory Opinion in response to the particular question that the General Assembly put to it. The ICJ Advisory Opinion already had underlined the fact that the Wall was a component of the wider Israeli annexation and settlement enterprise that systematically violates Palestinians' human rights. Indeed consecutive UN Special Rapporteurs on the situation of human rights in the occupied Palestinian territory have concluded that Israel's occupation and regime, to the extent that it integrates the settler colonies and the Wall, has resulted in institutionalized discrimination, segregation and systematic and severe violation of Palestinians' human rights. They have indeed characterized this Israeli regime as one "of prolonged occupation with features of colonialism and apartheid."<sup>86</sup> UN treaty bodies such as the UN Committee on the Elimination of Racial Discrimination (CERD) and independent legal studies have supported these findings. It follows that these Israeli violations trigger not only State responsibility, but also individual criminal liability under the Rome Statute of the ICC<sup>87</sup> and other standards of international criminal law.

In terms of the overall question of the rights of the Palestinian peoples to self-determination the advisory opinion also has effects. The view of the General Assembly has been that the Court considered the breaches of Israel in building the wall as affecting negatively the right of peoples to self-determination, which is a right *erga omnes* (Advisory Opinion, para. 88 and para. 122.). The General Assembly has since the opinion also expressed the firm belief that Israel, the occupying Power, in the Occupied Palestinian Territory, including East Jerusalem, through the construction of the wall along with measures previously taken, severely impedes the right of the Palestinian people to self-determination.<sup>88</sup> This is a view shared unequivocally by the current chief executive of the United Nations itself in the person of the Secretary General of the United Nations -Ban Ki-moon. At a special meeting to mark the 10th anniversary of the delivery of the advisory ruling declaring Israel's construction of a separation wall in the West Bank as illegal, Secretary General reminded all Member States to comply with international law and emphasised that the wall increased settlement activity and has been fuelling tensions. He correctly pointed out that "[t]he implications of the wall go far beyond its legality... The wall severely restricts Palestinian movement and access throughout the West Bank, cuts off land and access to resources needed for Palestinian development, and continues to undermine agricultural and rural livelihoods throughout the West Bank..."<sup>89</sup>

Despite the impressive array of legal responses by the General assembly discussed above progress in giving effect to the opinion has been slow if not negligible. Some writers have tried to show that the General Assembly has not done enough to create the desirable changes especially in view of the crucial finding of the Court that the violation of the Palestinian right to self-determination by Israel is in the nature of rights and obligations that are indeed *erga omnes*. Scobbie laments:

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<sup>85</sup> Discussed below.

<sup>86</sup> Mondoweiss Editors, *op. cit.*

<sup>87</sup> 1998 Rome Statute of the International Criminal Court 2187 UNTS 90/37 ILM 1002 (1998)/[2002] ATS 15.

<sup>88</sup> Sixty-eighth session Third Committee Agenda item 68 The right of the Palestinian people to self-determination (A/C.3/68/L.68)- Vote: 165 Yes, 6 No, 3 Abstain.

<sup>89</sup> UN News Centre, *op.cit.*

Despite this classification of the norms which were at the heart of the proceedings and central to the question of Israeli responsibility, the General Assembly only called upon States to discharge the responsibilities identified as incumbent upon them by the Opinion. Can it be said that this adequately addresses the findings of the International Court and the responsibility placed upon the General Assembly to ‘consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion’?<sup>90</sup>

### VIII. Impact of the Wall: Sealing in and *Bantuization* of Palestine

Few observers of Israel’s Palestinian policy would have any problem identifying the construction of the wall as a deliberate mechanism of furthering the occupation of Palestine along with a choking control of its borders, air space, and territorial waters.<sup>91</sup> It was clear from the early stages that Israel intended to use domestic quasi-legal techniques to acquire large amounts of land along the path of the barrier.<sup>92</sup> More than one-third of West Bank settlements were built on private Palestinian land that was ‘temporarily’ seized by military order for "security purposes," according to a report by Israel’s own Civil Administration.<sup>93</sup> Independent assessment from Western diplomatic sources appear to confirm that Israel’s apparent aim is to annex the Arab area of Jerusalem, using illegal Jewish settlement construction and the vast West Bank barrier.

It has for instance been correctly observed that:

"Israeli activities in Jerusalem are in violation of both its Roadmap (peace plan) obligations and international law.... This de facto annexation of Palestinian land will be irreversible without very large-scale forced evacuations of settlers and the re-routing of the barrier.... When the barrier is completed, Israel will control all access to East Jerusalem, cutting off its Palestinian satellite cities of Bethlehem and Ramallah, and the West Bank beyond. This will have serious ... consequences for the Palestinians.... Israel's main motivation is almost certainly demographic ... the Jerusalem master plan has an explicit goal to keep the proportion of Palestinian Jerusalemites at no more than 30% of the total."<sup>94</sup>

Indeed as the years go by it becomes clear that the thrust of Israeli boundary policy is designed to prevent Jerusalem from becoming a Palestinian capital, particularly settlement expansion in and around the city. Israel was not in fact very successful in peddling its claim that the wall was always about security. The objective

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<sup>90</sup> Iain Scobbie, "Unchart(er)ed Waters?: Consequences of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory for the Responsibility of the UN for Palestine" Vol. 16 *The European Journal of International Law* no.5 (2006) p. 949; See also *Legality of the Construction of Wall Opinion* at paras 160 and 163.3.E.

<sup>91</sup> Cf. Richard Falk, *Statement on the situation in the Gaza Strip*, Geneva, 9 January 2009 (excerpts). *Journal of Palestine Studies*, Vol. 38, No. 3 (Spring 2009), p. 341.

<sup>92</sup> Greg Myre, "Israel Confirms Plan to Seize West Bank Land for Barrier", *New York Times* August 25, 2005. The cloak of legality through domestic law is not only attempted as a matter of constitutional legality but as a matter of pragmatism to resolve diligent opposition and appeals by affected persons and families. Israel's courts and even its Supreme Court have had to order the state to redraw the route of its West Bank separation barrier near Palestinian villages. See Associated Press, *Israel Court: Redraw Route Barrier* September 5, 2007 available at <https://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/israel-palestine-and-the-occupied-territories/38243.html>, accessed on 03 September 2015. Cf. Shany, *op.cit.*, p. 7.

<sup>93</sup> See Meron Rapoport, "A Third of Settlements on Land Taken for "Security Purposes", *Haaretz*, (February 17, 2008).

