SECTION B

Dispute Settlement

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CHAPTER 9

Bad Law and a Hard Case? The Impact of the *Wall* Advisory Opinion of the ICJ

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Introduction

For almost a decade now, the arguments used in the debate on the conflict between Israel and the Palestinians include references to the advisory opinion of the International Court of Justice (ICJ) of 9 July 2004 on the *Wall*.[1] The opinion was requested by the General Assembly (GA) of the UN which sought an answer to the question of the legal consequences of the construction of the wall built by Israel in what the General Assembly considered to be the Occupied Palestinian territory. In its opinion, the court by majority condemned Israel for building this wall. The construction was held to be contrary to international law. Israel was obliged to cease its construction and to dismantle the wall. In addition, it should make reparation for the damage caused by its construction. All (other) states were held to be under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to aid or assist the maintenance of the situation. Furthermore, the states parties to the Fourth Geneva Convention (1949) were held to have an additional obligation to ensure compliance by Israel with international humanitarian law as embodied in that convention. The UN itself, and specifically the GA and the Security Council (SC), 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 regime. The advisory opinion has been and still is quoted or frequently referred to, not only in judicial decisions and legal writings, but also sometimes in political statements and pamphlets. For many of those who think that international law ought to play a decisive role in the solution of the conflict between Israel and the Palestinians, the opinion has become *the* legal standard. In their view it provides us with a solution to this conflict if only the parties, or may be more specifically, Israel, were to comply. An example of the authority ascribed to it is the Advice of the Dutch Advisory Council on International Affairs, of March 2013, called "Between words and deeds. Prospects for a sustainable peace in the

1 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion, *ICJ Reports 2004*, 136.

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Middle East."[2] In the section on the legal framework, the advisory opinion is used as the most important standard of what international law entails for the parties to the conflict, and especially the state of Israel. Overlooking the sometimes severe criticism on the opinion, the Advisory Council concluded that "there can be little difference of opinion over the main legal issues associated with the conflict."[3]

Impact on the Ground

Notwithstanding such references to the opinion it has to be observed that so far it has not had a real impact on the practice on the ground. The security barrier on territory east of the so-called Green Line[4] is still there, although parts of its route have been adapted. The adaptations were not made as a result of the advisory opinion. The opinion as such was, according to the Israeli Government, not binding, while next to that the opinion's findings in the field of facts and law were not convincing for the Jewish State. The rerouting was the consequence of judgments by the Israel Supreme Court sitting as the High Court of Justice,[5] which has frequently decided on judicial review petitions concerning the security barrier. This Court has been critical of the route of the security fence and ordered the government to change its track on several locations. These decisions were the outcome of the balancing of, on the one hand, the rights of Palestinian inhabitants and, on the other hand, the security interest of the State of Israel and its citizens within the framework of international humanitarian law and Israeli administrative law. The Supreme Court has itself thoroughly analyzed the advisory opinion, even if it was convinced that it was not in any way formally bound by it.[6] It criticized the weak factual basis of the opinion, as the facts have not been established in an adversarial procedure, but primarily based on UN reports. It also objected to the ICJ's virtual ignorance of the security interests of Israel; the justification for the construction of the security barrier. It will be submitted in this contribution that there are good

2 Advisory Council on International Affairs, *Between words and deeds. Prospects for a sustainable peace in the Middle East* no. 83, March 2013, 16–19.

3 Ibid., 19.

4 Referring to the armistice lines of 1949, drawn in green on the map. Sometimes also the expression "the pre-1967 borders" is used, referring to the outcome of the Six Days War in 1967.

5 Which means sitting as a court of first instance in judicial review procedures.

6 Case HCJ 7957/04 *Ma'arabe v. The Prime Minister of Israel*, in: Israel Supreme Court *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law*, vol. 2, 65, 107–109.

reasons for the critical approach of the Israeli Court. Consequently, it may be not a good idea to use the advisory opinion as the decisive contribution of international law to the solution of the longstanding conflict in the Middle East. This utilization would mean that there is indeed something wrong with international law. Before substantiating this observation, it is worthwhile to look into the use of the advisory opinion in various contexts. Subsequently, it will be explained that the opinion has so far been ineffective and also why this should not be deplored. In that connection, the non-binding nature of the opinion shall firstly be discussed. Next to that its political nature is addressed. It will also be explained that the opinion could be seen as a contentious judgment in disguise, without the consent of the parties which is required in contentious cases. Furthermore, the ICJ did not contribute to its own authority in this case by a rather superficial rejection of a serious objection against one its members for not being impartial. A serious flaw as to the substance of the opinion is the apparent lack of historical consciousness displayed by the court. Subsequently, this leads to the point of the weak factual underpinning of its findings. Finally, the opinion's lack of objective fairness will be demonstrated.

