

## Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)

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### A. Background

- 1 → *Palestine* had been part of the Ottoman Empire, and after World War I was the subject of a 'class A' mandate entrusted to Great Britain. In the east the boundary of Palestine was for the most part the line of the River Jordan separating Palestine and Transjordan (now Jordan). Although in November 1947 the United Nations General Assembly ('UNGA'; → *United Nations, General Assembly*) adopted a Partition Plan for the future government of Palestine, this Plan was never implemented. In May 1948, the United Kingdom withdrew from Palestine, on 14 May 1948 → *Israel* proclaimed its independence and armed conflict then broke out between Israel and a number of Arab States (→ *Arab-Israeli Conflict*). General armistice agreements were concluded in 1949 between Israel and neighbouring States, including, in particular, the agreement of 3 April 1949 between Israel and Jordan (→ *armistice*). This agreement fixed the armistice demarcation line (often called the 'Green Line') between Israeli and Arab forces, that line being without prejudice to any future political or territorial settlement between the parties. Israel thus gained possession of much of Palestine, but not including, in particular, East → *Jerusalem* and the area beyond (ie to the east of) the Green Line and lying between it and the west bank of the → *Jordan River* (the 'West Bank' territories). Israel was eventually generally recognized as a → *State* within the borders of those Palestinian territories of which it had gained possession, ie up to the Green Line and excluding East Jerusalem and the West Bank (see also → *Recognition*; → *States, Fundamental Rights and Duties*).
- 2 A further armed conflict erupted in 1967 in which Israeli forces occupied inter alia East Jerusalem and the West Bank (→ *Israel, Occupied Territories*). These areas have been consistently regarded by the → *United Nations (UN)* and virtually all other States as territories subject to belligerent occupation (→ *Occupation, Belligerent*), and not as part of Israel's sovereign territory. Israel, however, annexed East Jerusalem and established Jerusalem as the capital of the State, and actively encouraged Israeli citizens to settle in parts of the West Bank. This 'settlement' policy was regularly condemned as contrary to international law by the UNGA and the UN Security Council ('UNSC'; → *United Nations, Security Council*). The West Bank lands became increasingly regarded as the territory of a prospective State of Palestine.
- 3 While general Arab-Israeli hostilities did not resume after the 1967 war, numerous individual acts of violence continued to occur with each side claiming to have acted in response to acts of violence committed by the other (see also → *Palestine Liberation Organization [PLO]*). The death toll among Israeli civilians steadily increased. In order to stem the attacks on its civilian population, Israel decided to build a substantial continuous physical barrier to prevent would-be attackers from entering Israel. This barrier was a complex structure which for simplicity Israel referred to as a 'security fence', the UN Secretary-General as a 'barrier', Palestine and the Arab States as a 'wall', which last usage came to be adopted later by the UN and the → *International Court of Justice (ICJ)*. Construction of the first phase of the barrier was completed in July 2003; work on subsequent phases had by then already begun. This proposed barrier roughly reflected the course of the Green Line running between Israel and the occupied West Bank, but in practice it ran virtually wholly within the Palestinian areas occupied by Israel, in places encroaching into those areas by over 20 km. Moreover, it included on the western (ie Israeli) side of the barrier many of the Israeli settlements in the West Bank, as well as East Jerusalem; it ran through Palestinian lands often separating them from their owners; and while it included check-points through which Palestinians and their goods could pass, the way these were operated made them a serious obstruction to the Palestinians' freedom of movement, and caused them serious hardship (→ *Movement, Freedom of, International*

*Protection*). The feeling also grew that the route taken by the barrier was not solely designed to keep out would-be attackers but was intended to serve as the basis for Israel's eventual formal eastern boundary by incorporating into Israel the West Bank lands and the Israeli settlements already established on them, situated on the Israeli side of the barrier.