<sup>94</sup> Extracts from a document, drawn up by the British consulate in East Jerusalem as part of the UK's presidency of the EU, in 2005 quoted in Chris McGreal, "Secret British Document Accuses Israel; FO Paper Says International Laws Are Being Violated and Peace Jeopardized" *Guardian*, November 25, 2005; Also available at <https://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/israel-palestine-and-the-occupied-territories/38324.html>, accessed 03 September 2015.

reality created by the existence of the wall was captured most incisively in the following words:

The Palestinian State will effectively become a series of unstable pockets, completely surrounded lest they expand, within a Zionist body-politic that will cover all the territory between the Mediterranean sea and the Jordan river. The archipelago of isolated territories around the Palestinian cities that remain, initially under IDF control, will gradually turn into what will become the "Palestinian State within its temporary borders" – the one the "roadmap" has as its objective. The Green Line, which the Palestinian government would like to see as its border with Israel, is 350 kilometres long, but the total length of barriers projected to be constructed between Israel and the Palestinians stretch to more than 1,200 kilometres. In this geographic arrangement, the Palestinians are simultaneously inside and outside: landlocked inside a complete territorial envelopment, without any border save the very long and fragmented one to Israel, but – recalling the apartheid-era South African Bantustans – outside the Israeli State system.<sup>95</sup>

A 2008 map made by the UN Office for the Coordination of Humanitarian Affairs revealed that the separation wall has already trapped a quarter million Palestinians in enclaves to the east and west of the main barrier and isolated approximately 500,000 Palestinians who live in East Jerusalem from the rest of the West Bank. It currently separates over 90 Palestinian communities from their agricultural land. A further consequence of the wall is that at certain portions of its length it impinges on Catholic-owned lands and this has been the subject of separate negotiations with the Vatican.<sup>96</sup>

Indeed the refusal of Israel to give effects to the Advisory Opinion and its policy of continuation of building and modifying the wall has had proven and devastating effects on Palestinian individuals, businesses, villages and communities. The United Nations Relief and Works Agency (UNRWA) has for many years carefully documented and highlighted the hardship brought on several families in relation to the wall.<sup>97</sup> The case of the Nijim family, for instance, is very instructive. This family has lived for over four decades in the village of Qatanna, northwest of Jerusalem, where construction of the Barrier was completed in 2009 (after the Legal Consequences of Wall case). Every member of the Nijim family has been required to obtain permits from the Israeli authorities in order to reside in their own home. Access to their home has been severely restricted and monitored by several electronic monitoring equipment. Entry and exit from their property is controlled remotely by the Israeli Border Police and on many occasions, the family has been denied entry to their home for hours. The situation has affected not only family finances but religious and personal rights as no visitors are allowed to their home. The family head admits "My home has become a group prison for me and my family, but we are not going anywhere."

In this area alone the wall has had tragic consequences for the economic survival of entire Palestinian communities. This is more so as it diverges significantly from the Green Line around the Gush Etzion settlement bloc. Its potential effect on up to 22000 Palestinian residents of Al walaja include the isolation of up to seven Palestinian villages between the Barrier and the Green Line. It has created enclaves of Palestinian settlements away from their own people, separated farmers from their agricultural land, leaving them with occasional access via 'agricultural gates' and witnessed destruction of hundreds of economic trees such as almond, olive, apricot and grapes vital to the survival of the victim communities and their livelihood.<sup>98</sup>

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<sup>95</sup> Eyal Weizman, "Ariel Sharon and the Geometry of Occupation: Temporary Permanence", Open Democracy, September 5, 2007, available at <https://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/israel-palestine-and-the-occupied-territories/38244.html>, accessed 03 September 2015.

<sup>96</sup> René Backmann, *A Wall in Palestine*. A. Kaiser trans. (New York: Macmillan, 2010) pp. 24, 64.

<sup>97</sup> UNRWA, "The International Court of Justice Advisory Opinion on the Wall - Nine Years Later" 10 July 2013", 10 July 2013. Available at <http://www.unrwa.org/newsroom/features/international-court-justice-advisory-opinion-wall-nine-years-later?id=1819>, accessed on 02 September 2015.

<sup>98</sup> UNRWA West Bank Public Information Office, "Mini profile: Al walaja Bethlehem Governorate" (2013) pp. 1-4, available at [www.unrwa.org](http://www.unrwa.org), accessed 02 September 2015.

One of the other areas in which construction of the wall has wrecked serious havoc on Palestinian lives is the 'Biddu enclave'. This newly created enclave is located 10 kilometres northwest of Jerusalem and consists of a cluster of eight Palestinian villages in the West Bank with more than 30000 people. The UNRWA recognises that landowners in Biddu, Beit Ijza and Beit Surik have lost direct access to 31-38 per cent of the total area of their communities and around 20 per cent of their original agricultural lands in the West Bank. Punitive systems of agricultural gates and permit regimes have had devastating impact on farmers' livelihoods.<sup>99</sup>

Based on these proven violations UNRWA has correctly demanded that:

As the occupying power, Israel must take all measures to fulfil its obligations under international law, including: comply with the findings of the ICJ Advisory Opinion, namely cease the construction of the wall in the oPt, including East Jerusalem; dismantle the structure therein situated; rescind all legislative and regulatory acts relating to the wall; and make reparations for all damage caused by the construction of the wall.<sup>100</sup>

### **IX. UNRoD and the Application of the Principles of State Responsibility to the Wall**

As Green Hackworth a delegate of the US to The Hague Conference for the Codification of International Law identified nearly a hundred years ago "[t]here is perhaps no subject of international law so constantly and so actively before the nations, nor one which so virtually affects them as, as that of the Responsibility of States".<sup>101</sup> The responsibility of States for damage caused in their territory to the person or property of foreigners involves principles that underlie the whole fabric of public international law.

Israel bears international responsibility for its actions in relation to the construction of the wall and the economic and other damage caused to Palestinians and others affected by their actions. This conclusion is consistent with the interpretation of State responsibility decided by the ICJ in the *United States Diplomatic and Consular Staff in Tehran* (United States v. Iran) (1979-1981). Many of Israel's action also fall within the definition of aggression committed against the people of Palestine for which it also bears international responsibility.<sup>102</sup>

The responsibility of Israel is dictated first and foremost by international law as attested to by the unequivocal advisory opinion of the ICJ. That responsibility is further aggravated by the continuous and egregious nature of the breaches carried out by further construction and maintenance of the wall as well as its direct effect on the right of self-determination of the Palestinian people (para 122 of the Opinion). One of the key commendable features of international reaction to the intransigence displayed by Israel over the years has been the introduction of UNRoD. This unique body was created as a subsidiary organ of the General Assembly of the United Nations and operates under the administrative authority of the Secretary-General at the site of the

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<sup>99</sup>UNRWA West Bank Public Information Office, "Mini profile: Biddu Enclave Jerusalem Governorate" (2013) pp. 1-4, available at [www.unrwa.org](http://www.unrwa.org), accessed on 02 September 2015.

