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# Shouting at the Wall: Self-Determination and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

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**Abstract**
This article appraises the impact of the Advisory Opinion of 7 July 2004 on the development of self-determination as a legal principle. The plight of the Palestinians being widely understood as a textbook self-determination struggle, the Court had to address the issue in its examination of the case at hand. Self-determination left an indelible mark upon the Opinion, from the decision to allow Palestine to participate, through the use of the principle as applicable law, to the elucidation of the violations and the *erga omnes* character of the obligations breached. The article examines the Court's positions, which, however sparsely elaborated, may have serious repercussions on the understanding of the principle and on its handling in future judicial proceedings.

**Key words**
Arab–Israeli Conflict; Occupied Palestinian Territory; self-determination; sovereignty; Advisory Opinion; International Court of Justice

## 1. Introduction

In the study of self-determination, the 'question of Palestine' remains a steady staple of scholarly discourse. A reference to Palestinians routinely comes up whenever one alludes to a 'people' or wishes to illustrate who might hold the right.[1] It is widely understood in doctrine as well as in practice that there is a Palestinian people, and that it possesses the right to self-determination, although what the exercise thereof entails remains unclear, and certainly does not generate the same degree of consensus.[2]

General Assembly Resolution ES/14 of 8 December 2003, adopted in the course of an Emergency Special Session convened to discuss new Israeli settlements in the area

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1. This is illustrated, for instance, in the relevant entries in D. B. Knight and M. Davies, *Self-Determination: An Interdisciplinary Annotated Bibliography* (1987), and, in a more recent work, in 'Appendix II: Bibliography on the Middle East and International Law', in F. Boyle, *Palestine, Palestinians and International Law* (2003).
2. For an overview, including the positions of Israel, the PLO and the United Nations, see A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995), at 230–48. At 240, Cassese writes: 'State practice as well as declarations made by States within the UN and the resolutions adopted by the World Organization seem to warrant the following conclusions: ... practically all States (and inter-governmental organizations) except Israel take the view that the Palestinians are entitled to self-determination; ... for a long time, there has been no agreement as to how specifically to implement the Palestinians' right to self-determination ...'

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known as the Occupied Territories,[3] brought directly, for the first time, the core issue at the doorstep of the International Court of Justice.[4] To say that imminent judicial developments on the subject were awaited with eagerness – and some trepidation – should come as no surprise.

On 9 July 2004, the ICJ identified the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[5] The Advisory Opinion, as close to a unanimous decision as the Court was ever likely to supply on such a sensitive subject,[6] determined that the erection of a 'wall'[7] in the Occupied Territories was indeed contrary to international law,[8] and to enunciated what legal effects were attached to the violations. Included were the consequences stemming from breaches of the Palestinians' right to self-determination, and it is to that aspect, and to what the Court's decision tells us about the status of self-determination in contemporary international law, that the following pages are primarily devoted.

3. *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, UN Doc. A/RES/ES-10/14 (2003). The text of the resolution (and of most of the relevant documents emanating from the UN system) is available online on UNISPAL, the 'United Nations Information System on the Question of Palestine', at http://domino.un.org/unispal.nsf.
4. The Court had previously been involved thrice in issues related to the Middle Eastern conflict: in *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174, dealing with the consequences of the assassination of Count Folke Bernadotte; in *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advising Opinion of 20 July 1962, [1962] ICJ Rep. 161, following the deployment of peace-keepers during the Suez crisis; and in *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion of 26 April 1988, [1988] ICJ Rep., involving a wrangle over the status in the United States of the PLO delegation to the UN. None of these opinions, however, dealt with the heart of the matter.
5. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, available on the web at http://www.icj-cij.org (hereinafter '2004 Advisory Opinion').
6. While two judges disagreed with the majority, none filed a dissenting opinion. Judge Kooijmans, who 'voted in favour of all paragraphs of the operative part of the Advisory Opinion with one exception, viz. subparagraph (3) (D) dealing with the legal consequences for States', stated so in a 'separate opinion' (see www.icj-cij. org/ icjwww/ idocket/ imwp/ imwp_advisory_opinion/ imwp_advisory_opinion_separate_kooijmans. pdf, para. 1), while Judge Buergenthal's views are contained in a 'Declaration'. The American Judge thought that the incomplete evidence available made it inopportune for the Court to pronounce upon the matter, but took great pains to qualify his position as to the legal implications of his position (see http://www.icj-cij.org/ icjwww/ idocket/ imwp/imwp_advisory_opinion/imwp_advisory_opinion_declaration_buergenthal. pdf, par .1): 'Since I believe that the Court should have exercised its discretion and declined to render the requested advisory opinion, I dissent from its decision to hear the case. My negative votes with regard to the remaining items of the dispositif should not be seen as reflecting my view that the construction of the wall by Israel on the Occupied Palestinian Territory does not raise serious questions as a matter of international law. I believe it does, and there is much in the Opinion with which I agree'.
7. In its written submission, Israel objected to the terminology used to describe the structure it calls a 'security fence'. Insisting that the word 'barrier', deemed more neutral, should have been employed, Israel contended that the selection of terms in Resolution ES-10/14 'reflects a calculated media campaign to raise pejorative connotations in the mind of the Court ...' (Written Statement of the Government of Israel on Jurisdiction and Propriety (30 December 2004), para. 2.7, available on the ICJ website at http://www.icj-cij.org/icjwww/idocket/imwp/imwpstatements/iWrittenStatement_17_Israel.pdf, hereinafter 'Israeli Written Statement'). The Court dismissed the argument, noting that 'the other terms used, either by Israel ("fence") or by the Secretary-General ("barrier"), are no more accurate if understood in the physical sense' (2004 Advisory Opinion, para. 67).
8. This determination by the UN's principal judicial organ bolstered the assertion already proffered by the General Assembly that 'the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem ... is in contradiction to relevant provisions of international law' (UN Doc. A/RES/ES-10/13 (2003)).

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## 2. Self-determination before the opinion

If nothing else, the 'principle of equal rights and self-determination of peoples'[9] is undoubtedly a productive source of paradoxes and of scholarly comment. Recognized today as 'one of the essential principles of contemporary international law',[10] it remains nonetheless one of the most elusive norms in legal discourse.[11] The existence and legal standing of the right are today well established (if only after a long, uphill struggle), but its parameters and the scope of its consequences – be it the promotion of democracy, the compulsory establishment of autonomy regimes or special minority arrangements, the infamous 'right to secede', etc. – are still not fully fleshed out.

### 2.1. A theoretical aside: the prevailing view of self-determination

The general notion of self-determination (or the principle *lato sensu*) is a richly textured concept of political philosophy. One can trace its roots to the American and French Revolutions and follow its development through several iterations before the notion finally integrated the international legal order, in a more specialized configuration, as a norm of international law (the principle *stricto sensu*).[12]

A straightforward normative proposition is usually expressed, in the simplest terms, as 'who owes what to whom?' Accordingly, a principle according to which 'all peoples have the right to self-determination'[13] will rest on the definition of who are the 'peoples' whose right is to be respected, and of what the formula 'self-determination' means in terms of what is owed them.