## B. Questions Raised by the UN General Assembly

- 4 A draft resolution condemning the construction of the wall was put to the UNSC in October 2003 but was not adopted because of the negative vote of the United States of America ('US'). Consequently the debates leading to the request for an advisory opinion took place principally in the UNGA, within the framework of its Tenth Emergency Special Session which had first met in 1997. While the issue was under consideration by the UNGA, the UNSC, on 19 November 2003, adopted Resolution 1515 (2003) endorsing what had become known as the 'Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict' ('the Roadmap'), but neither the Roadmap nor Resolution 1515 (2003) contained any specific provision concerning the construction of the wall, which was not discussed by the UNSC in that context.
- 5 On 8 December 2003 the UNGA, at its resumed Tenth Emergency Session, adopted resolution ES-10/14, requesting an advisory opinion on the following question:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions.

- 6 The ICJ fixed 30 January 2004 as the time-limit for the submission of written statements by the UN and its Member States, and also by Palestine (given that Palestine had been granted by the UNGA a special status of observer and had been a co-sponsor of the resolution requesting an advisory opinion). The court also decided that the → *League of Arab States (LAS)* and the → *Organization of the Islamic Conference (OIC)* could submit written statements. The ICJ fixed 23 February 2003 for the opening of oral hearings. Meanwhile Israel had raised questions about the right of Justice Elaraby, an Egyptian national, to sit in the case, but the ICJ decided that the matters advanced by Israel were not such as to preclude Judge Elaraby from sitting.

## C. Written Statements and Oral Pleadings

- 7 Written statements were submitted by 44 States (including Israel), Palestine, the UN and three other international organizations. Oral statements were made on 23–25 February 2003 by 12 States (not including Israel), Palestine and two international organizations. Several participants in the proceedings (including Israel) dealt, in their written and/or oral submissions, only with the questions of the ICJ's jurisdiction and propriety (→ *International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications*); others, however, dealt both with issues of jurisdiction and of merits.

## D. The ICJ's Advisory Opinion

### 1. Jurisdiction and Propriety

- 8 The ICJ was satisfied that, as Art. 96 (1) UN Charter gave the UNGA the competence to request an advisory opinion 'on any legal question', legal issues relating to the construction of the wall in the Occupied Palestinian Territory were within the UNGA's competence (*Israeli Wall [Advisory Opinion]* 144–45).
- 9 The ICJ (*ibid* 148–55) then addressed a number of arguments challenging its jurisdiction. First, it was argued that since the UNSC had been actively engaged with the situation in the → *Middle East*, including the Palestinian question, the UNGA's request for an advisory opinion was ultra vires. Referring to Art. 12 (1) UN Charter, and noting that a request for an advisory opinion was not a 'recommendation' as referred to in that article, the ICJ observed that under Art. 24 UN Charter, the UNSC's responsibility for the maintenance of international peace and security was primary but not exclusive. The ICJ also noted that the interpretation given to Art. 12 UN Charter had evolved, and 'that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security' (*ibid* 149). The ICJ found this accepted practice to be consistent with Art. 12 (1) UN Charter. Accordingly, by submitting the request for an advisory opinion, the UNGA had not exceeded its competence.