The Use of the Advisory Opinion

UN and Member States

Less than a month after the publication of the opinion, the GA adopted a resolution acknowledging the opinion.[7] The GA stressed in that resolution, next to the answers formulated by the court on its questions, that the court concluded that "the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law." The opinion has since played a major role in the (many) GA resolutions on aspects surrounding the conflict. The initial resolution was adopted by 150 votes in favor (including The Netherlands), six against and 10 abstentions. In a sense this is remarkable, because it means that it was also supported by many member states who did not vote in favor of the request for the advisory opinion in 2003, which was adopted with 90 votes in favor, 8 against and 74 abstentions (including The Netherlands).[8] The voting behavior in the GA is illustrative of the surprisingly wide support of the advisory opinion among the member states of the UN. Unsurprisingly, both Israel and the USA voted against this.

7 A/RES/ES-10/15 of 2 August 2004.

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

The *Wall* advisory opinion has also been used as a foundational text in the resolutions of subsidiary organs of the UN, such as the Economic and Social Council (ECOSOC) and the Human Rights Council (HRC). As will be explained later, the ICJ based its opinion partly on the findings of the Special Rapporteur on the Occupied Palestinian Territories (OPT) (at that time John Dugard). It apparently also worked the other way round. The opinion has over the years been used by the Special Rapporteur on the situation of human rights in the OPT as an important frame of reference. The approach of the present – but out-going – Rapporteur Richard Falk as to the legal implications of the opinion was made very clear in his last report

> It is often supposed that because the legal findings of the Court were embedded in an "advisory opinion" it has no bearing on the status of the legal obligations of Israel. This is incorrect. An advisory opinion of the International Court of Justice is as determinative with respect to the authority of international law as a judgement in a dispute between two or more States, but unlike such a judgement between States that can be directly enforced by reliance on Article 94 of the Charter of the United Nations, an advisory opinion cannot be so implemented. However, this difference does not weaken the obligation of Israel to act in accordance with this authoritative determination of international legal obligations, and its failure to do so puts it in breach of international law and responsible for the cumulative harm inflicted on the Palestinian people. It is past time for the United Nations to take action that seeks to protect the rights of the Palestinian people bearing on the sanctity of their territory and its relation to the underlying right of self-determination.[9]

Incidentally, it can be remarked that Falk may too easily assume that enforcement via Article 94 of the UN Charter can be seen as "direct." The question regarding the binding nature of the opinion addressed by Falk will be discussed below.

Civil Society

The high esteem for the advisory opinion is also typical for many NGOs involved in debates and actions concerning the Israeli-Palestinian conflict. When it

9 A/HRC/25/67 *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967* Richard Falk, 13 January 2014. (American) spelling in the original.

comes to the use of international law, the Russell Tribunal on Palestine (RToP) is an important illustration. RToP "is an International People's Tribunal created following the international community's inaction regarding Israel's recognized violations of international law."[10] Although the name "tribunal" suggests otherwise, the RToP is not a tribunal in a legal sense, because it was not established by law, but just the initiative of individuals with sometimes impressive backgrounds in fields of politics, arts, scholarship and, indeed, law. A prominent member is the South African internationalist, human rights lawyer and former UN Rapporteur, John Dugard. These individuals, already prior to joining the RToP, expressed their strong feelings as to what is right and wrong in the conflict of Israel and the Palestinians. The RToP is to be seen as a high-profile action group using the concept of a tribunal to enhance its impact on the political discussion. It its Findings of the Final Session at Brussels, in March 2013, the Tribunal frequently invoked the *Wall* Advisory Opinion to underpin its conclusions, thereby giving its conclusions the appearance of being well founded in law. The RToP referred to the opinion to support its conclusion that Israel violates the right of the Palestinian people to self-determination. Next to that it copied the consideration in the opinion that Israel cannot invoke the right to self-defense to justify the construction of the *Wall* and that this construction is contrary to international law. A further reference is made of the conclusion that the Israeli settlements east of the "Green Line" and the expulsion of Palestinians from their territory was illegal. The RToP strongly criticizes the inaction of states, and in particular the USA, as well as the UN, the EU and the ICC, referring *inter alia* to the responsibility of states and other international actors derived by the ICJ from the *erga omnes* character of the obligations concerned. Despite the use of judicial vernacular the RToP does not try to address possible rights, interests or concerns on the Israeli side which might have been of some relevance in terms of law. The perfunctory reference to the adversarial principle and the invitation which was extended to *inter alia* states to participate do not take away the impression of partiality. That impression is confirmed in the tribunal's findings whereby the very creation of the state of Israel is labeled as a violation of the principle of self-determination in respect of the mandate territory of Palestine.