<sup>100</sup> UNRWA (2013) Ibid. As a minimum set of measures UNRWA has insisted that Israel must provide unrestricted access for Palestinians separated from their lands by the Barrier. And that such access should only be restricted for reasons of absolute military necessity. In the event of absolute military necessity UNRWA correctly indicates that, the relevant Israeli authorities must take all measures to ensure that a well-functioning system is established whereby Palestinians can continue to access their lands at all times, together with all required agricultural equipment, inputs and labour. This is to ensure that communities may be able to continue proper maintenance, cultivation, harvesting and transportation of crops from their land. See UNRWA West Bank Public Information Office, "Mini profile: Biddu Enclave Jerusalem Governorate" p. 4.

<sup>101</sup> Green H. Hackworth. "Responsibility of States for Damages Caused in Their Territory to the Person or Property of Foreigners", 24 *Am. J. Int'l L.* 500 (1930) p. 500.

<sup>102</sup> Palestine UNGA Resolution on the Definition of Aggression (GA Res 3314 (XXIX) 1974).

United Nations Office at Vienna (UNOV). UNRoD's mandate and activities has been to serve as an authoritative record of documentary evidence, relating to the damage caused to all natural and legal persons concerned as a result of the construction of the Wall including in and around East Jerusalem. Very significantly it has been receiving processes and reviewing claims from natural and legal persons who have sustained material damage or loss as a result of the construction of the Wall in the Occupied Palestinian Territory. As a result as at November 2014, more than 43,850 claims have been reported and between 650,000 to 1.1 million supporting documents have been supplied to UNRoD with respect to the Occupied Palestinian Territory.<sup>103</sup>

Claim intake activities have been completed in six out of nine affected governorates - Tubas, Jenin, Tulkarem, Qalqiliya, Salfit, and Hebron - and are nearly completed in Ramallah and ongoing in Bethlehem. As of December 2014, a total number of 15,798 of the collected claims have been reviewed by the Board of UNRoD for its inclusion in the Register.

The introduction of UNRoD and its meticulous gathering of data and evidence is very much in line with two key principles –one customary and the other recently emergent. The first is the general principle of customary international law that provides that there is an obligation of reparation for acts of damage for which sovereign States have responsibility in law. The ICJ's predecessor, the Permanent Court of International Justice, had occasion to express this customary principle in the *Chorzów Factory* case when it stated that:

“It is a principle of international law, and even a general conception of the law, that any breach of an engagement involves an obligation to make reparation ... Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.”<sup>104</sup>

The formidable position of customary international law on the issue has been further strengthened by the 2005 General Assembly acclamation of “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”. As Iain Scobbie correctly identifies, this important mechanism was expressly created in relation to Israel's obligation to make reparation declared in paragraphs 152–153 of the Advisory Opinion.

The second principle is the recognition of the individual as a direct recipient of rights under international law. Leah Friedman, correctly notes that this opinion has increased:

“... the extent to which relief procedures available under international human rights instruments will now be seen to apply in the context of armed conflict. Mechanisms of individual redress, available under human rights instruments, support the view confirmed recently by Justice Michael Kirby, that a State's obligations under human rights law are owed to individuals, rather than to other States.”<sup>105</sup>

There is, therefore, the reasonable conclusion that it is beyond doubt that the Court's decision established Israel's responsibility for redress in respect of the Palestinian people and affected legal persons (See para. 163 of the decision). It is in fact argued here that this responsibility for redress extends beyond the Palestinian people to include responsibility for wilful damage to the interests of other States who may be harmed as a result of a reasonable and viable attempt to put an end to the illegality of the wall in question. There are two levels of understanding of the liabilities

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<sup>103</sup> UN News Centre, “*Ban says Israel's Construction of West Bank Wall Violates International Law, fuels Mid-East Tensions*”, available at <http://www.un.org/apps/news/story.asp?NewsID=48236#.VJxvODpDY>, accessed 25 December 2014; UN, “*About UNROD*”, <http://www.unrod.org/http://www.unrod.org/>, accessed 26 December 2014.

<sup>104</sup> *Factory at Chorzow (Germ. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13) para 73. The Permanent Court of International Justice (PCIJ) cases are available at [http://www.worldcourts.com/pcij/eng/decisions/1928.09.13\\_chorzow1.htm](http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1.htm), accessed 08 December 2014.

<sup>105</sup> *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 213 ALR 688.

involved here. They are; liability for wrongful actions and damage caused since the inception and execution of its plans to build the wall and liability for wrongful actions and damage caused since the decision in the *Legal Consequences of Wall* case rendered on 9 July 2004.

## X. Israel's Responsibility to other States

One of the reasons why accession to the Rome Treaty and the assimilation of Palestine into the brotherhood of States is significant and definitely not in the imperialistic interests of Israel is that it increases the number of States that may legitimately come to Palestine's aid. Israeli aggression and egregious actions in relation to the occupied territories may be challenged by other contract States and on an increasing number of legal basis. Furthermore when other States are acting legitimately to bring the illegal situation to an end, resistance by the government of Israel may create further burden of responsibility and liability on their State.

Article 48(1) of the Draft Articles on State Responsibility from 2001 provides that States other than the injured State may invoke the responsibility of another State if (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) The obligation breached is owed to the international community as a whole.<sup>106</sup>

The idea of Palestinian statehood has for long enjoyed international support. The treatment of the Palestinian people by Israel and more recently the wall policy are two related issues that have earned Israel a lot of opprobrium in the international community.<sup>107</sup> It is indeed arguable that with the current support the Palestine enjoys in the General Assembly today continuous illegal and egregious acts against the territory and the people by Israel would constitute breaches of obligations owed to the international community as a whole. Further illegal Israeli actions with respect to the wall and indeed other areas of its illegal occupation may, therefore, constitute breaches of the peace owed to the international community as a whole. Other States may also, therefore, invoke the responsibility of Israel for its actions to the Palestine or to themselves in their protective actions in favour of Palestine.

The responsibility borne by Israel for its actions in relation to the wall is no way displaced by the excuse that they are necessary on grounds of security. Note could also be taken of the unsatisfactory practice of certain States (notably by Israel, the United States and erstwhile apartheid South Africa) to use excessive force in self-defence in response to attacks, by indiscriminately targeting terrorist bases in the alleged host country. Such negative action cannot be said to be part of State practice or a reflection of custom to the extent that majority of States did not share let alone approve this view. As confirmed by the *Nicaraguan case*, armed reprisals or repressive and oppressive actions in response to small-scale use of force short of an 'armed attack' proper, have been regarded as unlawful both against States and against terrorist organisations.<sup>108</sup>

At any rate the security argument for the wall's existence continues to wear thin as the years go by, Perhaps no better way of dispelling the security justification

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<sup>106</sup> UNGA Res 56/83 (12 December 2001) A/RES/56/83 art 48(1). See also International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (UN, 2001) [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf), accessed 30 October 2009.