It is widely understood that, at a minimum, the norm so laid down vests a *collective entity* – a human group labelled '*people*', a concept for which there is as yet no generally accepted definition in legal terms – with a right that, at its core, is a 'right to choose'.[14] What it can choose, and how it may do so, remains fertile ground for

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9. Charter of the United Nations, Art. 1(2).
10. *Case Concerning East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep. 4, at 102, para. 29 (hereinafter '*East Timor Case*').
11. The following is but a small sampling of the literature on the subject, restricted to book-size publications in English since 2000: A. F. Bayefsky (ed.), *Self-Determination in International Law: Quebec and Lessons Learned* (2000); A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (2003); J. Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial National Identity* (2000); O. Dahbour, *Illusion of the Peoples: A Critique of National Self-Determination* (2003); W. Danspeckgruber (ed.), *The Self-Determination of Peoples: Community Nation and State in an Interdependent World* (2002); K. Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights, and the Right to Self-Determination* (2000); Y. N. Kly and D. Kly (eds.), *In Pursuit of the Right to Self Determination* (2001); K. Knop, *Diversity and Self-Determination in International Law* (2002), R. McCorquodale (ed.), *Self-Determination in International Law* (2000); D. Raič, *Statehood and the Law of Self-Determination* (2002). For a more complete bibliography, see J.-F. Gareau, *Janus at the Crossroads: The Future of the Right of Peoples to Self-Determination as a Principle of International Law* (forthcoming, 2006).
12. Notable among distinguished works treating the evolution of self-determination from a historical perspective are A. Cobban, *The Nation State and National Self-Determination* (1963), and A. Rigo-Sureda, *The Evolution of the Right of Self-Determination: A Study of the United Nations Practice* (1973). See also, more recently, Cassese, *supra* note 2, or Raič, *supra* note 11, at 171–225.
13. This formulation, introduced in the notorious *Declaration on the Granting of Independence to Colonial Countries and Peoples* (annexed to UN Doc. A/RES/1514 (XV) (1960)), is used in both Human Rights Covenants of 1966, reiterated in the *Declaration on Principles of International Law on Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations* (UNGA Res. 2625(XXV), UN Doc. A/5217 (1970)) (hereinafter 'Declaration on Friendly Relations 1970').
14. One can point to a notable exception to the conventional understanding of self-determination as a collective right, in the view of an individual right to choose one's nationality or, at a minimum, to select a preferred

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doctrinal debate, although it seems incontrovertible that the right should be geared towards a decision as to the people's own fate and, arguably, as to its international status.

Notwithstanding the uncertainty that blurs its contours, the 'principle of self-determination of peoples has been recognized by the United Nations and in the jurisprudence of the Court'.[15] How it is to be implemented had, at the time of the opinion, only been defined in certain circumstances, such as colonial domination and its derivatives,[16] where a substantial body of law has evolved over the course of the last 50 years.[17]

#### *2.1.1. A 'popular' model of self-determination*

Outside the relatively safe terrain of colonial and para-colonial cases, self-determination becomes far more difficult to handle. Once described as 'loaded with dynamite',[18] the concept can be said to have attained today a nuclear capacity; while valuable causes and purposes may be well served by the considerable energy yielded by it when properly harnessed, letting it operate freely would unleash, or so it is feared, unimaginable destructive forces upon the existing international system, threatening its very survival. Hence, maintenance of control and the elaboration of rigid constraints tends to be a paramount objective in the apprehension of self-determination as a legal principle.

*2.1.1.1. The decolonization of self-determination?* The challenge of devising a proper framework for self-determination beyond colonization usually involves minimizing the risks commonly associated with its exercise, notably excessive state fragmentation through a regressive chain of uncontrollable secessions, while satisfying the requirements of universality built into a norm that entitles 'all peoples'. To that end, one can discern in the literature a coalescence of views favouring a 'model' of self-determination that appears to preserve the relevance of the principle in a post-colonial setting, while alleviating its deleterious effects on the stability of states and on the international system.

The main thrust of this effort is to uproot the principle from its anti-colonial past, singling out the colonial experience of self-determination and de-linking the

group to which one would belong. See A. Pellet, 'The Opinions of the Badinter Commission: A Second Breath for the Self-Determination of Peoples', (1992) 3 *EJIL* 178, at 179 [emphasis added]: 'As they are given the right of self-determination, individuals may demand and obtain their recognition as being part of a group of persons of their choice. This would be done through precise mechanisms, bringing with them guarantees, which have to be negotiated and settled at international level. This would not, however, have any effect upon the territories of those States concerned. Frontiers would remain unchanged'.

15. See East Timor Case, *supra* note 10, at 102, para. 29.
16. Over time, alien domination and the establishment of racist regimes were assimilated into colonization in an attempt to expand the coverage of the existing legal regime, notably in the Declaration on Friendly Relations 1970.
17. For a good review, see Cassese, *supra* note 2, and W. Ofuatey-Kodjoe, *The Principle of Self-Determination in International Law* (1977). The United Nations also commissioned two reports on the subject: A. Cristescu, *The Right to Self Determination: Historical and Current Development on the Basis of United Nations Instruments*, UN Doc. E/CN.4/Sub.2/404/Rev.1 (1981) and H. Gros-Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions – A Study*, UN Doc. E/CN.4/Sub.2/405/Rev.1 (1980).
18. In 1918, President Wilson was warned thus of the volatility of the notion by his Secretary of State. See R. Lansing, *The Peace Negotiations – A Personal Narrative* (1921), 98.

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principle from its usual corollary, namely the creation of a new state. Doing so implies a conceptual split of the principle into two facets: an 'external dimension' (claimed against the state) and an 'internal dimension' (claimed within the state), with the latter arguably constituting the real core of the right.

> The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state.[19]

It naturally follows that 'the right operates within the overriding protection granted to the territorial integrity of "parent" states'.[20] Recasting of the internal dimension of self-determination as the 'true' ambit of the principle is often deemed the only possible means to reconcile it with the virtually sacrosanct principle of respect for a state's territorial integrity.

*2.1.1.2. An Orwellian interpretation?* In this context, the exercise of 'external' self-determination cannot be anything but an exception to the general rule. Decolonization would then be seen as a vast aberration in the legal development of self-determination, the true aim of which having been, from the start, a call for (representative) self-government, an area of regulation located largely outside the reach of classical international law. The consequences associated with decolonization, and especially the close ties linking self-determination to access to statehood, should rather be construed as exceptional remedies than as formative elements of the legal principle.

This view leads to the dubious conclusion that although 'all peoples have the right to self-determination', only a select list of groups, 'more equal than others', can actually benefit from an a priori entitlement to external self-determination:

> . . . the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.[21]

In other words, the model as it stands is a three-step process:

1. *all* peoples have the right to *internal* self-determination (and thus are *equal* in that respect); *but*
2. only *some* peoples are granted the right to *external* self-determination; *because*
3. external self-determination is the *ultimate sanction of the violation of the right* to internal self-determination (after all other recourses have failed).

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19. Reference re. Secession of Quebec, (1998) 11 D.L.R. (4th) 385 (S.C.C.) §126 (hereinafter 'Reference re. Secession of Quebec (1998)'). Materials concerning this decision of the Supreme Court of Canada, including expert reports, have been collected in Bayefsky, *supra* note 11; the decision is also available online at http://www.lexum.umontreal.ca/csc-scc/en/pub/1998/vol2/html/1998scr2_0217.html.
20. Reference re. Secession of Quebec (1998), §131.
21. Ibid., §138.