The next example of the use of the advisory opinion of the ICJ as an important frame of reference is provided by the BDS Campaign ("boycott, divestment and sanctions"), which was launched by Palestinian civil society on the opinion's first anniversary in 2005. The BDS Campaign has in the meantime gained

10 Findings of the Final Session of the Russell Tribunal on Palestine, Brussels, 16–17 March 2013 available at <http://www.russelltribunalonpalestine.com/en/full-findings-of-the-final-session-en>.

worldwide support of all kinds of NGOs. One of the aims is to convince companies to withdraw from Israel, at least from activities held to be supportive of Israeli "illegal" activities in the commonly so called occupied territories.[11] The BDS Campaign time and again refers to international law, and more specifically to the advisory opinion. A recent example of a successful action was the decision taken by one of the largest Dutch pension funds, PGGM, to withdraw their investments from Israeli banks. For our purposes the most interesting thing is the explicit reference made to the advisory opinion in their official statement on this step

> PGGM recently decided to no longer invest in five Israeli banks [...]. The reason for this engagement was their involvement in financing Israeli settlements in the occupied Palestinian territories. This was a concern, as the settlements in the Palestinian territories are considered illegal under international humanitarian law. Moreover, international observers have indicated that the settlements constitute an important obstacle to a peaceful (two state) solution of the Israeli-Palestinian conflict. In 2004 the International Court of Justice concluded in an Advisory Opinion that the settlements in the Palestinian territories are in breach of Article 49 of the Fourth Geneva Convention relative to the Protection of Civilian Population in Time of War. This article prohibits an occupying power to transfer its own citizens to occupied territory. International bodies, including the UN General Assembly and the UN Human Rights Council have adopted various broadly supported resolutions, which state that the settlements are considered illegal. Israel disputes this interpretation of the applicability of international law.[12]

This last point was no reason for PGGM to refrain from pursuing the course taken and its decision took effect as of 1 January 2014.

The Ineffectiveness of the Advisory Opinion

Notwithstanding its ubiquity in written texts and oral debates, the advisory opinion does not seem to have a very positive effect on the solution of the

11 The term "occupied territories" may be questioned in the light of the continuing relevance of the rights under the Palestine Mandate as discussed later in this contribution. I prefer the term "disputed territories."

12 https://www.pggm.nl/english/who-we-are/press/Pages/Statement-regarding-exclusion-of-Israeli-banks.aspx

conflict as such. Having regard to the status, contents and intrinsic flaws of the opinion, it comes as no surprise. Furthermore, it should not be deplored that the opinion lacks effect on the conflict concerned. The following may serve as an explanation of these submissions.

It is Not Binding

The opinion is an *advisory* opinion and not a binding judgment for the parties to the conflict. The court itself quoted explicitly from an earlier advisory opinion in order to bring this to attention: "as such, it has no binding force."[13] Nevertheless, it is often interpreted, for example by Richard Falk as we have seen earlier, as being binding, but only lacking enforceability via Article 94 of the UN Charter. In my view this is rather confusing. The binding nature of a legal norm or decision exists independent of its enforceability. Otherwise law would be, especially in the international field, a very limited category. Acknowledgment of the non-binding nature also beyond the circles of international lawyers could have induced a more relaxed approach to the opinion as being a view to be taken seriously. Of course, even apart from being binding in a formal sense, the opinion could be seen by all parties as an authoritative statement of the applicable law in the specific situation concerned. That at least could be the case if the substantial and legal findings of the court were in itself convincing, as being the outcome of a procedure in which the essentials of fairness have been observed. But this can be questioned, as shall be observed. The absence of bindingness of the opinion may partially serve as an explanation for the lack of impact on the resolution of the conflict, though having regard to the contents of the opinion this impact would not have been positive at all.

The Political Nature of the Court's Opinion

That brings us to a first point of criticism of the opinion as such. The court, and that was inevitable, addressed legal questions that related to the heart of a contentious issue, which has separated parties, a state and a non-state entity for decades. Technically they concerned the construction of the security barrier, but almost all aspects of the underlying political conflict are linked to this question. The court's opinion and its subsequent use in the debate confirm this. This was clear to the court, from the very beginning of the proceedings: "The Court is indeed aware that the question of the wall is part of a greater whole."[14] So far so good, but the court then continues: "and it would take this

13 *ICJ Reports 2004*, 157, quoting from *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase* Advisory Opinion, *ICJ Reports 1950*, 71.

14 *ICJ Reports 2004*, 160.

circumstance carefully into account in any opinion it might give."[15] The court proceeds by remarking that "the question that the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall."[16] Having regard to the context of the adoption of the resolution of the GA during its Tenth Emergency Special Session on 8 December 2003, it is clear that the GA asked the question in the framework of pursuance of its political aims with regard to the Israeli-Palestinian conflict. This in itself is not surprising, having regard to the political nature of the organ.[17] Apparently, the legality or illegality of the wall was not even a question for the states who voted in favor, because according to the preamble of the resolution, they are already convinced that Israel "continues to refuse to comply with international law vis-à-vis its construction […]." Judge Kooijmans aptly commented in his separate opinion that the GA's request was "far from being 'legally neutral'."[18] This indicates that not so much the enlightenment of an obscure legal question was the issue, but rather the search for the authoritative support of the "World Court" for a clear political objective. This becomes even clearer if we take note of the fact that the GA asked the court to examine the legal aspects of a security barrier built by Israel, but had never shown a similar interest in other barriers erected in disputed territories in the world, such as Kashmir, the Western Sahara or Cyprus. Moreover, the resolution was adopted with a majority of 90 votes in favor, 8 against and no less than 74 abstentions. Among those states that voted in favor there are many that have traditionally adopted a hostile attitude against Israel and a considerable number of these do not recognize this state. The political background of the GA's request in the *Wall* case is of course not at all unique. Moreover, the advisory opinions in, for example, the cases on the Status of Eastern Carelia,[19] Namibia,[20] Western Sahara[21] and Kosovo[22] originated in requests of political bodies, with political motives, concerning legal aspects of controversial political questions. In a sense it is part of game; the UN Charter explicitly provides its main political organs, with the