<sup>107</sup> Recently the Pope visited and prayed at the wall in what has been described by a Vatican spokesperson Father Federico Lombardi as "a very significant way to demonstrate his participation in suffering ... It was a profound spiritual moment in front of a symbol of division." Peter Beaumont, "Pope Francis Offers Prayers at Israeli separation wall in Bethlehem, *Guardian*, available at <http://www.theguardian.com/world/2014/may/25/pope-francis-israeli-separation-wall-bethlehem>, accessed on 05 September 2015.

<sup>108</sup> *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. United States of America); I.C.J. Reports 1986, p. 14.

exist other than making reference to the conclusions of Richard Falk as UN Special Rapporteur on the Situation of Human Rights in the Palestinian Occupied Territories. He drew attention to the clear connections between Israeli security concerns and the Palestinian right of self-determination. He wrote:

As long as Palestinian basic rights continue to be denied, the Palestinian right of resistance to occupation within the confines of international law and in accord with the Palestinian right of self-determination is bound to collide with the pursuit of security by Israel under conditions of prolonged occupation. In this respect, a durable end to violence on both sides requires an intensification of diplomacy with a sense of urgency, and far greater resolve by all parties to respect international law, particularly as it bears on the occupation as set forth in the Fourth Geneva Convention.<sup>109</sup>

## **XI. Alternative Futures: Dealing with the Refusal to Implement the Decision within International Law and Diplomacy**

### *Further Exploration of the Judicial Route*

It is interesting that some of the frustration of commentators on the continuing nuisance and illegality of the wall has again been directed towards the Court.<sup>110</sup> It is as though the World Court is somehow responsible for the intransigence of Israel or the inability of the international community to force Israel to give effect to the legal imperative of tearing the wall down. Such views are, however, based upon inconclusive reasoning about the constitutionalism of the United Nations Organisation and of international law generally. As in municipal situations it is not for a court to bother about the enforcement of its judgments or the acceptance of its opinions beyond the satisfaction of its own judicial competences before it becomes *functus officio*.

It may be argued that by giving a definitive and clear response in this case, the Court indeed placed an obligation on the United Nations as a whole to introduce measures to bring all parties to the path of legality. Ultimately this would involve three things. First, doing all that is necessary to ensure cessation of the Israel-Palestine conflict. Second indicating specific measures leading to ‘a just and lasting peace in the region’ and third assisting in the establishment of an independent Palestinian State.<sup>111</sup> The Court traditionally loathes to dictate courses of conduct to litigant States when the methods of compliance with its rulings are essentially at the parties’ discretion.<sup>112</sup>

It expressly stated in the *Haya de la Torre* case that even where the parties so desire it is not for the Court to indicate how an illegal or invalid situation should be terminated. The Court will not indicate a particular line of action where there are choices to be made between a set of actions which “to a very large extent, the Parties are alone in a position to appreciate.”<sup>113</sup> This is more so when “[a] choice amongst them could not be based on legal considerations, but only on conditions of practicability or of political expediency; it is not part of the Court’s judicial function to make such a choice”<sup>114</sup>

Scobbie also usefully argues that:

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<sup>109</sup> UN Special Rapporteur on the Situation of Human Rights in the Palestinian Occupied Territories, Richard Falk, Report to the Human Rights Council, Geneva, 17 March 2009 (excerpts) *Journal of Palestine Studies*, Vol. 38, No. 4 (Summer 2009), p. 204.

<sup>110</sup> Berlins considers the ICJ as the least effective body within the UN and writes in very critical terms about the Court especially after the *Legality of the Construction of Wall Opinion*: “The rejection by Israel of the international court of justice’s opinion on the wall in Palestine is not the first time the court’s view has been rubbished, and will be ignored, by the losing party”. Marcel Berlins, “The ICJ is the UN’s least effective body”, *Guardian* (Tuesday 13 July, 2004), available at <http://www.theguardian.com/world/2004/jul/13/law.features11>, accessed on 04 September 2015; See also criticism about the Court’s ineffectiveness and States’ failure to comply with its judgements in Mustafa Karakaya, “*The Jurisdiction of the International Court of Justice: How Effective is it?*” *Law & Justice Review*, Volume: IV, Issue: 2, December 2013.

<sup>111</sup> Paragraph 161 *Legality of the Construction of Wall Opinion*.

<sup>112</sup> Scobbie, *op.cit.*, p. 947.

<sup>113</sup> *Haya de la Torre* case [1951] ICJ Rep 79.

<sup>114</sup> *Ibid.*

“No doubt the particular circumstances of implementing its advice in terms of alternative possible strategies and alternative measures could not be foreseen by the Court. The consequence is, however, that the United Nations’ responsibilities are left abstract and detached: an affirmation of an amorphous obligation which appears to be more an exhortation to action than a delineation of the precise content of that duty.”<sup>115</sup>

*Haya de la Torre* was essentially an attempt by the parties to the earlier *Asylum case*<sup>116</sup> to obtain guidance as to how that judgment should be best implemented. The refusal of the ICJ to so oblige shows that it would hardly be a useful exercise for any authorised body within the UN to approach the ICJ again to ask for an opinion on how to give effect to the *Legal Consequence of the Construction of a Wall* case or which of any set of action would best achieve implementation of the courts to decision.

There is, however, one further opportunity in which the jurisdiction of the ICJ may be invoked again against Israel. This would be in the circumstances that a concerned member of the United Nations takes coercive actions against Israel in order to bring the illegal occupation in Palestine or the situation caused by the Wall to an end and this is resisted by Israel. In such a theoretical circumstance both the state(s) taking the contentious actions and Israel may approach the court to resolve the dispute. This scenario is not as remote as it may at first appear given the increasing determination of the international community to bring the Palestinian occupation to an end and the fact that the Security Council has more or less been paralysed by power politics.<sup>117</sup> Israel, however, is not one of the 72 States that are parties to the Optional Clause of the ICJ.<sup>118</sup> Founding jurisdiction in contentious cases involving Israel would therefore require its consent.

## **XII. The ICC Route: Assimilation of Palestine into the International System**

In the face of the severe economic challenges and abuse as well as violations of rights and liberties suffered by the Palestinian people it is arguably a quite positive fact that Palestine recently acceded to the Rome Statute on 2 January 2015. The International Criminal Court (ICC) on 1 April 2015 welcomed the Palestine as the 123rd State Party to its founding Rome Statute. Palestine, thus, acquired all the rights as well as responsibilities that come with being a State Party to the Statute.<sup>119</sup> Very importantly the ICC now has jurisdiction ‘over alleged crimes committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.’

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<sup>115</sup> Scobbie, *op.cit.*, p. 948.

<sup>116</sup> *Asylum case* [1950] ICJ Rep 266.