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This basic construct reaches its aim of constraining the allegedly destructive power of self-determination by expanding the application of the principle *ratione personae*, including more groups beyond the colonial categories, while asserting that this can be done only by contracting the general scope of the right *ratione materiae*, limiting from the outset the range of choices available to the groups. Accordingly, more groups qualify as 'peoples' and are allowed to partake of the principle's benefits, but only to the extent that they share a shrunken right, which is then apt to be tailored contextually according to circumstances.[22] This, alas, leaves unanswered the question of who is to do the tailoring.

### *2.1.2. A critical view of the prevalent model*

For reasons explained further below, a full critique of the model is not necessary to the analysis of the present case. Suffice it to say that the model sketched above rests on three debatable pillars.

*2.1.2.1. Disputable assumptions.* One may question whether the *legal* configuration of the principle embodies in its entirety the wider philosophical concept of self-determination. This would include the famous divide between its preoccupation with self-government, activated within the state, and its use as a weapon to challenge the existing order (the 'empire-busting' function) so often turned against the state. But the instrumentalization of self-determination as the legal weapon of choice in the fight for colonial freedom profoundly affected the principle's conceptual development and has left an indelible imprint on it. Using the principle to pry open the colonial hold did nurture its revolutionary dimension, from a relatively benign affirmation of the importance of self-government exemplified by the 'principle of trusteeship', through increasingly vigorous demands for institutional change, and into an aggressive, fearsome claim to national identity complete with title to territory. The external exercise of self-determination was thus suffused with legitimacy and legal value – and therein, precisely, lies the danger that the principle's amoebal separation wishes to address.

The model also rests upon the notion that a legal norm in some way precludes the creation of a new state – that is, one of the means to exercise 'external self-determination' – when attempted outside the framework of self-determination, even though virtually all commentators admit that international law today does not prohibit secession.[23] This leads to the ridiculous conclusion that possessing the right would be a nuisance, *legally preventing* a group deemed (by whom?) to enjoy a sufficient degree of 'internal self-determination' (and thus deprived of the right to exercise 'external self-determination') from doing something that a group not so endowed could achieve legally, that is, secede.

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22. Alluding to this alleged malleability of the principle, one author lauded its 'variable geometry' ('*un principle à géométrie variable*'). See A. Pellet, 'Quel avenir pour le droit des peuples à disposer d'eux-mêmes?', in M. Rama-Montaldo (dir.), *Le droit international dans un monde en mutation: Liber Amicorum en hommage au professeur Eduardo Jiménez de Aréchaga* (1995).
23. As shown in a thorough review by T. Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation* (1999), scholarly discourse and conventional wisdom readily recognize that secession is neither encouraged nor outlawed by international law. Hence access to statehood is always possible, even in the absence of an express legal authorization, as a matter of fact. No other conclusion can be drawn from the absence of a prohibition placed thereupon.

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It is believed that 'internal self-determination', often presented as a recasting of self-determination in a proper human rights framework, is as valuable an expression of the principle as 'external self-determination',[24] even though by design, human rights, whether collective or individual, are *filtered* by the state. Such a 'state filter', by which we mean the power to legally reconfigure the international norm for internal consumption, operates both downwards (in the interpretation of the rights' content and substance) and upwards (in the assessment of the compatibility of a given regime with the obligations undertaken). However, the foremost feature of the right embodied by self-determination as it has evolved in international law is precisely that it is bestowed without intermediary, or, in other words, *unfiltered*; the power to choose is vested directly in the collective entity, and it is around the formulation and respect of their free choice that the legal regime is engineered. This construct cannot be reconciled with the one outlined above, which would significantly alter the principle's normative structure.[25]

*2.1.2.2. A structural duality.* That said, it is important for our present purposes to keep in mind an aspect of the innate duality of self-determination that is of great import in the operationalization of the right. Indeed, one must distinguish between the principle's ends and its means, or, in legal terms, between the right to self-determination *as an outcome* and *as a process*.

If self-determination does comprise a 'right to choose' bestowed upon a people by international law, a people will enjoy a legal power to freely voice its opinion and, having expressed their choice, to see it respected. Such a view of self-determination entails that, by definition, 'peoples' possess the right to select the *outcome* of their choice, but it also means that they have the right to be provided a *process* through which the choice will be expressed.

In view of what precedes, it is clear that control over the *outcomes* available for selection (the material dimension of the right) must rest exclusively in the hands of the people concerned. Any other normative proposition would trump the essence of the right. Accordingly, the options open to the group cannot be manipulated or limited beforehand by a third party or, *a fortiori*, by the parent state; *ab initio*, the parameters of the choice should run the full gamut of possibilities available.[26]

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24. See, e.g., R. McCorquodale, 'Human Rights and Self-Determination', in M. Sellers (ed.), *The New World Order: Sovereignty, Human Rights and the Self-Determination of Peoples* (1996), at 9.
25. From a technical point of view, envisaging self-determination thus involves a fundamental transformation of a right to choose directly vested in the people and bypassing state control, to a right to demand (and obtain) protection from the state, with a corresponding state obligation to provide a degree of protection compatible with a general framework defined by international law. But the parameters of that protection are set by the state; whether envisaged as a right to special minority treatment, to autonomy, or to democratization, internalization makes the 'people' dependent on the state for the key aspect of determination. The group, enjoying no direct entitlement, does not decide upon its own fate, as the state retains the last word as to the interpretation of the rights and the nature and scope of the protection granted. The normative proposition is thus downgraded into a right to *determine what should be asked of the state*, with little technical support from an international order still underpinned by the primacy of sovereignty. For a more detailed argument, see Gareau, *supra* note 11.
26. Since no prefabricated menu or a priori exclusions should be externally imposed, the options range from the creation of a sovereign state (full independence), to self-denial of the status by integration in another unit (full dependence), whereby a people manifests its wish to dissolve its identity into that of another 'people', and to merge the respective territories they occupy. This, arguably, was the original intent of the Kosovo Albanians in their struggle against Serbia and Montenegro.

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On the other hand, control over the *process* employed to ascertain the will of the people can be, and often has been left in the hands of a third party and/or of the parent state.[27] Indeed, while control over outcomes should be the people's purview, the group is rarely able to control the means of ascertaining its choice, given its unfavourable place in the domination structure that gives rise to self-determination claims. Such a power generally resides in the dominating state – be it a metropolitan or an occupying power – by virtue of its privileged position. Obligations imparted by the principle, however, place upon the state the burden of ensuring the setup of an appropriate process,[28] with a correlative duty of third parties to assist the state in achieving compliance, as this is a matter of international concern not protected by domestic jurisdiction.[29]

Given the exclusivity of the power to select outcomes within the processes provided, this analysis leads to the inevitable conclusion that any alleged iteration of the principle must provide for the *possibility* of statehood, while it is understood that the people remain free to make any other choice *they* see fit. This point will play a significant role in assessing what groups may be identified as due right-bearers. Yet a more provocative result of this contention is that any legal construct that denies the opportunity to achieve statehood outright, or that displaces control over the substance of the determination to another entity (such as the 'parent state') to eliminate the possibility, cannot properly be called an instance of self-determination. In that sense, there is no other self-determination than 'external' self-determination, that is, a right to choose granted outside the state's structure and overseen directly by international law.

This view proving somewhat provocative, it is perhaps fortunate that the case under discussion does not require us to decide categorically upon the matter. Indeed, the consensual model evoked above and its critique only part ways as to whether what is called 'internal self-determination' actually constitutes self-determination at all. Thankfully, the very idea of a 'two-state solution' clearly involves a matter of 'external' self-determination – that is, the entitlement to constitute a state if the people should so wish – although it may be difficult, in this instance, to assess what such an exercise would be 'external' to.[30]

27. This is the gist of the critique of the UN's handling of the Timorese independence process in C. Drew, 'The East Timor Story: International Law on Trial', (2001) 12 *EJIL* 651.