15 Ibid.

16 Ibid.

17 Res. ES-10/14.

18 *ICJ Reports 2004*, 227.

19 *Status of Eastern Carelia* (*USSR v. Finland*) Advisory Opinion, *PCIJ 1923*, ser. B, no. 5.

20 *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*, 24.

21 *Western Sahara* Advisory Opinion, *ICJ Reports 1975*, 12.

22 *Accordance with International law of the Unilateral Declaration of Independence in respect of Kosovo, ICJ Reports 2010*, 403.

competence to request an advisory opinion (Article 96).[23] That does not take away the fact that there are reasons to question the adequacy of the use of the instrument of the advisory opinion in the present case, but also in other cases, as a contribution to the solution of serious international conflicts. This may even point to doubts as to the advisory function of the court as such, but in any case it is concerned with the use by the court of its discretion to respond positively or negatively to a request for an opinion. In this connection it is relevant to refer to the hesitations that were expressed already in the times of the League of Nations (LoN) in respect of an advisory function of the Permanent Court of International Justice (PCIJ).[24] The reputation of the court could be negatively affected if it rendered advise to political organs (of the LoN), which could be seen as an executive rather than a judicial task. Although it was not formally required, the Council of the LoN succeeded almost always to generate unanimous support for its requests for an advisory opinion of the PCIJ, including the vote of the state(s) that would be affected by the opinion. Indeed, the GA's request in the case under consideration is very far from this cautious practice. By virtue of its preparedness to answer the question, the court would inevitably result in adopting a stance to a very sensitive political controversy. Not only the affected state, but many other member states of the UN seem to have been aware of this danger and therefore withheld their support for the request. Judge Kooijmans also observed in his separate opinion that the court in accepting the request would be made an actor on the political stage, but he held the GA responsible for this. Indeed, it is true that the court cannot be blamed for the political choices of the GA. Moreover, in Kooijmans's view, a refusal by the court to give an opinion would also be a political act.[25] Be that as it may, only delivery of an opinion would imply the need to express views on controversial substantive issues, which would very likely support the position of one of the parties in the conflict, and condemn the position of the other party. The court could have used its discretion not to respond to the request of the GA. It saw, however, no reason to refrain from delivering an advisory opinion. It, obligatorily, observed that "the Court would only examine other issues to the extent that they might be necessary to its consideration of the question put to it."[26]

23 See for a similar provision, League of Nations, *Statute of the Permanent Court of International Justice*, 16 December 1920, available at <http://www.refworld.org/docid/40421d5e4.html>, Art. 65.

24 See M. Pomerance, "The ICJ's Advisory Jurisdiction and the Crumbling Wall between the Political and the Judicial" (2005) 99 *American Journal of International Law* 27–29.

25 *ICJ Reports 2004*, 225.

26 *ICJ Reports 2004*, 160.

Nevertheless, the conclusions of the court on many contentious issues in the Israeli-Palestinian conflict, and not only on the security barrier itself, have since played an important role in the debate. In addition, it has to be observed that the court uncritically adopted the terminology used by the GA in its request, namely the qualification of the barrier erected by Israel – contrary to the technical characteristics of the largest part of the construction – as a "wall."[27] In doing so, it took for granted all the historical connotations of this expression which can safely be presumed to have been used purposefully by the GA (think of the *Berlin wall*) thereby contributing to the suspicion that the engagement of the court in a political action was not free from one-sidedness. This impression is strengthened by the permission granted to "Palestine"- a non-state entity – to participate in the written and oral proceedings, which according to the Statute of the Court is a procedural right only of states and international organizations (Article 66).

A Contentious Judgment in Disguise

It is submitted that in all but a formal sense the court adjudicated in a contentious case, without the consent of at least one of the parties, while the other party, even if it can be assumed to have consented, lacked the possibility of legal standing before the court. The concern was already expressed in connection to the PCIJ, namely that compulsory jurisdiction on the international level could enter the scene via the backdoor of the advisory competence of the court.[28] The *Wall* advisory opinion, like the other advisory opinions mentioned in the previous paragraph, illustrates that this concern is not only theoretical. The central presupposition of international adjudication is, according to Article 36 of the Statute of the Court, that contentious issues can be judged by the court only if its jurisdiction has been accepted by both parties. Any other foundation of the court's jurisdiction is excluded in an international legal order of which the sovereign equality of states is the cornerstone (see Article 2.1 of the UN Charter). Only if one is prepared to accept, with Richard Falk in 2005, that the "Westphalian tradition of world order is gradually being superseded by a system of global governance that erodes and complicates our understanding of traditional categories, but none more than that of sovereignty"[29] the conclusion may be different. But this is still a (in my view dangerous) utopia. Therefore

27 The Secretary General of the UN opted for the more "neutral" term "barrier" in his preparatory report submitted to the GA on 24 November 2003, A/ES-10/248.