- 10 The ICJ dealt next with the contention that the request did not fulfil the essential conditions set by UNGA Resolution 377 (V) of 3 November 1950 (→ *Uniting for Peace Resolution [1950]*) under which the Tenth Emergency Special Session had been convened and continued to act. That resolution required two conditions to be met, namely that the UNSC had failed to exercise its primary responsibility for the maintenance of international peace and security as a result of a negative vote of a permanent member and that the situation was one in which there appeared to be a threat to the peace, breach of the peace, or act of aggression. The UNSC, as a result of the negative vote of a permanent member, the US, had on 14 October 2003 rejected a draft resolution concerning the construction of the wall; following this rejection, the UNGA's Tenth Emergency Special Session was reconvened on 20 October 2003. The UNSC had not reconsidered the negative vote of 14 October 2003. The Tenth Emergency Special Session had therefore been duly reconvened and could properly be seised of the matter now before the ICJ. The Emergency Special Session's 'rolling' character (ie being convened in 1997 and reconvened 11 times since then) was irrelevant; nor had it been improper to reconvene the Emergency Special Session during the regular session of the UNGA.
- 11 As to the contention that the request for an advisory opinion was not a 'legal question', since the question posed was not sufficiently specific and its legal meaning was not reasonably certain, the ICJ found that the question was (quoting its earlier opinion in the → *Western Sahara [Advisory Opinion] [1975]* ICJ Rep 12) 'by its very nature susceptible of a reply based on law; indeed it is scarcely susceptible of a reply otherwise than on the basis of law. In the view of the Court, it is indeed a question of a legal character' (ibid 153; see also *Western Sahara [Advisory Opinion]* at 18). Lack of clarity in the drafting of a question did not deprive the ICJ of jurisdiction: it had often clarified the interpretation to be given to a question. The allegedly abstract nature of the question posed did not raise an issue of jurisdiction, and in any event the question posed was not an abstract one. Finally the ICJ could not accept the view that it had no jurisdiction because of the 'political' character of the question posed. It relied upon 'its long-standing jurisprudence' (*Israeli Wall [Advisory Opinion]* 155) to the effect that the fact that a legal question also had political aspects did not deprive it of its character as a legal question.
- 12 The ICJ accordingly concluded unanimously that it had jurisdiction to give the advisory opinion which had been requested (ibid 156, 201). The ICJ then considered whether it was appropriate for it to exercise that jurisdiction (ibid 156–64).
- 13 Although the ICJ had a discretion to decline to give an advisory opinion, it should in principle not refuse to do so unless there were compelling reasons. The ICJ had never declined a request for an advisory opinion, and its predecessor had done so only once, in very particular circumstances (see also → *Permanent Court of International Justice [PCIJ]*). The ICJ nevertheless had to satisfy itself each time as to the propriety of the exercise of its judicial function, by reference to the criterion of 'compelling reasons' (ibid 156–57).
- 14 The ICJ rejected the argument that it should decline to give an advisory opinion because the request concerned a contentious matter between Israel and Palestine, in respect of which Israel had not consented to the exercise of the ICJ's jurisdiction. Although lack of consent to the court's contentious jurisdiction by interested States had no bearing on the ICJ's jurisdiction to give an advisory opinion, the opposition of certain interested States to the giving of an opinion might raise questions of judicial propriety. Israel and Palestine had expressed radically divergent views on the legal consequences of Israel's construction of the wall, but there had been differences of legal views in practically every advisory proceeding. Moreover, the present request concerned not just a bilateral matter between Israel and Palestine but directly concerned the UN. Giving an opinion would not circumvent the principle of consent to judicial settlement.
- 15 As to the argument that the giving of an opinion could impede a political, negotiated solution to the Israeli-Palestinian conflict, in particular by complicating the negotiations on the Roadmap, the ICJ was not clear what influence its opinion might have on those negotiations. This factor was not a compelling reason to decline to reply to the question posed, nor was the fact that the construction of the wall was only one aspect of the Israeli-Palestinian conflict.
- 16 It was further argued that the ICJ did not have the necessary facts and evidence to enable it to reach its conclusions. Since the ICJ had at its disposal the report of the Secretary-General and voluminous detailed material submitted by him to the court, and since numerous participants, including Israel, had submitted relevant information to the ICJ which also had access to much material already in the public domain, sufficient information and evidence was available to enable the ICJ to give the advisory opinion which had been requested.
- 17 As to the argument that the requested opinion would lack any useful purpose, it was for the requesting organs to decide upon the usefulness of an opinion which they had requested. The ICJ could not substitute its assessment of the usefulness of the opinion requested for that of the UNGA which had requested it.

- 18 The ICJ dismissed the argument that since Palestine bore responsibility for the acts of violence against Israel and its population which the wall was aimed at addressing, Palestine could not seek a remedy for a situation resulting from its own wrongdoing: it was the UNGA, not a specific State or entity, which requested the advisory opinion and to which the opinion would be given.
- 19 The ICJ concluded (ibid 164, 201) that there was no compelling reason for it to use its discretion not to give the requested advisory opinion, and decided, by 14 votes to one, to comply with the request for an advisory opinion.