<sup>117</sup> The most recent effort (on 30 December 2014) by the members of the Security Council to make the body prescribe an end date for the Israeli occupation in accordance with International law again failed largely as a result of lack of support by vet wielding US government. An Arab coalition led by Jordan had bid for the creation of a Palestinian State and an end to Israeli “occupation” in the draft resolution. The veto power US and Australia voted against the move with 5 abstentions. The draft resolution gathered only 8 votes in favour, and as such was automatically defeated. The US, however, emphatically still exercised its veto power and voted against the resolution. The UK, along with Lithuania, Nigeria, Korea and Rwanda abstained from the vote. Russia Today, “Palestinian statehood bid fails at UN Security Council as US, Australia Vote Against”, Russia Today Website, available at <http://rt.com/news/217975-unscc-palestine-statehood-vote/>, accessed 31 December 2014; Rajini Vaidyanathan, “UN Security Council Rejects Palestinian Resolution” BBC Website 31 December 2014, available at <http://www.bbc.co.uk/news/world-middle-east-30639764>, accessed 31 December 2014.

<sup>118</sup> For the Declarations Recognizing the Jurisdiction of the Court as Compulsory see the website of the ICJ. *Supra* note 2.

<sup>119</sup> UN News Centre, “*International Criminal Court welcomes Palestine as State Party to the Rome Statute*”, available at <http://www.un.org/apps/news/story.asp?NewsID=50477#.Veafe7eFPOo>, accessed 02 September 2015; BBC News, “Will ICC membership help or hinder the Palestinians’ cause? 1 April 2015.



It is notable that both Israel, and the US, share an aversion towards becoming a member of the Rome Statute. Indeed In accordance with Article 25 of the Rome Statute, individual responsibility for prohibited crimes is framed very widely. It includes criminal responsibility and liability for punishment for crimes committed within the jurisdiction of the Court. Israel as a State is thus, very much aware of the theoretical possibility that any of its nationals may in the future be tried by the ICC for alleged crimes committed on Palestinian territory.<sup>120</sup> The Office of the Prosecutor of the International Criminal Court, has already opened a preliminary examination of the situation in Palestine in January 2015.<sup>121</sup>

Although strongly opposed by Israel, the general assimilation of Palestine into the mainstream of International relations is bound to have a positive effect on the general resolution of the Palestinian question.<sup>122</sup> Palestine has been recognized as a State in bilateral relations by more than 130 governments and by certain international organisations, including United Nation bodies.<sup>123</sup> It is plausible that these developments will also affect the providence of the Israeli wall.<sup>124</sup> Apart from gaining membership of the ICC, the Palestinian leadership have expressed readiness to return "again and again" to the UN Security Council seeking support for a resolution that sets a deadline for the creation of an independent Palestinian State. Already the recognition granted to Palestine on 29 November 2012 by the General Assembly as a 'non-member observer State' at the United Nations, carries significance in terms of the recognition of the 1967 borders<sup>125</sup> which itself carries implications as regards East Jerusalem and settlements that are over the green line.<sup>126</sup>

There has always been the narrow possibility of the ICC exercising jurisdiction over crimes if its jurisdiction is authorized by the United Nations Security Council. The threat of veto power being used by certain permanent members States always made the possibility of that happening very remote indeed.

With accession of Palestine to the Rome treaty, however, there is now the strong possibility that the ICC may be eventually *seised* of a viable case against Israel with respect to its actions in the occupied territories. Despite Israel's rhetoric and pre-emptive sanctions the threat a possible exercise of jurisdiction by the ICC would in time act as a gentle civiliser of Israel. There are signs that this is already the case. Israel

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<sup>120</sup> BBC News, *ibid*.

<sup>121</sup> Office of the Prosecutor, "The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine" Press Release: 16/01/2015 ICC-OTP-20150116-PR1083 [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx), accessed 02 September 2015.

<sup>122</sup> The Israeli Prime Minister Benjamin Netanyahu responded to the Palestinian application to join the ICC by saying they had chosen "a path of confrontation" and that Israel would "not sit idly by". Israeli immediate punitive move was to stop the transfer of about \$400m (£270m) in tax revenues collected on behalf of the Palestinian Authority (PA) between January and March 2015. It is also feared that the US as the biggest donor to the Palestinian Authority after the European Union, may cut up to \$400m (£265m) each year if the Palestinians press claims against Israel at the ICC. BBC News *op.cit*.

<sup>123</sup> The Office of the Prosecutor, "Situation in Palestine" p.2, available at [http://www.icc-cpi.int/fr\\_menus/icc/structure\\_of\\_the\\_court/office\\_of\\_the\\_prosecutor/comm\\_and\\_ref/pe-ongoing/palestine/Pages/update\\_on\\_situation\\_on\\_palestine.aspx](http://www.icc-cpi.int/fr_menus/icc/structure_of_the_court/office_of_the_prosecutor/comm_and_ref/pe-ongoing/palestine/Pages/update_on_situation_on_palestine.aspx), accessed 03 September 2015

<sup>124</sup> This trend has been accelerating. On 29 November 2012, the UN General Assembly (UNGA) adopted Resolution 67/19 granting Palestine "non-member observer State" status in the UN with a majority of 138 votes in favour, 9 votes against and a total of 41 abstentions.

<sup>125</sup> Chuck Holmes, "Background: Israel's Pre-1967 Boundaries" *NPR* May 20, 2011, accessed on 10 September 2015.

<sup>126</sup> UN Centre, "General Assembly grants Palestine non-member observer State status at UN" (29 November 2012), available at <http://www.un.org/apps/news/story.asp?NewsID=43640#.VejrXbeFPOo>, accessed 04 September 2015 ; Benjamin Macqueen, "Explainer: The Upcoming UN Palestinian Sovereignty Vote" (August 9, 2011), available at <https://theconversation.com/explainer-the-upcoming-un-palestinian-sovereignty-vote-2768>, accessed 03 September 2015; On 23 September 2011, Palestine submitted an application for admission to the United Nations as a Member State in accordance with article 4(2) of the United Nations Charter, but the Security Council has not yet made a recommendation in this regard. The Office of the Prosecutor, *op.cit.*, pp. 1-2.

pays attention to the ICC's actions and statements about its conduct. Following the Flotilla incident submitted by Comoros on 14 May 2013, the office of the prosecutor declined to initiate an investigation stating that "considering the scale, impact and manner of the alleged crimes, the Office is of the view that the flotilla incident does not fall within the intended and envisioned scope of the Court's mandate" (para. 142).<sup>127</sup> Despite this outcome the Prime Minister of Israel still responded to the court accusing it of choosing to deal with Israel for 'cynical political reasons'.<sup>128</sup>