28 Pomerance, note 25.

29 Richard Falk, "Toward Authoritativeness: the ICJ Ruling on Israel's Security Wall" (2005) 99 *American Journal of International Law* 46.

the ruling of the PCIJ in the *Eastern Carelia* case still stands: "It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement."[30] What played a role in this case was that Russia, one of the states involved, was not a member of the LoN and had therefore not accepted the advisory competence of the PCIJ. This was one of the reasons for the ICJ not to follow this precedent in the *Namibia*[31] and *Western Sahara*[32] advisory opinions, where the states concerned as member states of the UN had accepted that competence of the ICJ. That does not mean, however, that the principle formulated by the PCIJ is no longer relevant. In the context of the international legal order, consent is an essential requirement of fairness in proceedings. If in a conflict the obstacle to jurisdiction due to lack of consent of one of the parties can be bypassed by the generation of political support for a request for an advisory opinion on the conflict, that party is no longer treated as an equal in international relations. It is moreover a serious infringement of a basic principle of a fair trial in the adversarial context of international adjudication, namely the equality of the parties before a court. The court seems to have been aware of these concerns. It quoted a crucial observation made in its previous *Western Sahara Advisory Opinion* that

> In certain circumstances [...] the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a state is not obliged to allow its disputes to be submitted to judicial settlement without its consent.[33]

Having regard to the fact that an answer to the GA's request would oblige the court to address many legal aspects of the dispute between Israel and the Palestinians, including territorial rights, humanitarian law and human rights, there were good arguments to conclude that in this case the issuance of an advisory opinion would be incompatible with the court's judicial character. The reasoning of the court leading to the opposite conclusion is not convincing.

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30 *Status of Eastern Carelia*, note 20. This precedent was mentioned by the Court: *ICJ Reports (2004)*, 156-157.

31 *ICJ Reports 1971*, 22.

32 *ICJ Reports 1975*, 23–24.

33 *ICJ Reports 2004*, 158.

The court acknowledges that Israel and Palestine "have expressed radically divergent views on the legal consequences of Israel's construction of the wall," but that was, according to the court, not sufficient to qualify the issue as being contentious, because, "differences of views [...] on legal issues have existed in practically every advisory proceeding."[34] This platitude is not helpful in convincing that there was no contentious issue. The same is true for the final argument of the court that the subject matter of the GA's request cannot be regarded as *only* a bilateral matter, but also one involving the responsibility of the UN and its organs. This involvement is however the consequence of the existence of the "bilateral conflict" and is therefore no argument against qualifying the issue before the court as being essentially contentious. This was also stressed more than once by Judge Owada in his separate opinion: "It is undeniable that there is in this case an underlying legal controversy or a dispute between the parties directly involved in this situation [...]."[35] This did not lead him to the conclusion that the court should decline the exercise of jurisdiction. It led him to stress that also in the framework of the advisory procedure the court should abide by its judicial role and observe the principle of fairness "in the midst of divergent positions and interests among the interested parties."[36] In the context of this procedure, this was already from the beginning almost an impossible mission. The court should therefore have refrained from giving an opinion. As was observed by Richard Falk, in 1986

> [T]o cast a state in the role of de facto defendant, without acquiring its genuine consent to the proceedings, is hazardous for the Court from the point of view of its growth as an institution [...]. The notion of judicial caution implicit in the *Eastern Carelia* proceedings before the Permanent Court of International Justice was an apt acknowledgment of these limits, perhaps too easily ignored by the International Court of Justice in the more difficult – that is, more politicized – environment of its operations.[37]

The court in the *Wall* case indeed insufficiently took heed of this notion of judicial caution. By doing so it gave the impression that the underlying principle of equality was not taken seriously.

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34 *ICJ Reports 2004*, 158. The Court is quoting here itself from the *South West Africa Case*, note 21 at 24.

35 *ICJ Reports 2004*, 264.

36 *ICJ Reports 2004*, 266.