28. For instance, the process may involve popular consultation or negotiations with legitimate representatives of the group involved. It is usually 'guaranteed' by some sort of international supervision, with varying degrees of success. See, e.g. Raič, *supra* note 11, at 199–226.

29. Several conditions are attached thereto, among which feature prominently the requirement that the choice be 'free and informed', and the assessment of the people's wishes by democratic means. See for instance Principle VII in Resolution 1541 (XV), *Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter*, UN Doc. A/RES/ 1514 (XV) (1960).

30. To wit, the Security Council's endorsement of the 'Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli–Palestinian Conflict' (UN Doc. S/2003/529) in a resolution adopted on 19 November 2003 (UN Doc. S/RES/1515 (2003)). The mandatory institutional reforms set forth therein as intermediate steps towards a permanent solution have less to do with requirements of internal self-determination than with a revived 'principle of trusteeship', whereby peoples not deemed 'ready to govern themselves' had to be duly prepared to do so under the tutelage of self-styled 'civilized nations'. On this last, see Ofuatey-Kodjoe, *supra* note 17, at 116.

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### 2.2. The shape of things to come: the Order of 19 December 2003

The first appearance of self-determination in the case does not occur entirely out in the open, is found not in the opinion itself, but in an earlier order,[31] whereby the Court had to decide upon the participation in the proceedings of those 'likely to be able to furnish information on the question', in accordance with Article 66 of its Statute.

#### *2.2.1. The participation of Palestine*

The relevant provisions of Article 66 expressly state that the Court may call upon 'states' or 'international organizations' in this regard.[32] Inevitably, the question of whether Palestine, directly concerned by the outcome, could be allowed to submit written and oral arguments had to be resolved.

The Palestinian authority, representing Palestine, would not, at first glance, fall within the ambit of either of the categories appearing in Article 66(2). It is certainly not an international organization, and the Court had no intention of recognizing the sovereignty of Palestine as an independent state, or of allowing its decision to be interpreted as such.[33] The answer would then lean towards the negative.[34]

Yet not only did the Court authorize the Palestinians to stand before it in The Hague on the same footing as other parties,[35] but it did so with no dissent.[36] It so held by 'taking into account the fact that the General Assembly has granted Palestine a special status of observer and that the latter is co-sponsor of the draft resolution requesting the advisory opinion'.[37] This special status, emanating from the UN's qualification of the Palestine Liberation Organization (PLO) as a legitimate movement of national liberation, was granted in 1974.[38]

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31. The text of the Order is available on the website of the International Court of Justice, at http://www.icj-cij.org/icjwww/idocket/imwp/imwporder/imwp_iorder_20031219.PDF.
32. These provisions read as follows:

    '2. The Registrar shall also . . . notify any state entitled to appear before the Court or international organization considered by the Court . . . as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question. . . .

    4. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time limits which the Court, or, should it not be sitting, the President, shall decide in each particular case . . .'
33. This can be clearly deduced from the proceedings, most notably in the expression of support for the 'Roadmap' found in the 2004 Advisory Opinion at para. 162 (emphasis added): 'The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving *as soon as possible*, on the basis of international law, a negotiated solution to the outstanding problems and *the establishment of a Palestinian State*, existing side by side with Israel and its other neighbours, with peace and security for all in the region.
34. Israel stressed the point in its written submission. See 'Israeli Written Statement', *supra* note 7, para. 2.14–2.16.
35. For instance, there is no intimation that Palestine should be invited to present a brief as an 'amicus curiae' (a possibility that has been evoked in proceedings before other international jurisdictions), although one could argue that all opinions sought by the Court in advisory proceedings are proffered on that basis.
36. Judge Buergenthal of the United States did file a dissent on the order of 30 January 2004, regarding whether a judge should sit in the case given an alleged previous involvement. See http://www.icj-cij.org/icjwww/idocket/imwp/imwporder/imwp_iorder_20040130.PDF.
37. See Order of 19 December 2003, *supra* note 31, para. 2.
38. The Palestine Liberation Organization, acknowledged as 'the representative of the Palestinian people' in Resolution 3236 (XXIX) of 22 November 1974, was invited to 'participate in the sessions and work of the General Assembly in the capacity of observer' the same day by Resolution 3237 (XXIX). Resolution 43/160

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However, the observer status granted to Palestine by the General Assembly does not expressly cover the matter of participation in advisory proceedings. The status would certainly allow Palestine to contribute to the formulation of the request in the General Assembly, but the relevant resolutions do not extend its privileges to *locus standi* before the Court.[39]

*2.2.2. The precedent of Palestine?*

In allowing the Palestinian Authority to plead its case in The Hague, the Court lent its ear, for the first time, to a non-state entity that is not an international organization.[40] The source of that entitlement, which is not statutory, must then be sought in the very reason why Palestine or, more specifically, the PLO was granted its observer status in the first place: the fact that, as a recognized movement of national liberation,[41] it was deemed the legitimate representative of the Palestinian people.[42] It is because the Palestinians are a 'people', whose entitlement to self-determination is indubitable in the eyes of the United Nations, that its representatives were invited to sit as observers in the General Assembly, and, for the same reason, they should be allowed to partake of advisory proceedings assessing their rights on the international plane.

The impact of that Order could prove significant in future cases in which issues of self-determination may arise (whether the practice may be extended to other situations, involving NGOs or private entities, for instance, remains dubious). Indeed the Court does seem to establish here a limited *locus standi* for non-state groups properly labelled as 'peoples', holders of the right to self-determination, in advisory proceedings (notwithstanding its observer status, Palestine could certainly not take part in a contentious case before the Court). This would constitute, for an embattled group, a procedural advantage, heretofore unheralded, of obtaining recognition as a legitimate 'people' in the international arena, adding to the value that such a qualification may otherwise bring to its beneficiaries.[43] One may think of several

A of 9 December 1988 later entitled the PLO to have its communications issued and circulated as official documents of the United Nations, while a UN-wide change of denomination from 'Palestine Liberation Organization' to the designation 'Palestine' was effected by Resolution 43/177 two weeks later, following the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988. See e.g. N. Sybesma-Knol, 'Palestine and the United Nations', in S. Silverburg, *Palestine and International Law: Essays on Politics and Economics* (2002), 271, at 288–94.

39. This possibility does not appear either in the list of 'additional rights and privileges of participation in the sessions and work of the General Assembly and the international conferences convened under the auspices of the Assembly or other organs of the United Nations, as well as in United Nations conferences', which were conferred upon Palestine by Resolution 52/250 of 13 July 1998.

40. In this instance, the Court did hear the arguments of two international organizations, namely the Arab League and the Organization of the Islamic Conference. See 2004 Advisory Opinion, para. 6.

41. On the concept of 'war of national liberation' and its relation to self-determination, see, e.g., G. Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols', 165 RCADI 353 (1979-IV), A. Cassese, 'Wars of National Liberation and Humanitarian Law', in C. Swinarski (ed.), *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-rouge – en honneur de Jean Pictet* (1984), at 313, or H. Wilson, *International Law and the Use of Force by National Liberation Movements* (1988).