Israel ratified the Fourth Geneva Convention in 1951. Furthermore, Article 35 of Israeli Military Proclamation No. 3 provided that Israeli military courts and officers were bound by the provisions of the conventions. Unfortunately attempts were made to reverse the situation, on October 22, 1967, when the proclamation was purportedly amended and Article 35 was cancelled by Military Order No. 144. Israel has, thus taken the view that the convention is no longer applicable to the Occupied Palestinian Territories (OPT).<sup>129</sup> This position is completely insufficient given the clear indication by the international community of the status of the territories as occupied within the meaning of the Fourth Geneva Convention. This has been reiterated as recently as 2014 when the participating High Contracting Parties called on the Israeli State as Occupying Power to fully and effectively respect the Fourth Geneva Convention in the Occupied Palestinian Territory, including East Jerusalem. They also reminded the Occupying Power of its obligation to administer the Occupied Palestinian Territory in a way which fully takes into account the needs of the civilian population while safeguarding its own security, and notably preserve its demographic characteristics.<sup>130</sup>

Perhaps most strikingly the Conference declared as follows:

The participating High Contracting Parties express their deep concern about the impact of the continued occupation of the Occupied Palestinian Territory. They recall that, according to the advisory opinion of the International Court of Justice of 9 July 2004, the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, at least insofar as it deviates from the Green Line, and its associated regime, are contrary to international humanitarian law.<sup>131</sup>

Furthermore, UNSC Resolution 799, of December 18, 1992 clearly reaffirms the applicability of the Fourth Geneva Convention of 12 August 1949 to all the Palestinian territories occupied by Israel since 1967, including Jerusalem. The ICJ opinion in this case is further proof of the correct position.

### **XIII. Self Help and/or Coercive Action by Concerned States**

Given the abundance of evidence of the difficulties and human rights abuses occasioned on ordinary Palestinians and the economy of Palestine it is possible to argue that the wall, therefore, constitutes legitimate target of destructive force by Palestinians and concerned States. The wall is clearly illegal and it is good international policy that illegal situations be brought to an end. Over a full decade of waiting for Israel to do the correct thing by bringing the wall down in accordance with international law as confirmed by the *Legality of the Construction of Wall Opinion* the

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<sup>127</sup> *Situation On The Registered Vessels Of The Union Of The Comoros, The Hellenic Republic And The Kingdom Of Cambodia* No. ICC-01/13 16 July 2015 Original: English No.: ICC-01 ... available at [www.icc-cpi.int/iccdocs/doc/doc2015869.pdf](http://www.icc-cpi.int/iccdocs/doc/doc2015869.pdf), accessed 03 September 2015.

<sup>128</sup> Prime Minister Media Adviser, "PM Netanyahu responds to ICC decision", 16 Jul 2015, available at the website of the Israel Ministry of Foreign Affairs <http://mfa.gov.il/MFA/PressRoom/2015/Pages/PM-Netanyahu-responds-to-ICC-decision-16-Jul-2015.aspx>, accessed 03 September 2015.

<sup>129</sup> Linda Bevis, *The Applicability of International Humanitarian Law to the Occupied Palestinian Territories* (Ramallah: Al Haq West Bank Affiliates to the International Commission of Jurists: 2003), pp. 8-11.

<sup>130</sup> See Declaration of 17 December 2014 by the Conference of High Contracting Parties to the Fourth Geneva Convention. Declaration, available at <http://unispal.un.org/UNISPAL.NSF/0/E7B8432A312475D385257DB100568AE8#sthash.kV7hLSnn.dpuf>, accessed 04 2015.

<sup>131</sup> *Ibid* see Paragraph 8.

Palestinian people have an inherent right to bring the illegal situation represented by the wall down by self-help. An author captures this argument beautifully when he wrote: [i]n the body of general law and practice concerning enforcement of international rules the principle of self-help remains prominent.<sup>132</sup>

Although self-help is a broad and somewhat imprecise term that according to Schachter “covers a range of actions (other than armed force)” which may be taken by a State injured by a violation of legal obligations owed to it; the imperative argument raised here is that robust actions taken by Palestinians to remove, flatten or obliterate this illegal construction must be within their right to self-help.<sup>133</sup> Such actions must be seen as legitimate under international law especially where they target the wall solely and avoid the loss of human lives. An example of legitimate self-help actions would be the way hundreds of Palestinian people of the Cremisan valley recently gathered to protest and tear down one of the gates of the Israeli apartheid infrastructure that segregates the Palestinian people from their lands and from each other.<sup>134</sup>

Furthermore other independent States may come to the aid of Palestine to help remove this illegal wall which gives exemplary expression to Israel’s apartheid policies with respect to the Palestinian occupied territories. Theoretically, therefore, if a drone operated from a concerned State infiltrates Palestinian airspace and obliterates portions of the illegal wall such an action will not only be legal but will be within the purview of the decision of the World Court. This is more so given the unequivocal refusal of Israel to comply with international law and its flagrant actions of escalating illegality through rampant human rights abuses and by continuously extending the wall. It appears to be inevitable that some states will end up using coercive means to bring Israel into a situation of compliance with its legal obligations. Features like walls, fences, dams and dikes can and have been legitimate targets from either a military, resistance or law of war standpoint.<sup>135</sup>

It will however, be necessary that any State(s) willing to take such actions against the wall should avoid loss of life and damage to property other than the wall itself. It is also important to bear in mind that use of force will only truly ripen under customary law, as well as the Charter of the UN, Article 2, paragraph 4 (interpreted in the light of Article 1, paragraph 1), as a last resort after the exhaustion of diplomatic remedies and peaceful alternatives.<sup>136</sup>

#### **XIV. Imposition of Trade and other Sanctions**

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<sup>132</sup> Attila Tanzi, “Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations” Vol. 6 *European Journal of International Law* No. 1 (1995) p. 539.

<sup>133</sup> See O. Schachter, “United Nations Law”, *AJIL* 88 (1994), 14.

<sup>134</sup> Palestinian Grassroots Anti-apartheid Wall Campaign, “Cremisan: People tear down the gates of the Wall”, <https://www.stophthewall.org/2015/08/24/cremisan-people-tear-down-gates-wall>, 05 September 2015; Beaumont, op.cit.

<sup>135</sup> Such successful campaigns by the Royal Air Force Bomber Command and the USAAF Eighth Air Force were registered against key points in the Dortmund-Ems and Mittelland canals as part of the attack on German lines of communication in late 1944. W. Hays Parks, “*Rolling Thunder and the Law of War*”, *Air University Review*, (January-February 1982), available at <http://www.airpower.maxwell.af.mil/airchronicles/aureview/1982/jan-feb/parks.html>, accessed 19 December 2014; Webster and Frankland, vol. III, pp. 244-48. Military targets generally sit at the intersection of law, morality strategy and policy. Military targeting also in various ways relies on the jurisprudence of courts and the interaction of military needs and events in the legal theatre of courts both national and international. Cf. 45 Amos N. Guiora, “Targeted Killing: When Proportionality Gets All out of Proportion”, Vol. 5 *Case Western Reserve. Journal of Int’l L.* (2012-2013) pp. 235, 248. Israel itself is not new to quite liberal determination of what may constitute legitimate targets in Palestinian territory, Iran, Iraq, Syria, Lebanon and even Uganda among others. As put it “the Lebanese government was supposed to rein in Hezbollah while Israel was bombing its cities, destroying its roads and bridges, blocading it by sea, targeting its armed forces, and rendering its airport unusable” Stuart Elden, *Terror and Territory: The Spatial Extent of Sovereignty* (Minneapolis: University of Minnesota Press, 2009) p. 88.