## 2. Merits

- 20 The ICJ noted that since the question concerned the legal consequences of the wall being built 'in the Occupied Palestinian Territory, including in and around East Jerusalem' (ibid 164), it was not concerned with those parts of the wall being built on the territory of Israel itself.
- 21 The court briefly analyzed the history and status of the territory concerned, and noted various UNSC resolutions emphasizing the inadmissibility of acquisition of territory by war, calling for the withdrawal of Israeli forces, and declaring invalid and a violation of international law measures taken by Israel to change the status of Jerusalem (ibid 165–67). The ICJ also noted the terms of the 1994 Jordan-Israel peace treaty, which fixed the boundary between the two States by reference to the boundary definition under the mandate but without prejudice to the status of any territories which came under Israeli control in 1967. The court concluded that:

The territories situated between the Green Line ... and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories ... have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power (ibid 167).

The ICJ noted that it was essentially in these territories that Israel was constructing the wall, and then described the works involved, the route to be taken by the wall, its physical structure, its impact on the Palestinian population and the restrictive administrative regime accompanying it (ibid 168–71).

- 22 Turning to the relevant rules and principles of international law (ibid 171–81), the ICJ recalled Art. 2 (4) UN Charter and the emphasis in the → *Friendly Relations Declaration (1970)* that no territorial acquisition resulting from the threat or use of force would be recognized as legal (→ *Use of Force, Prohibition of*). Repeating its earlier view that the UN Charter principles as to the use of force reflected customary international law, the ICJ added that the same was true 'of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force' (ibid 171). The ICJ also noted the applicability of the principle of → *self-determination* of peoples, and that the right of peoples to self-determination was a right *erga omnes* (→ *Obligations erga omnes*).
- 23 Although Israel was not a party to the 1907 Hague Convention respecting the Laws and Customs of War on Land ('Hague Convention IV'), to which the Regulations respecting the Laws and Customs of War on Land ('Hague Regulations') were annexed, the ICJ considered 'that the provisions of the Hague Regulations have become part of customary law' (ibid 172; see also → *Hague Peace Conferences [1899 and 1907]*; → *Humanitarian Law, International*). Section III Hague Regulations, which concerned 'Military authority over the territory of the hostile State', was particularly relevant.
- 24 Israel disputed the applicability *de iure* of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War ('Geneva Convention IV') to the Occupied Palestinian Territory, even though Israel and Jordan were both parties (since 1951) and Palestine had given a unilateral undertaking to apply it (→ *Geneva Conventions I–IV [1949]*). Geneva Convention IV applied when there existed an armed conflict, and when the conflict was between two Contracting Parties. When Geneva Convention IV applied, it did so, in particular, in any territory occupied in the course of the conflict by one of the Contracting Parties. The intention of the drafters of Geneva Convention IV had been to protect civilians who found themselves, in whatever way, in the hands of the occupying Power (see also → *Civilian Population in Armed Conflict*). That interpretation was confirmed by the Convention's *travaux préparatoires*, and, with particular reference to the Occupied Palestinian Territory, including East Jerusalem, was approved by the States parties to the Convention in 1999 and 2001, and by the → *International Committee of the Red Cross (ICRC)* in 2001. Many

UNGA and UNSC resolutions had been to the same effect. Further, the Supreme Court of Israel had, in May 2004, found that Israeli military operations in the occupied territory were governed by the Hague Convention IV and the Fourth Geneva Convention. The ICJ, for all those reasons, considered:

that the Fourth Geneva Convention was applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories (ibid 177).