42. This role is assumed today by the Palestinian Authority. On this point, and for an instructive exposé of the general problem from the point of view of the United Nations, see *The Question of Palestine and the United Nations*, United Nations Department of Public Information #DPI/2276, March 2003, available online at http://www.un.org/Depts/dpi/palestine.

43. The Court did not do so in previous advisory opinions that touched upon self-determination issues. When asked to determine the Legal Consequences for States of the Continued Presence of South Africa in Namibia

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groups – First Nations, Kurds, Kosovars, Tamils, Chechens, et al. – that this development could serve, especially if they can muster the clout necessary to push the General Assembly to solicit an opinion regarding their rights or demands. Unfortunately, however, the Court will not tell us how the apposition of the legal label of 'people' is to be achieved.

## 3. Self-determination in the advisory opinion

The structure of the opinion follows a methodical pattern. After consideration and rejection of objections to its jurisdiction or to the exercise thereof, the Court lays down the applicable law, examines the substantial violations and delineates the consequences flowing from these violations for all concerned. We find references to self-determination, albeit somewhat sparse, in all three sections.

### 3.1. Self-determination as applicable law

In laying down the applicable law, the Court is concerned not only with the identification of relevant provisions of customary and treaty-based law, but also with the applicability of rules of humanitarian law and of human rights to the occupied territories.[44] Given the state of current thinking on self-determination, the Court might have been tempted to subsume its discussion of the principle under the heading of 'human rights', grounded in the provisions of the Covenants. Instead, in keeping with its previous pronouncements, the Court chose to handle self-determination autonomously, as a legal regime related to, yet distinct from the universe of human rights protection.

#### *3.1.1. The principle as Charter law*

The regime is introduced from the outset, in paragraph 88, as Charter law, derived from the United Nations constitutive instrument itself. The manner in which paragraph 88 is laid out reveals some interesting insights as to the Court's thought processes in this instance.

In the first part of the first sub-paragraph, the Court refers to the source of the principle in general international law, and underlines one of the obligations derived therefrom, relevant to the case at hand:

> The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant to which 'Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] ... of their right to self-determination'.[45]

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(South West Africa) notwithstanding Security Council Resolution 276 (1970) – Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 16 (hereinafter, 'Namibia Opinion'), the Court did not hear pleadings from representatives of the Namibian people; similarly, no arguments were submitted by nor sought of Saharoui representatives in Western Sahara, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 12 (hereinafter, 'Western Sahara Opinion'), which dealt with the territory's status at the time of colonization and its consequent ties to states vying for recognition of their title thereupon.

44. 2004 Advisory Opinion, paras. 86–113.
45. Ibid., para. 88.

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The link with the preceding discussion of the rules governing the use of force and the illegality of consequent territorial acquisition is thus established, and the two principles are thereby placed on an equal footing, notwithstanding the fact that contrary to the prohibition on the use of force, self-determination is introduced in the Charter as an element of the Organization's 'Purposes', and not among the 'Principles' of action listed in Article 2.[46]

Although much has been made of this distinction in earlier debates over self-determination, the matter is no longer of great import, given the rectification operated in 1970 by the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*.[47] On this solemn occasion, the General Assembly did incorporate the 'principle of equal rights and self-determination of peoples' within its elaboration of the rights and duties imposed by the Charter. Nevertheless, it is interesting to note in passing how the Court, once again, relies heavily on this Declaration in interpreting (and complementing) the law set down in the Charter, be it on the implications of the prohibition of the use or threat of force or on the status of self-determination within the contemporary legal system.[48] This tends to reinforce the strongly held belief that this instrument transcends its formal status as a 'non-binding' resolution of the General Assembly and can be said to embody an authentic interpretation of the treaty.

The second part of the same sub-paragraph underscores the indubitable obligations that obtain specifically to the parties to the Human Rights Covenants, and thus to Israel, given their conventional origin:

> Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter.[49]

This passage – and the use made of the principle at a later stage – should definitely lay to rest a view which still lingers in doctrine, according to which the terminological distinction between a 'rule' and a 'mere principle' would somehow detract from the latter's normative power and restrict its impact to that of an interpretative tool with no direct bearing on specific situations.[50] The Court's stance shows to be unfounded

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46. According to Article 1 of the Charter:

    'The Purposes of the United Nations are: . . .

    2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.'

47. Declaration on Friendly Relations 1970.
48. On this point, see notably G. Abi-Saab, 'La reformulation des principes de la Charte et la transformation des structures juridiques de la communauté internationale', in *Le droit international au service de la paix de la justice et du développement – Mélanges Michel VIRALLY* (1991), at 1.
49. 2004 Advisory Opinion, para. 88.
50. E.g., P. Alston, 'Peoples' Rights: Their Rise and Fall', in P. Alston (ed.), *Peoples' Rights* (Collected Courses of the Academy of European Law – Vol. IX/2) (2001), at 261: '. . . in its Charter incarnation self determination was not a right at all but only a principle'. For an earlier review of some of the semantic debates, see also E. Laing, 'The Norm of Self-Determination, 1941–1991', (1991–2) 22 *California Western International Law Journal* 209, at 220.

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the belief that a principle of law generally, and the principle of self-determination in particular, somehow lacks the ability to generate direct legal consequences in a given case such as the one under scrutiny.[51]

Having so underlined the pertinence of the principle, the Court added a second sub-paragraph, recalling previous decisions in which it had affirmed the evolutive nature of the right to self-determination and the expansion of its scope beyond its former, formal bounds:

> The Court would recall that in 1971 it emphasized that current developments in 'international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]'. The Court went on to state that 'These developments leave little doubt that the ultimate objective of the sacred trust' referred to in Article 22, paragraph 1, of the Covenant of the League of Nations 'was the self-determination . . . of the peoples concerned' (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 31, paras. 52–3).[52]

Indeed, the application of principle initially concerned territories placed under a mandate by virtue of Article 22 of the Covenant of the League of Nations.[53] It was grounded in a creative (and more noble) interpretation of the expression 'sacred trust of civilization' than the terms were probably meant to convey, as an elegantly euphemistic justification for the colonial custody of the mandatory power. The formula was reinserted in Article 73 of the Charter – with the words 'of civilization' politely removed – to benefit *all territories whose peoples have not yet attained a full measure of self-government.*[54]

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51. On the notion of 'principle', see M. Virally, 'Le rôle des "principes" dans le développement du droit international', in M. Virally, *Le droit international en devenir: essais écrits au fil des ans* (1990), 195, note at 196.
52. 2004 Advisory Opinion, para. 88.
53. Article 22 of the Covenant (available online at http://www.yale.edu/lawweb/avalon/leagcov.htm) reads as follows (emphasis added):

    '1. To those colonies and territories which as a consequence of the late war have *ceased to be under the sovereignty of the States* which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

    2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League'.

    The paragraphs that follow differentiate between types of administration, later termed Mandates A, B and C. Palestine was placed under an 'A' Mandate under para. 4 (emphasis added):

    '1. The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

    2. Certain communities formerly belonging to the Turkish Empire have reached a stage of development where *their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.* The wishes of these communities must be a principal consideration in the selection of the Mandatory'.
54. Charter of the United Nations, Art. 73.