<sup>136</sup> Note the advice of the UN Special Rapporteur on the Situation of Human Rights in the Palestinian Occupied Territories, Richard Falk, Report to the Human Rights Council, Geneva, 17 March 2009 (excerpts), *Journal of Palestine Studies*, Vol. 38, No. 4 (Summer 2009), pp. 204.

Israeli authors and respected US political figures are in agreement as to a common desire to see the advisory opinion has no effect.<sup>137</sup> On the other hand, Israel's recalcitrance over the wall and its occupation of Palestine has understandably been a source of concern to the majority of States. Trade, professional and diplomatic sanctions do have a special place in the annals of international relations in bringing illegal situations to an deserved end. There are already a raft of hard hitting sanctions levied by States, corporations and even universities. Activist movements soliciting sanctions against Israel have been increasingly successful.

French corporation Veolia withdrew participation from the Jerusalem Light Rail (JLR), a rail system built to facilitate the growth and expansion of Israeli colonial settlements on occupied Palestinian territory<sup>138</sup> 42 Similarly two French firms, Safège and Puma pulled out from a cable car project earmarked for Jerusalem<sup>139</sup> The *Stop the wall* campaign succeeded in convincing Norway's Government Pension Fund, one of the largest pension funds in the world, to divest from Elbit Systems, an Israeli security company involved in the construction of the Wall.<sup>140</sup> Other recent examples include the cancellation of performances by foreign artistes from around the world.<sup>141</sup>

Although what is ideal is that a comprehensive negotiated solution to the entire Palestine question should be implemented. States may formulate targeted sanctions at Israel specifically to encourage Israel abandon its policy on the wall by; dismantling parts already built, returning all lands confiscated for the Wall and compensating the affected population for all losses.

## XV. Conclusions

As noted by the Court in its Namibia judgment: "the qualification of a situation as illegal does not by itself put an end to it. It can only be the first, necessary step in an endeavour to bring the illegal situation to an end."<sup>142</sup> Progress in giving effect to the World Court's opinion in this celebrated case has been one of the most disappointing in the history of the Court. What has been lacking so far as is reflected in

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<sup>137</sup> Alan Dershowitz, "Israel follows its own law, not bigoted Hague decision" in *The Jerusalem Post*, July 11 2004; Senator Hillary Clinton in "Powell says Israel proved fence reduces terror," by Shlomo Shamir, *Haaretz*, July 11, 2004; Senator John Kerry and Secretary of State Colin Powell in "US dismisses ICJ ruling" by Janine Zacharia, in *The Jerusalem Post*, July 11, 2004; and House Resolution 713, available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_bills&docid=f:hr713eh.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:hr713eh.txt.pdf); See Akram, Quiggley t.al, *op. cit.* p. 14.

<sup>138</sup> See Palestinian BDS National Committee, BDS marks another victory as Veolia sells off all Israeli operations September 1, 2015, available at <http://www.bdsnationalcommittee.org/2015/09/01/bds-marks-another-victory-as-veolia-sells-off-all-israeli-operations/> 13270?utm\_content=buffer9db48&utm\_medium=social&utm\_source=twitter.com&utm\_campaign=buffer#sthash.xdz9gEkJ.dpuf.

<sup>139</sup> Nir Hasson, "French Firm Pulls Out of Controversial Jerusalem Cable Car Project" *Haaretz* Mar 25, 2015, available at <http://www.haaretz.com/news/diplomacy-defense/.premium-1.648797>, accessed 02 September 2015; BDS Movement, "French firms pulls out of Jerusalem cable car after government warning", available at: <http://www.bdsmovement.net/2015/french-firms-pulls-out-of-jerusalem-cable-car-after-government-warning-13074#sthash.q4ggBDIu.RGYtdVuh.dpuf>, accessed 05 September 2015.

<sup>140</sup> Stop the Wall is one of the founding organisations of the Palestinian campaign for Boycott, Divestment and Sanctions, which seeks to apply economic and political pressure on Israel until it complies with international law. See *War on Want, Boycott, Divestment and Sanctions: Winning justice for the Palestinian people* (London: 2010) p. 14, available at <http://www.waronwant.org/resources/boycott-divestment-sanctions>, accessed on 05 September 2015.

<sup>141</sup> Recent examples of which include cancellations by American singer Lauryn Hill (former singer of The Fugees) and Spanish American singer Marianah. Palestinian BDS National Committee, "Marinah becomes first singer in Spain to cancel concerts" May 15, 2015, available at <http://www.bdsmovement.net/2015/marinah-becomes-first-singer-in-spain-to-cancel-concerts-13152#sthash.KRjr8H26.dpuf>, accessed 10 September 2015.

<sup>142</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p. 16, 52 (para 111).

James Crawford's conclusion that "[r]egrettably, the political will does not seem to exist at present to enforce principles of international law in respect of the settlements".<sup>143</sup>

Adopting a multiple stakeholder review of the reactions to the last decade of practice in response to the dictates of the *Legality of the Construction of Wall Opinion* reveals a deficit of political will on all sides even surprisingly including the Palestinian authority which has not exploited the legal and political capital of this opinion to its full potentials. Although it could do more the General Assembly actually appears to have come out best in an objective assessment of positive reactions to the Court's decision. The establishment of UNRoD is arguably one of the best steps that has been taken in giving effect to its imperatives. The Security Council on the other hand has been disappointingly catatonic in its response considering its central mandate in giving effect to authoritative decisions of the ICJ and its general mandate in maintenance of international peace security and justice. The institution of the veto vote and the willingness of certain veto wielding States to shamelessly exploit the device is perhaps responsible for the inaction of the Security Council in this case.

Responsibility for the lack of progress in relation to giving effect to the legal imperatives of the opinion, however, is to be borne first and foremost by the State of Israel. Israel's inability to recognise and implement the imperatives of this advisory opinion is a serious shortcoming of its responsibility under international law. The fact that further building and maintenance of this illegal wall has continued up to the present time is an egregious disregard for the international rule of law. Israel's factual military, economic, and diplomatic supremacy in the territory and in the region does not grant immunity from international legal rules. Rather such factual vitality imposes immense responsibility on Israel as it remains the only party that can very easily remedy the situation by bringing the illegal situation to an end. Doing so will be inexpensive and fully in alliance with the true national and international interests of Israel. To this one may add that the lack of political will to enforce international law in respect of the approximately 760 km wall in the occupied territories built by Israel is one of the reasons why progress in resolving the Israeli-Palestinian dispute continues unabated.