37 Quoted by Pomerance, note 25 at 40.

The Appearance of Partiality

The decisions of the court taken in the field of jurisdiction and the propriety of an advisory opinion are not the only questionable elements. An important procedural move of the court in this case also raises doubts. What I have in mind is the very formal approach of the objections of Israel against the Egyptian Judge Elaraby. These concerned the latter's function as Legal Advisor to the Egyptian Ministry of Foreign Affairs and more particular his leading role in the Tenth Emergency Special Session of the GA (ES) from which the request of the advisory opinion had emerged. Moreover, Israel referred to an interview given by him to an Egyptian newspaper, two months before he was elected as a member of the court. In this interview, in the text which is included in the dissenting opinion of Judge Buergenthal attached to the court's order of 30 January 2004, he qualified the Israeli occupation as being against international law, while he also refers to grave violations of humanitarian law that ensued from Israeli activities in these territories.[38] It is imaginable that this led to serious doubts on the side of Israel as to the impartiality of the judge. The court without much ado rejected the objection, however. It referred to Article 17 paragraph 2 of the Statute and concluded that the issue of the construction of a wall was only discussed in the ES after Elaraby had ceased to participate, and also that in the interview he had not expressed an opinion "on the question put in the present case."[39] Buergenthal qualified this as "the most formalistic and narrow construction of Article 17, paragraph 2."[40] Having regard to the broad political context of the request for the advisory opinion, one is inclined to agree with the American judge. In fact, the court itself confirmed Israeli concerns as it gave its opinion regarding a wide range of questions related to the conflict, among these indeed the topics addressed by Elaraby in his interview. Elaraby himself, however, appeared not to be impressed by the objections against his participation in the case. He quoted former Judge Lachs in his separate opinion: "A judge [...] is bound to be impartial, objective, detached, disinterested and unbiased" and added that he "exerted every effort to be guided by this wise maxim [...]."[41] Be that as it may, not only the noble intentions of a judge count, but also the appearance of bias has to be avoided if the principle of impartiality is taken seriously.[42] In this case it is arguable that it was not. Therefore the authority of the opinion was affected negatively.

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38 *ICJ Reports 2004*, 8.

39 *ICJ Reports 2004*, 5.

40 *ICJ Reports 2004*, 10.

41 *ICJ Reports 2004*, 246.

42 Compare House of Lords 15 January 1999 in re *Pinochet Ugarte*, [1999] All ER (D) 18.

The Lack of Historical Consciousness

We now come to some flaws of the opinion of a substantive nature. The first point in this connection is the way the court dealt with the historical background of the controversy on its table. History is always relevant in the case of international disputes, but this is particularly the case in the context of the conflict in the Middle East. In this respect, the opinion is disappointing and therefore not convincing in its findings. With a characteristic English understatement, Judge Rosalyn Higgins observed in her separate opinion: "I find the 'history' as recounted by the Court [...] neither balanced nor satisfactory."[43] The unbalance is illustrated by the selective attention paid to the Mandate for Palestine. In general terms, the court mentions the objectives of the Mandate system, namely the interest of the inhabitants of the territory, and of humanity in general, thereby quoting from its *International Status of South West Africa Advisory Opinion*.[44] It overlooked, however, the background and specific nature of the Mandate for Palestine, as recognized in its central Article 2, namely the establishment of a National Home for the Jewish people in the geographical area called Palestine in those days.[45] Different from all the other mandates, the Mandate for Palestine concerned a population, part of which was not established in the territory. The Mandate therefore included a right to establishment of Jewish settlers in the territory (Article 6).[46] All this made the Mandate for Palestine unique. It was the recognition of a sacred trust of civilization in respect of a people who for many centuries had been the victim of persecution and even from time to time endangered by attempts of annihilation in all parts of the world. In the Preamble of the Mandate "recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country." All this should have informed observations of the court on the issues of "borders" and

43 *ICJ Reports 2004*, 211.

44 *ICJ Reports 2004*, 165; *International Status of South West Africa* Advisory Opinion, *ICJ Reports 1950*, 131–132.

45 "The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion."

46 "The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes."

"Israeli settlements" and the Palestinian right to self-determination, but it did not. The court did not pay attention to the central provisions of the Mandate, while it was willing to quote the provision in the Mandate on the status of Holy Places (Article 13).[47] In doing so the court ignored in a sense the "birth certificate" of the State of Israel and implicitly gave the impression that the position of the State of Israel was not to be taken that seriously. The court seems tacitly to agree to a revision of the history and legal significance of the Mandate for Palestine, by not noticing the fact that under the Mandate, the political rights eventually leading to independence according to the purposes of the Mandate system were given to the Jewish people, while concurrently the civil and religious rights of the non-Jewish inhabitants should be protected. We find a notable example of the denial of the unique character of the Mandate for Palestine in the writings of John Quigley, who defends the thesis that the State of Palestine indeed derives its legitimacy from the Mandate, but then as state for Palestinians, in the modern use of this term which refers to Palestinian Arabs.[48] John Dugard also appears to feel sympathetic towards this new approach.[49] It is part of academic freedom to propose a radically different view of history but it remains difficult to reconcile this view with the relevant legal provisions. Quigley refers only to the general article on mandates in the Covenant of the LoN (Article 22) and ignores the text of the Palestine Mandate itself. The ICJ can in any case be criticized for not paying any attention to the central obligations and rights under the Mandate, which are still relevant in legal terms having regard to the preservation of the rights of peoples under the mandate-system in Article 80 of the UN Charter.[50] Therefore, there are reasons for concluding that the principle of fairness, which entails that the positions of the interested parties have to be taken into account, has not been observed. It can be imagined that the court's omission in this respect reduced the authority of the opinion quite considerably.