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In the course of a stream of advisory opinions concerning the status of South-West Africa,[55] the Court developed an understanding of the sacred trust that eventually read it as encompassing the ultimate objective of self-determination for the populations concerned, even though the Charter says nothing of the sort.[56] Inspired by what it perceived as the evolution of international law, the Court later used this interpretation of the 'sacred trust' to extend the scope of self-determination and, more specifically, of the new body of decolonization law that it had spawned, to all non-self-governing territories, notwithstanding their formal status.[57]

This broadening was later reinforced, most notably by the added assertion of the universal opposability of the *right* thus recognized:

> The Court has referred to this principle on a number of occasions in its jurisprudence (ibid.; see also Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 68, para. 162). The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes* (see *East Timor* (*Portugal v. Australia*), Judgment, I.C.J. Reports 1995, p. 102, para. 29).[58]

But the situation before the Court differs from that of Namibia and of Western Sahara in that it is only indirectly linked to a colonial past. This very reason prompted Judge Rosalyn Higgins, in a separate opinion very critical of the decision (to which she nevertheless rallied), to raise an interesting point.

*3.1.2. Is this the Court's first 'post-colonial' case?*

Judge Higgins, who has written often on the subject,[59] believes that this advisory opinion constitutes the Court's first foray into the application of self-determination beyond the colonial context:

> There is a substantial body of doctrine and practice on 'self-determination beyond colonialism'. The United Nations Declaration on Friendly Relations ... speaks also of self-determination being applicable in circumstances where peoples are subject to 'alien subjugation, domination, and exploitation' ... The Committee on Human Rights has consistently supported this post-colonial view of self-determination.

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55. Namely, International Status of South West Africa, Advisory Opinion of 11 July 1950 (hereinafter 'South West Africa Opinion'), Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion of 7 June 1955, Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion of 1 June 1956, and the 1971 Namibia Opinion. The contentious case of South West Africa (*Ethiopia v. South Africa; Liberia v. South Africa*) – Preliminary Objections, Judgment of 21 December 1962, and Second Phase – Judgment of 18 July 1966, do not follow the pattern of the opinions.
56. See R. Higgins, 'International Law and the Avoidance, Containment and Resolution of Disputes (General Course on Public International Law)', Collected Courses of the Hague Academy of International Law volume 224 RCADI (1991-V), at 154: 'The common assumption that the United Nations Charter underwrites self-determination in the current sense of the term is in fact a retrospective rewriting of history.' Similarly, Q. D. Nguyen, P. Daillier, and A. Pellet, *Droit international public* (6th ed., 1995), at 514: '... loin de promouvoir la décolonisation, la Charte organise juridiquement le colonialisme.'
57. Western Sahara Opinion, para. 162.
58. 2004 Advisory Opinion, para. 88.
59. See, among other works, R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* (1963); R. Higgins, 'Self-Determination and Secession', in J. Dahlitz (ed.), *Secession and International Law: Conflict Avoidance – Regional Appraisals* (2003), at 16, and the course cited *supra* note 56.

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> The Court has for the very first time, without any particular legal analysis, implicitly also adopted this second perspective ... [60]

One can certainly share Judge Higgins's disappointment at the paucity of legal analysis that surrounds the treatment of self-determination in the Court's reasoning. Be that as it may, the point she makes is not insignificant, and the distinction between a colonial and a post-colonial application of the principle may matter more than is immediately perceptible.

The case of Palestine has always been an idiosyncratic one. It is rooted in a colonial history that could have yielded a 'classical' solution – that is, one congruent to the law which was to evolve from decolonization – were it not for the terms of the mandate assumed by the United Kingdom over Palestine and the contradictory engagements it contained.[61] Hence, one could be tempted to view the current unresolved situation as a matter of unfinished business resulting from a somewhat bungled process of decolonization,[62] and the 'question of Palestine' as a persisting colonial thorn in the side of the United Nations, whose continuing interest derives from the demise of the 1948 partition plan whereby the liquidation of the British Mandate over Palestine was to be achieved.[63] In that view, the dislocation of the two- state solution and the modification of the initial borders would be construed as a protracted if temporary glitch in the resolution of the issue according to the UN's initial programme.

If such were the case, one would trace the source of the Palestinians' right to self-determination directly to the termination of the mandate and the end of the British hold over Palestine.[64] While the normal operation of the principle would have called forth the creation of one Palestinian entity within the boundaries of the territory placed under mandate by the League of Nations, the partition plan recommended by the General Assembly in Resolution 181(II) was an exceptional measure warranted by the United Kingdom's deferral of the case to the UN. Its adoption would have yielded two states instead of one, and placed the city of Jerusalem under a special internationalized status.[65]

As a result of this process, title to the respective territories would have been attributed to the new state of Israel on the one hand, and to the Arab state of Palestine to the other. *Ex hypothesi*, the following armed conflicts, implying the seizure of territory through force, could not have validly affected the territorial titles

60. Separate Opinion of Judge Higgins, paras. 29–30, available online at http://www.icj-cij.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_separate_higgins.pdf.
61. The Mandate on Palestine, being a class A mandate, granted the territory provisional recognition of its impending Statehood, but the incorporation of the 'Balfour Declaration' also asked the mandatory to set in motion the establishment of a 'Jewish national home' in Palestine, a policy the Arab inhabitants deemed contrary to their right to self-determination. See e.g. J. Strawson, 'Mandate Ways: Self-Determination in Palestine and the "Existing Non-Jewish Communities"', in S. Silverburg, *Palestine and International Law: Essays on Politics and Economics* (2002), at 251.
62. See, e.g., M. Mazzawi, *Palestine and the Law. Guidelines for the Resolution of the Arab–Israeli Conflict* (1997).
63. This is confirmed by the Court in dismissing the allegation that the opinion would indirectly decide a contentious case without Israel's consent. See 2004 Advisory Opinion, para. 49.
64. See F. Van de Craen, 'The Territorial Title of the State of Israel to "Palestine": an Appraisal in International Law', 14 *Revue belge de droit international* 500, at 532–35.
65. The plan was accepted by Israel, but refused by the Arab states. In the wake of the resolution, Israel proclaimed its independence and war ensued. For an overview, see e.g. Q. Wright, 'The Palestine Conflict in International Law', in M. Khadduri (ed.), *Major Middle Eastern Problems in International Law* (1972), at 13–36.

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thus apportioned, and neither could the successive occupation of part of the Arab zones of Palestine by Israel, Jordan or Egypt.[66] Accordingly, the self-determination units would have remained what they were under the initial partition plan, within territorial confines delimited by the lines drawn in 1948.

Irrespective of the complications such an outlook would have introduced in the treatment of this particular issue, consideration of this matter in a strict colonial light would make it but the last in a long line of self-determination cases emanating from the decolonization process.[67] As such, it would not hold any special significance as a precedent in the jurisprudence of the Court.

But Judge Higgins is, of course, quite right in pointing out that the current situation of Palestine, and especially the relations between the Palestinian people and Israel do not belong to the colonial realm. The rejection of partition by the Arab representatives and the subsequent demise of the plan threw the region into a turmoil that has not abated since. The claims of the two entities were indeed inherited from the colonial ruler through the intervention of the UN; but while these claims remained alive and continued to form the main bone of contention between the adversaries, they acquired a peculiarly blurred, if not dematerialized character as a result of the successive conflicts that bloodied the land.