The Security Council is the principal enforcement organ of the United Nations and has formidable powers within its jurisdiction to compel Israel to comply with the courses of action indicated by the World Court in this case. Its inability to do this is a vacation of its primary responsibility under the current system of international order and a sad reflection of its political impotence in relation to the Palestinian-Israeli question and the Middle-East crises generally. The failure of responsibility by the State of Israel and the Security Council calls for a reconfiguration of their respective power bases to move them in alignment with the true ends of international law and international relations.

The expiration of a full decade after the delivery of the Court's decision in response to the competent request of the world's most democratic and representative legislative body, is more than enough time to implement the decision in good faith.

The UN may decide to re-constitute the UN Special Committee and Centre against Apartheid. This body should then be charged with investigating Israeli apartheid, especially as promoted by the existence of the wall. This body may also recommend measures to combat such manifestation of apartheid policies and mechanisms and monitor compliance of all States and private entities in light of their individual, collective, domestic and extraterritorial obligations vis-à-vis Israel's regime of prolonged occupation.

A full decade after the Opinion, the UN ought to meaningfully reconfigure its approach by developing a vibrant UN Agenda for Action in consultation with the UN

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<sup>143</sup> Crawford, *op.cit.*, pp. 59-60.

human rights treaty bodies, ILO compliance mechanisms, legal advisors to the Secretary-General and the depositary of the IV Geneva Convention.<sup>144</sup>

The General Assembly must continue developing capacity in the maintenance of its mandate regarding the UN Register of Damage. Capacity development in the determination of reparations for losses, costs and damages to any party as a consequence of the wall's development, construction and/or maintenance must be pursued vigorously.

Furthermore and very importantly a systematic UN led reparation mechanism of sanctions should be imposed on the State of Israel allowing participating States to seize Israel's assets within their reach to satisfy damages and compensation determined under the processes of the UN Register of Damage. Perhaps only when the purses of Israel are strained under the financial implications of its acts in relation to the building and maintenance of the globally condemned wall will it reconsider and rescind this illegal structure and the apartheid policy upon which it is built.

There ought to be an intensification of efforts to ensure more successes like that achieved by the Stop the Wall campaign in bringing the onset of targeted sanctions against Israel. It is also recommended that there should be a general revitalisation of world-wide activism by civil society, academic and intergovernmental groups to incentivise compliance with the will of the international community on this notorious apartheid wall.

## **Bibliography**

### **Doctrine**

Mahasen Mohammad Aljaghoub, *The Advisory Function of the International Court of Justice 1946 – 2005* (Berlin: Springer-Verlag, 2006)

Linda Bevis, *The Applicability of International Humanitarian Law to the Occupied Palestinian Territories* (Ramallah: Al Haq West Bank Affiliates to the International Commission of Jurists: 2003)

Ian Brownlie, *Principles of Public International Law*, Third ed. (Oxford: E.Q.B.S.,1979)

Alan Dershowitz, "Israel follows its own law, not bigoted Hague decision" in *The Jerusalem Post*, (2004)

Richard Falk, Statement on the situation in the Gaza Strip, Geneva, 9 January 2009 (excerpts). *Journal of Palestine Studies*, Vol. 38, No. 3 (Spring 2009)

Amos N. Guiora, "Targeted Killing: When Proportionality Gets All out of Proportion", Vol. 5 *Case Western Reserve Journal of Int'l L.* (2012-2013)

Mustafa Karakaya, "The Jurisdiction of the International Court Of Justice: How Effective is it?" *Law & Justice Review*, Volume: IV, Issue: 2, December 2013.

Hans Kelsen, *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems*, (New York: Frederick A. Praeger, (1964)

Greg Myre, "Israel Confirms Plan to Seize West Bank Land for Barrier", *New York Times* August 25, 2005.

Gbenga Oduntan, *Law and Practice of the International Court of Justice a Critique of the Contentious and Advisory Jurisdictions* (Enugu, Nigeria: Fourth Dimension Publications, 1999)

Dharma Prataap, *The Advisory Jurisdiction of the International Court* (Oxford: Clarendon Press, 1972)

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<sup>144</sup> Our conclusions in this area dwells heavily upon the the conclusions and recommendations of the experts that signed up to the document "10 Years after the Advisory Opinion on the Wall in Occupied Palestine: Time for Concrete Action" in Mondoweiss Editors.

- Shabtai Rosenne, *The World Court: What it is and How It Works*, (New York: A.W. Sijthoff - Leiden Oceana Publication Inc. 1973)
- Iain Scobbie, "Unchart(er)ed Waters?: Consequences of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory for the Responsibility of the UN for Palestine" Vol. 16 *The European Journal of International Law* no.5 (2006)
- Avi Shlaim, "The Iron Wall Revisited" *Journal of Palestine Studies* Vol. 41, No. 2 (Winter 2012)
- J. Sloan, "Advisor, Jurisdiction of the International Court of Justice", 38 *California Law Review* (1950)
- Attila Tanzi, "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations" Vol. 6 *European Journal of International Law* No. 1 (1995)
- T. A. Taranco, *The Soviet Union and International Law* (New York: Macmillan Co., 1985)

#### **International instruments and treaties**

- UNGA Res 56/83 (12 December 2001) A/RES/56/83 art 48(1).
- Declaration of 17 December 2014 by the Conference of High Contracting Parties to the Fourth Geneva Convention.
- Palestine UNGA Resolution on the Definition of Aggression (GA Res 3314 (XXIX) 1974
- Rome Statute of the International Criminal Court 2187 UNTS 90/37 ILM 1002 (1998)/[2002] ATS 15
- U.S. House of Representatives, House Resolution 713, 108th Congress, 2nd Session. 31 UN Doc.A/RES/ES-10/15 (2 Aug. 2004).
- S/RES/242 (1967) 22 November 1967.
- S/RES/338 (1973) 22 October 1973.
- League of Nations, Statute of the Permanent Court of International Justice, 16 December 1920, available at: <http://www.refworld.org/docid/40421d5e4.html> [accessed 27 December 2014] Amended by the Protocol of 14 September 1929.

#### **Case law**

- Western Sahara Advisory Opinion*, ICJ Reps, 1975
- Alian v. Prime Minister*, H.C.J. 4825/04, Written Response, 23 February 2005
- Legality of the threat or use of nuclear weapons advisory opinion* [1996] I ICJ Rep 226
- East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep102
- Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 79.
- Beit Sourik Village Council v. Government of Israel*, H.C.J. 2056/04, 2004(2) Takdin-Supreme 3035.
- NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 213 ALR 688.
- Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. United States of America); I.C.J. Reports 1986