- 25 Israel was also a party to both the → *International Covenant on Civil and Political Rights (1966)* ('ICCPR') and the → *International Covenant on Economic, Social and Cultural Rights (1966)* ('ICESCR') and also to the 1989 Convention on the Rights of the Child ('CRC'; see also → *Children and Armed Conflict*; → *Children, International Protection*). The ICJ considered that the protection offered by → *human rights* conventions did not cease in case of armed conflict (save through the operation of provisions for derogation), and that it would have to take into consideration both human rights law and, as *lex specialis*, international humanitarian law. The ICJ concluded that in the light of Art. 2 ICCPR, the Covenant 'is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory' (ibid 180). Although the ICESCR contained no provision on its scope of application, the same result could not be excluded and the ICJ found that Israel, as the occupying Power of territories subject to its territorial jurisdiction, was bound by the ICESCR. The CRC expressly provided that it applied on the basis of the exercise of jurisdiction, so that it too was applicable within the Occupied Palestinian Territory.
- 26 Addressing the question whether the construction of the wall violated the rules and principles which the ICJ had found applicable, the court found Israel's policy and practices with regard to the establishment of settlements were contrary to Art. 49 (6) Geneva Convention IV (ibid 181–94), and that 'Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law' (ibid 184). The ICJ further considered 'that the construction of the wall and its associated régime create a "fait accompli" on the ground that could well become permanent, in which case ... it would be tantamount to *de facto* annexation' (ibid). Moreover, the route chosen for the wall gave expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, with a risk of further alterations to the demographic composition of the occupied territory: consequently, the construction of the wall along with measures taken previously severely impeded the exercise by the Palestinian people of its right to self-determination, and was therefore a breach of Israel's obligation to respect that right.
- 27 The ICJ further found that Arts 43, 46 and 52 Hague Regulations applied to the Occupied Palestinian Territory, as did Arts 47, 49, 52, 53 and 59 Geneva Convention IV. As to the ICCPR, Israel had made a permitted derogation only from Art. 9 ICCPR, and the other articles of the Covenant (particularly Arts 17 (1) and 12 (1) ICCPR) remained applicable both on Israeli territory and on the Occupied Palestinian Territory. Specific guarantees of access to the Christian, Jewish and Islamic → *Holy Places* also applied to the Holy Places which had come under Israel's control in 1967. Arts 6, 7, 10, 11, 12, 13 and 14 ICESCR were also relevant, as were the similar provisions in Arts 16, 24, 27 and 28 CRC.
- 28 The ICJ concluded that the construction of the wall had led to the destruction or requisition of properties in contravention of Arts 46 and 52 Hague Regulations and Art. 53 Geneva Convention IV. As regards freedom of movement, the ICJ was:
- of the opinion that the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention of the Rights of the Child. Lastly, the construction of the wall and its associated régime, by contributing to the demographic changes referred to ..., contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council resolutions cited in paragraph 120 above [ie UNSC Resolutions 446 (1979), 452 (1979) and 465 (1980)] (ibid 191–92; Information in square brackets inserted by the author).
- 29 Although provisions of the applicable international humanitarian law enabled account to be taken of military exigencies in certain circumstances, these provisions were either not applicable or their requirements were not satisfied. The ICCPR and ICESCR both contained provisions qualifying the rights covered by those Covenants, such as Art. 12(3) ICCPR and Art. 4 ICESCR, but the conditions for their operation had not been met.

30 By way of summary the ICJ said that it:

is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments (ibid 193–94).

31 Having 'concluded that the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel' (ibid 194), the ICJ addressed Israel's argument that the construction of the wall was consistent with its inherent right to → *self-defence* enshrined in Art. 51 UN Charter (ibid 193–94). The ICJ observed that 'Article 51 ... thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State' (ibid 194); given that Israel had not claimed that the attacks against Israel were imputable to a foreign State, and that the threat which Israel regarded as justifying the construction of the wall originated within, and not outside, the Occupied Palestinian Territory, the ICJ concluded that Art. 51 UN Charter was not relevant.

32 The ICJ then considered whether Israel could rely on a state of necessity as precluding the wrongfulness of the construction of the wall (ibid 194–95; → *Necessity, State of*). A state of necessity was recognized by customary international law under strictly defined conditions, the State concerned not being the sole judge of whether those conditions had been met. One was that the act being challenged was the only way to safeguard an essential interest against a grave and imminent peril. The ICJ was not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it had invoked as justification for that construction. Measures taken by Israel to protect the life of its citizens nonetheless had to conform with applicable international law.