Nevertheless, it is obvious that Israel cannot be construed in this case as a surrogate mandatory power, nor as a colonial metropolis in the guise of the classical type of situation in which self-determination has arisen before the Court. The new Jewish state did not claim sovereignty over the Territories between 1949 and 1967, when Cisjordania was in Jordanian hands by virtue of a military occupation.[68] As Israel's status from then on, notwithstanding its protestations to the contrary, has also been that of an occupying power, no sovereignty is or, by virtue of the principles of humanitarian law, can be asserted on its behalf.[69]

66. As Professor Marcelo Kohen noted in the French newspaper *Le Figaro* on 23 April 2004, Israel's insistence on the negligible value of the Green Line and on the 'contested' status of the Occupied Territories ironically casts doubts on the status of all occupied territories, including those that lay west of the Green Line up to the 1948 Partition Line. This view is shared by Judge Al-Khasawneh who argues at para. 11(2) of his Separate Opinion (available online at http://www.icj-cij.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_separate_al-khasawneh.htm): 'Attempts at denigrating the significance of the Green Line would in the nature of things work both ways. Israel cannot shed doubts upon the title of others without expecting its own title and the territorial expanse of that title beyond the partition resolution not to be called into question.'
67. The same could have been said of the case of East Timor (until its resolution) and, today, of that of Western Sahara. But East Timor continued to be considered a non-self-governing territory by the *Special Committee of 24 on Decolonization* even during its occupation by Indonesia, and Western Sahara still figures on the Committee's list (the General Assembly having reaffirmed in 1990 that this remained a question of decolonization to be completed by the people of Western Sahara, even after Spain's official departure in 1976). Palestine was never included in the Committee's list of non-self-governing territories.
68. On the attempted merger of Cisjordania into Jordan, see e.g. Mazzawi, *supra* note 62, at 262–9.
69. As expressed in its simplest terms by the ICRC on its website: 'A situation of occupation confers both rights and obligations on an occupying power. However, while a situation of occupation may in fact prevent a government from exercising sovereignty over part or all of its territory, this does not confer sovereign rights on the occupant. Occupation is by definition a temporary situation that interferes with, but does not diminish or terminate, the sovereign rights of the people under occupation'. Excerpted from the 'Occupied territory – the legal issues' webpage (http://www.icrc.org/Web/eng/siteengo.nsf/iwpList74/472C34B6798F6036C125-6FBA004184D7#Key%20document).

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Yet the Court claims that the Palestinians are legally entitled to exercise the right to self-determination. If the source of that right does not stem from the translation of the original colonial condition to the present situation, one would have to conclude that it is derived directly from the fact of the occupation itself; the wellspring of self-determination would then be the 'foreign domination' that necessarily comes as a consequence.[70]

In that sense, the right would flow from the mere fact that a state has established and maintains through force its presence in a territory that it cannot legitimately claim as its own. Whether that territory was previously under colonial domination or the determinacy of its previous status would prove irrelevant, as the envisaged consequences would apply wherever any such occupation occurred. However, the definition of the territorial unit on which self-determination could be exercised would then be defined as the expanse of the occupied territory, that is, the expanse of territory on which the occupying power cannot legally lay claim. Therein would lie the significance of the 'Green Line', as separating Israeli territory from non-Israeli territory; whatever the latter's actual status may otherwise be, it is perforce different from the former's.

Read as a whole, the Court's opinion tends to validate the second version, which already constituted the standpoint adopted by most analysts and by the UN organs themselves.[71] In this light, the Court's prudent reminder that developments in legal thinking and practice had previously caused the scope of self-determination to extend to all non-self-governing territories lays the required ground for an assertion that self-determination today is indeed applicable to all territories where 'alien subjugation, domination, and exploitation' can be discerned, irrespective of the existence of a colonial past.

As such, the opinion would not come as the latest in a well-established line, but would prove, as Judge Higgins contends, a first. In fact, the Court's embrace of occupation as a legitimate source of self-determination would provide a hinge between colonial and post-colonial self-determination, a turning point that could open potential windows of opportunity for other, no less spectacular cases not directly linked to colonization, such as that of Tibet.[72] This development would indeed be momentous – and one may only regret that its advent would have come, in the words of Judge Higgins, implicitly and 'without any particular legal analysis'.

## 4. Against the wall: the violations of the right

The applicability of self-determination necessarily leads the Court to ascertain whether and, if so, how the construction of the wall in its current location would entail a violation of the Palestinians' right. To do so, the Court feels the necessity to reaffirm, somewhat succinctly, what it seems otherwise to consider a truism.

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70. See Cassese, *supra* note 2, at 240.
71. Ibid.
72. On Tibet, see K. Parker, 'Understanding Self-Determination: The Basics', in Kly and Kly, *supra* note 11, 63, at 69. But for doubts as to the qualification of the case, see Cassese, *supra* note 2, at 95 n. 86.

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### 4.1. 'No longer in issue': Palestinians as a people

What is a 'people' for the purpose of self-determination in a legal setting? We do not know, but we know that the Palestinians are one. The Court disposes of any doubt on the subject with a peremptory affirmation: 'As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a 'Palestinian people' is no longer in issue'.[73]

The expression '*no longer* in issue' hints at the fact that such identification was not always held as self-evident. Given the language used, one presumes it would have been necessary to undertake an analysis of whether or not that claim was warranted if the existence of a Palestinian people had *still* been in issue. But the Court studiously avoided venturing into the perilous minefield of the definition of what constitutes a 'people' and of what criteria the Palestinians actually fulfil to be duly so considered. We are told that Palestinians are a people in the 'legal' sense, that is, within the ambit of the application of self-determination as a *principle of law* (a conception that may or may not correspond to anthropological or sociological notions of the term 'people'), but we are not told why, save for the fact that everyone seems to concede the point.

It is true that the Court was not required, strictly speaking, to deal with this thorny issue. The view of the organization of which it is an organ – and particularly of the General Assembly, to whom the advisory opinion is addressed – as regards the existence of a Palestinian people is clear and has been reiterated forcefully and often.[74] Moreover, insistence upon the recognition by Israel of the existence of the Palestinian people, and, perhaps more importantly, of the PLO as its representative, underscores the fact that this was not a contested point.[75] The Court's exercise of cautious restraint is perhaps judicially sound, but is not very satisfying from the standpoint of analysis.

There is indeed little doubt as to the 'peoplehood' of the Palestinians, and there is no intent here to dispute the point. But contrary to what a superficial reading of the Court's appraisal may suggest, the identification of a people in international law is not a mere matter of recognition.

#### *4.1.1. The function of the principle and the added value of self-determination*

In the discourse on self-determination, one rarely encounters an enquiry into its usefulness to groups apt to claim it, outside of the debate over a 'right to secede'. If one admits that secession is, in fact, an open recourse to any group willing to pay the price an insurrection entails, this last issue becomes a red herring. It seems clear that, by its very structure, international law presumes that the needs of a people are satisfied within the confines, and by the internal processes of the state. As the sovereign authority, it is expected properly to manage the status quo, or know how to conduct its 'everyday life'. Hence, in 'normal' circumstances, the principle

73. 2004 Advisory Opinion, para. 118.

74. The General Assembly reaffirms the 'inalienable rights of the Palestinian people in Palestine' every year since it reintegrated the 'question of Palestine' into its agenda in 1974 (in UN Doc. A/RES/3236 (XXIX) of 22 November 1974). Moreover, subsidiary bodies have been established to that effect, such as the 'Committee on the Exercise of the Inalienable Rights of the Palestinian People' (UN Doc. A/RES/3376 (XXX) of 10 November 1975), later complemented by a 'Division for Palestinian Rights' within the Secretariat, pursuant to UN Doc. A/RES/32/40(B) of 2 December 1977.

75. 2004 Advisory Opinion, para. 118.