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47 *ICJ Reports 2004*, 188.

48 See *inter alia* J. Quigley, "The Palestine Declaration to the International Court: The Statehood Issue" in C. Meloni and G. Tognoni (eds) *Is There a Court for Gaza?* (TMC Asser Press, The Hague: 2012) 429–440.

49 J. Dugard, "Britain's betrayal of the sacred trust in Palestine" *Middle East Monitor* 12 October 2012.

50 See on this for example N. Feinberg, "The Arab-Israel Conflict in International Law" in J.N. Moore (ed) *The Arab-Israeli Conflict*, vol. I (Princeton University Press, Princeton: 1974) 405, 419–420; E. Rostow, "The Future of Palestine" (November 1993) *National Defense University, Mc Nair paper 24* 10, 15; H. Grief, *The Legal Foundation and Borders of Israel under International Law* (Mazo Publishers, Jerusalem: 2008) 255–257.

The Weak Factual Underpinning

Another factor that may have contributed to the ineffectiveness of the advisory opinion is the weak factual basis of the findings of the court. The opinion would have been more convincing in its findings if they were based on strong evidence. The weak factual underpinning was the main point of criticism of the only dissenting judge, Judge Buergenthal, in his declaration: "the Court did not have before it the requisite factual bases for its sweeping findings."[51] The Israel Supreme Court also in its first judgment, where it had the possibility to take into account the advisory opinion, expressed as its view that the ICJ based its findings on insufficient evidence, especially where Israel's security interests were at stake.[52] This criticism refers both to the available information before the court, as well as the manner in which the court substantiated its findings based on the evidence. In that sense it is also an issue of the basic principle of a fair trial, namely that a court is under a duty to give well-reasoned decisions. Only then can it be expected that its decisions will be taken seriously by all the parties concerned. Firstly, the court based its findings primarily on information comprised in UN Reports, such as a preparatory report by the Secretary-General[53] and reports by two Special UN Rapporteurs.[54] These rapporteurs did not restrict themselves to findings of fact, but sometimes also felt free to come up with far reaching interpretations of these facts. John Dugard, for example, qualified the construction of the security barrier as an act of unlawful (*de facto*) annexation,[55] a qualification which was reproduced by the court.[56] Of course it has to be noted that Israel did not decide to take part in the oral proceedings before the court, while "Palestine" did. However, it is only in contentious proceedings that the position a party adopts be relevant as to the approach of the court regarding the evidence presented on its table. Whether or not the Israeli decision was a wise one, it should not have been a reason for the court not to examine Israel's security interests in a way which might be expected of a court. Judge Owada expressed concerns to this effect in his separate opinion:

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51 *ICJ Reports 2004*, 240.

52 *Ma'arabe v. The Prime Minister of Israel*, note 7.

53 A/ES-10/248.

54 Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 1993/2A, E/CN.4/2004/6; The right to food,. Report by the Special Rapporteur, Jean Ziegler. Addendum Mission to the Occupied Palestinian territories, E/CN.4/2004/10/Add.2.

55 E/CN.4/2004/6, par. 6–16.

56 *ICJ Reports 2004*, 184.

"What seems to be wanting [...] is material explaining the Israeli side of the picture [...]."[57] In addition to this lacking factual basis is the superficial reasoning of the court in respect of the legal findings based on the evidence. When the humanitarian law and the human rights law applied by the court require the balancing of, on the one hand the fundamental rights of Palestinians, and on the other the interest of the State of Israel to protect the security of its citizens against terrorist attacks, we find the following pattern. The violations of the rights of the Palestinians are held to be established on the basis of the available information in the UN Reports. On the other hand, the security interests of Israel, which should be taken into account having regard to the relevant legal provisions, are mentioned only briefly and without a thorough analysis, followed by the conclusion that: "on the material before it, the Court is not convinced that [for example] the destructions carried out [...] were rendered absolutely necessary by military operations."[58] One remains in the dark as to *why* the court was not convinced. It belongs however to the judicial function not only to scrutinize the available material but also to explain why it came to a conclusion, in other words to provide its reasoning. This was also stressed by Judge Owada: "the Court [...] should be extremely careful not only in ensuring the objective fairness in the result, but in seeing to it that the Court is seen to maintain fairness throughout the proceedings [...]."[59] By saying that it was not convinced without explaining why, the court takes the risk that its own findings will not be considered to be convincing to all parties to the conflict.

The Lack of Objective Fairness

It is not just a matter of inadequate reasoning. There are serious reasons to doubt whether, using Owada's words, the objective fairness in the result has been met in this case. There is an impression that the serious threats to the State of Israel and its citizens which led to the decision to build the security fence were not taken in sufficient seriousness by the court. That is exemplified in its frequently contested decision on the right to self-defense under Article 51 of the UN Charter, which was invoked by Israel in connection with the security barrier.[60] The court

57 *ICJ Reports 2004*, 268.