33 Since neither a right of self-defence nor a state of necessity precluded the wrongfulness of the construction of the wall, the ICJ 'accordingly finds that the construction of the wall, and its associated régime, are contrary to international law' (ibid 195).

34 The ICJ then turned to the consequences of Israel's violation of various international obligations (ibid 195–200). From the unlawfulness of the construction of the wall by Israel it followed that Israel's responsibility under international law was engaged (→ *State Responsibility*). Moreover, Israel was obliged to comply with the international obligations it had breached by the construction of the wall: Israel was therefore bound to respect the right of the Palestinian people to self-determination, to comply with its obligations under international humanitarian law and international human rights law, to ensure freedom of access to the Holy Places which came under its control following the 1967 conflict, and to put an end to the violations of its international obligations flowing from the construction of the wall. Accordingly Israel had forthwith to cease the construction of the wall in the occupied territories and to dismantle those parts already built there; and Israel had to terminate the legislative and regulatory acts adopted with a view to the construction of the wall and the establishment of its associated regime. Since the construction of the wall involved the requisition and destruction of buildings and agricultural holdings, Israel had to make → *reparations* for the damage caused to those concerned, involving an obligation to return lands seized for purposes of the construction of the wall, and if that was materially impossible, Israel had to pay → *compensation*.

35 As for the consequences for other States, the ICJ observed that certain obligations violated by Israel were obligations *erga omnes*, namely the right of the Palestinian people to self-determination and certain obligations under international humanitarian law. The ICJ was:

of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention (ibid 200).

- 36 Finally, the UN, especially the UNGA and the UNSC, should consider what further action was required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime.

### **3. The ICJ's Reply to the Question Put by the UN General Assembly**

- 37 The ICJ replied to the issues raised by the question posed as follows:
- A. (By fourteen votes to one) The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law;
  - B. (By fourteen votes to one) 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, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto ...;
  - C. (By fourteen votes to one) 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;
  - D. (By thirteen votes to two) 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;
  - E. (By fourteen votes to one) 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 (ibid 201–2).
- 38 Judges Koroma, Higgins, Kooijmans, Al-Khasawneh, Elaraby and Owada appended separate opinions to the ICJ's advisory opinion, and Judge Buergethal appended a declaration. Judge Buergethal dissented both on the propriety of giving an opinion and on most of the substantive international law issues raised by the request; Judge Kooijmans dissented from the ICJ's conclusions regarding the obligations of all States consequential upon the construction of the wall being unlawful.

### **E. Assessment**

- 39 The subject-matter of the ICJ's advisory opinion was a matter of great political controversy, affecting one of the world's major and long-running problem areas. The ICJ, however, confirmed its previous jurisprudence to the effect that so long as the legal questions were properly identifiable as separate issues, the court was not prevented from answering them by their political ramifications.
- 40 Procedurally the ICJ's approach was interesting in its treatment of Palestine as though it was a 'State' for purposes of Art. 66 ICJ Statute which refers only to States and (international) organizations as being eligible to submit statements to the ICJ and to comment on the statements submitted by others. Not only was Palestine accorded that right, but in the organization of the oral proceedings Palestine was allotted twice as much time for its oral statements as any other participating State or organization.
- 41 The ICJ's treatment of its jurisdiction was in line with its earlier jurisprudence. On the substance of the matter the ICJ's advisory opinion was generally satisfactory (with perhaps one exception, see para. 42 below). The cornerstones of the advisory opinion were perhaps the ICJ's insistence on the limited scope of an occupying State's powers in relation to territory occupied as a result of armed conflict, and its equal insistence on the application of a wide range of international obligations resting upon the occupying State—obligations resulting not only from international humanitarian law but also from human rights law. The fact that the occupation was still continuing nearly 40 years after the fighting which gave rise to it had stopped did not result in any lessening of the limitations upon the occupying State's powers. As a result of the advisory opinion, the law is now much clearer on such fundamental matters as the right of the Palestinian people to self-determination, the status as 'occupied territories' of the territories beyond the Green Line occupied by Israel as a result of the 1967 conflict, the limitation upon Israel's authority in those occupied territories to that of an occupying Power, the application of human rights treaties in the occupied territories alongside the provisions of international humanitarian

law, the unlawfulness of the Israeli settlements established in those occupied territories, and the unlawfulness of the construction of the wall and its associated regime.