58 In the case of the alleged interference with Article 53 of the Hague Regulations of 1907 see *ICJ Reports 2004*, 192.

59 *ICJ Reports 2004*, 269.

60 See among many other articles R. Wedgwood "The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense" (2005) 99 *American Journal of International Law* 52 and S.D. Murphy "Self-Defense and the Israeli Wall Advisory Opinion: An *Ipse Dixit* from the ICJ?" (2005) 99 *American Journal of International Law* 62.

quotes the text of this provision and concludes immediately: "Article 51 [...] *thus* recognizes the existence of an inherent right of self-defence in case of armed attack by one State against another State."[61] It subsequently considers that Israel does not claim that the attacks are imputable to another state. Then after a very short passage of not more than seven lines the court concludes that Article 51 is not applicable, because the attacks originated from within the Palestinian territories. This conclusion is not warranted by the wording of this provision, which does not refer to the source of an attack, nor by the case from which the modern doctrine of self-defense originated, the *Caroline* case, which concerned an attack by rebels.[62] This reasoning, or better lack of reasoning, brought Judge Higgins to maybe her fiercest criticism in her, in general, very critical separate opinion, formulated in a way that makes her eventual support of the *dispositive* a mystery. She also pointed to a serious inconsistency in the court's reasoning

> [...] Palestine cannot be sufficiently an international entity to be invited to these proceedings, and to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attack on others to be applicable. This is formalism of an uneven-handed sort.[63]

Not only the inconsistency addressed by Judge Higgins but also more in general the superficiality of the reasoning on the central issue of self-defense raises serious doubts as to the fairness of the court's opinion. The protection of its citizens against armed attacks is the core business of a state. The security barrier was an answer to the Second Intifada, with its frequent suicide attacks purposely aimed at many innocent Israeli citizens. It was a relatively peaceful and effective means to counter these attacks; it is clear that forms of deterrence will not work in case of suicide bombers. The court should have taken the reasons for constructing the wall more seriously. Buergenthal rightly observed that the attacks on Israel "are never really serious examined by the Court, and the dossier provided [to] the Court by the United Nations on which the Court to a large extent bases its findings barely touches on that subject."[64] The perfunctory reference to peace and security for all in the region in its last substantive

61 *ICJ Reports 2004*, 194, emphasis added.

62 M. Dixon and R. McCorquodale, *Cases & Materials on International Law* (Blackstone Press Limited, London: 2000) 561–562.

63 *ICJ Reports 2004*, 215.

64 *ICJ Reports 2004*, 241.

paragraph does not take away this impression.[65] The scant attention of the security interests of Israel, culminating in the superficial way the court wiped the self-defense argument from the table, made the opinion as a whole a rather dubious standard, if it was supposed to be a contribution to a fair solution of the conflict between Israel and the Palestinians.

Concluding Remarks

The ICJ's advisory opinion on the *Wall* is hailed as a landmark decision. It enjoys popularity far beyond the narrow circles of international lawyers. On the other hand it did not have an effect on the facts on the ground. International law is of course supposed to have an impact on international relations and as such to be a means to contribute to peace and justice in the world. The fact that an advisory opinion of the ICJ has so far not had an impact on a conflict that has already for so long affected many people, could therefore be deplored. However, there are reasons for not bemoaning this in respect of the *Wall* advisory opinion. We have identified some flaws, which are the result of insufficient respect for basic notions of fairness which might have been expected even of a court exercising an advisory function. The opinion therefore contributes very little to a fair and just solution of the conflict which underlies the request of the GA. In the preceding paragraphs it has been shown that already the political context of the question of the GA was an obstacle in this respect. The disguise of the contentious character of the question before the court made respect for the principle of equality of the parties involved in the conflict, required by both the presuppositions of the international legal order and the principles of a fair trial *per se*, questionable. The court furthermore did not take away the impression of partiality by rejecting the objections against one of its members in a very formalistic way. When it came to the substance of the issues before the court it overlooked important parts of the relevant historical aspects. Reading the opinion it is difficult to escape the conclusion that it is based on one-sided information and failed to take seriously the interests of both "parties" in a balanced way. The reasoning leading from the facts to the legal conclusions was obscure and therefore not convincing. That was also true for the approach of the central issue of the right to self-defense, which is at the heart of Israel's justification of the construction of the security barrier partly beyond the Green Line. It can be concluded that instead of promoting peace and reconciliation based

65 *ICJ Reports 2004*, 201.

on justice and fairness, which is the purpose of an international order based on the rule of law,[66] the advisory opinion has burdened the peace process unnecessarily. There is indeed something wrong with international law, if the *Wall* opinion is expected to be an important contribution to the solution of one of the most persistent conflicts in the world.

66 Compare Resolution 62/70 of the GA of the UN "The rule of law at the national and international levels," referring to the Charter of the UN and international law as being "indispensable foundations of a more peaceful, prosperous and just world" A/Res/62/70.