- 42 Perhaps the most troublesome part of the ICJ's advisory opinion was its terse dismissal of Israel's reliance on its inherent right of self-defence. The ICJ denied that Art. 51 UN Charter was relevant, simply stating that it allowed for a right of self-defence 'in the case of armed attack by one State against another State' (ibid 194), and implicitly requiring that 'the threat which [Israel] regards as justifying the construction of the wall' (ibid) had to originate outside Israel or territory it was occupying. However, nothing in the text of Art. 51 UN Charter supports those views: it refers simply to an armed attack occurring against a Member State of the UN, without any indication of the nature of the entity mounting the attack, or of the attack's geographical origins. Moreover, the implicit treatment of Palestine as not a State in this context sits oddly alongside the ICJ's application of Art. 66 ICJ Statute to Palestine's procedural position; and the ICJ's view that the threat was not within Art. 51 UN Charter because it originated within the occupied territories sits ill alongside the ICJ's clearly correct emphasis on those territories being non-Israeli but only territories in respect of which Israel was the occupying Power. It is unfortunate that the ICJ refrained from developing the arguments in support of its interpretation of Art. 51 UN Charter as meaning something which the text itself does not say. The court's failure to deal fully with the right of self-defence in this case was part of a wider failure to grapple with the impact of international → *terrorism* on rules of international law which assume an essentially State-State relationship (or at least one between a State and a territorial political entity). Judges Higgins, Kooijmans and Owada drew attention to various aspects of these problems in their separate opinions, and criticized the position taken by the ICJ.

## F. Relevance

- 43 Perhaps first and foremost the ICJ's advisory opinion provides the authoritative legal background for further consideration of so-far intractable problems associated with the Arab-Israeli confrontation in the Middle East. Although Israel and a handful of other States rejected the advisory opinion, the great majority of the international community accepted it as a valuable statement of the legal position—an outcome which was helped by the fact that the ICJ adopted its conclusions with overwhelming majorities (unanimous on one point, 13 to two on another, and 14 to one on each of the remaining five). This is scarcely surprising given the extent to which the UNGA and the UNSC had already expressed views in line with the ICJ's findings. But the court's advisory opinion was more than just a restatement of pre-existing positions adopted by political organs of the UN: it was a legally reasoned exposition, lending the full weight of the UN's 'principal judicial organ' to propositions which hitherto had been grounded almost as much in politics as in law. But while the law may now be clearer, it remains to be seen to what extent the ICJ's findings on crucial legal elements of the Middle East problem are translated into political action to resolve it.
- 44 At a more legal level, this advisory opinion does much to clarify the modern law on belligerent occupation of territory, while at the same time doing nothing to weaken the prevailing orthodoxy that an occupying State does not acquire → *sovereignty* over the occupied territory but is, rather, subject in its administration of the territory to a number of substantial limitations upon its power and authority imposed by international law. Particularly significant in this respect is the ICJ's view that an occupying State is subject not just to international humanitarian law applicable in time of armed conflict but also the ordinary body of human rights law normally thought of as applying in peacetime.
- 45 While Palestine is in many respects *sui generis*, there are passages in the ICJ's treatment of the status of Palestine and the Palestinians, either expressly or by implication, which will resonate with other entities which are presumptively on the way to, but have not yet acquired, full statehood. The right of self-determination is perhaps the principal mechanism through which this transitional situation evolves, but it is clear from what the ICJ has said that even before that mechanism has worked its way to completion, entities emerging into statehood have, for certain purposes at least, a substantive position within the international community.

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