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operates in passive mode and lies dormant under the mantle of sovereignty.[76] Self-determination will spring into action in situations of transition arising from failures in the standard operation of sovereignty (even if these appear as a result of a change in social values, as in the case of colonization), and will pre-empt sovereignty by preventively creating to the benefit of the group concerned a 'reversible entitlement' to statehood.[77]

The practical utility, or value-added, of the principle resides in its ability to project, to the benefit of discrete social groups, a range of legal protections and benefits that normally proceed from and are a function of the result sought, namely sovereignty. These would not be available before the effective consolidation of independence, were it not for the operation of the right to self-determination. In other words, the principle generates a 'potential sovereignty', or sovereignty by anticipation, that places the people – as compared to other groups, left to fend for themselves – on a privileged fast track to statehood, if they so wish.

Accordingly, the entity aspiring to the status of 'people' must already be configured in such a manner as to allow international law to apprehend it as a potential state. Consequently, the group must exhibit at least an elementary rendition of the three requisite factual conditions that define a state, interlocked (as is the case for the state), to form an entity de facto.[78]

1. A coherent *population*: Although a group may not legally claim the status of 'people' by simple virtue of its asserting it, it must exhibit a degree of conscious collective identity and perceive itself as distinct. Self-awareness (and self-identification), while not a sufficient condition, is a necessary one. This sense of collective identity will often be ascertained by the outside world through the recognition of an institutional apparatus that will bear witness to the internal cohesion of the community.

2. A *representative authority*: By legally sanctioning a right to choose, the right to self-determination supposes that the entity entitled to articulate and communicate demands is able to do so. A certain degree of institutionalization is thus necessary not only to attest to the group's cohesion, but to provide organs enabling the people to formulate and express their wishes and aspirations on the international plane. To the same extent as the state, the people are a collective entity, and must also find embodiment, or *voice*, through recognizable organs. There is no coincidence in the fact that the reassertion of the Palestinians' rights as a people on the international stage has coincided with the PLO's assumption of a representative role to that end.

3. A *territorial base*: In international law, the exercise of sovereign powers is necessarily linked to the delimitation of areas of jurisdiction, both in the legal and the physical sense. The existence of an identifiable territorial base is thus an

76. See e.g. G. Abi-Saab, 'Cours général de droit international public', 207 RCADI 1 (1987-VII), at 357.
77. See text *supra*, at 2.1.2.2.
78. Of course, not all entities configured in this manner constitute peoples under international law; the realization of the triad of factors is a condition, necessary but not sufficient, enabling international law to grasp the group as a recognizable entity. See Gareau, *supra* note 11, at 245.

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essential criterion in the identification of an entity in which such powers are, or may soon be, recognized. Hence, a reasonable (if not legally unassailable) claim to territorial title, based on an acceptable rationale and an effective situation that correlates to the actual territorial status, must be advanced.[79]

*4.1.2. Peoples as territories*

In reading the opinion as a whole, one is stuck by the intrinsic relationship drawn between the Palestinian people and the territory they purport to inhabit. However, this intimate and, indeed, organic link should come as no surprise, as it is the cornerstone of the notion of people as it is apprehended by international law and, consequently, a key factor in the exercise of the right to self-determination.[80]

Given the anarchic structure of international law, with its lack of vertical integration and the primacy of sovereignty as its cardinal tenet, the lack of a legally authorized third party granted the power to interpret or decide the issues with binding results placed international law in a bind; the classical vision of the state as a black box whose inner workings are veiled from the scrutiny of international law would lead to the inescapable conclusion that the expression 'people' can only refer to the population of a state in its entirety, and that the concept of 'people' should be assimilated to that of 'state' for legal purposes.[81] This view surmises that the state, by its very definition, contains only one people, irrespective of the actual composition of the population.[82] The legal concept of 'people' would call upon no sociological criterion, but would be determined by one legal standard of reference: sovereignty.

This perspective leads to a conclusion formulated early on which remains valid today, notwithstanding the progress of international law in the matter: under international law, *states are presumed to contain one people*, and to embody this national population in institutional terms.

But, as the practice of decolonization amply demonstrates, *this is a rebuttable presumption.* The state veil that traditionally sheltered the population from the eyes of international law is not impenetrable; in certain circumstances, it is possible to pierce it and identify non-state groups within as peoples. This also supposes the existence of an entity competent so to proceed, but such an arbiter exists, as a matter of law, in cases of decolonization.

79. See, e.g., L. Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation', (1991) 16 *Yale Journal of International Law* 177, or M. Kohen, 'La libre determinación de los pueblos y su relación con el territorio', in Z. Drnas de Clement and M. Lerner (ed.), *Estudios de Derecho Internacional en homenaje al Profesor Ernesto J. Rey Caro* (2002), at 859.

80. As the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967, John Dugard, writes in his Report entitled *Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine* (UN Doc. E/CN.4/2004/6, 8 September 2003), at para. 15: 'The right to self-determination is closely linked to the notion of territorial sovereignty. A people can only exercise the right of self-determination within a territory.'

81. In his 1950 commentary on the Charter, Hans Kelsen cast aside the inconvenient passage in Art. 1(2) as a mere reaffirmation of the well-established pillar that supports the international legal order: self-determination was to be taken simply as a synonym of the sovereign equality of states and its corollary obligations, viewed from a different angle, that is, from within the state. See H Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (1950), at 99–101.

82. See the analysis of R. Higgins, 'Self-Determination and Secession', *supra* note 59, and the critique of A. Pellet, 'Quel avenir', *supra* note 22.

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The jurisdiction of the United Nations as regards the identification (and monitoring) of non-self-governing territories flows from its position as the overseer of the mandates inherited from the League of Nations, and thus of the performance of the 'sacred trust' they embodied. As the notion was expanded to cover all territories deemed non-self-governing, the power authoritatively to designate what territories were to be so considered came to rest with the UN.[83]

In labelling territories as non-self-governing, the UN effectively withdrew the legitimacy of the sovereign title thereon from the metropolitan power (irrespective of any constitutional provisions to that end in the domestic order). Contrary to the power it held upon the territories placed under its trusteeship, the UN did not enjoy direct control over the mandates, and even less upon non-self-governing parts of colonial empires. Accordingly, the UN could not claim the authority to apportion territory according to its own determination of the demographic or ethnic composition of the lands, and it did not have the legal capacity to single out which groups could be construed as peoples for purposes of self-determination. On the other hand, neither did the colonial power: a partition of the territory effected either before or after the exercise of self-determination would not be condoned.[84]

As a result, there evolved through the history of decolonization a second type of group regarded as 'peoples' by international law: *the population of a non-self-governing territory* is presumed to contain one people for the purposes of its self-determination. In the terms inherited from the decolonization era, a 'people' was, and to a great extent still is, a territory.

*4.1.3. The Palestinian Territory*

Hence, it is in the colonial roots of the problem that one finds the justification for the seemingly unassailable qualification operated by the Court in this instance. The affirmation of the existence of a Palestinian people is decisive in this particular set of circumstances precisely because of the special role of the United Nations regarding the 'sacred trust'. In justifying the existence of a Palestinian right of self-determination, the apparent translation of this colonial situation to one ruled by the law of belligerent occupation could not erase this initial qualification, although the spatial area to which the people is linked may have been modified. Indeed, it has remained valid in the eyes of the United Nations and has been the basis of the General Assembly's discourse ever since.[85]

As was discussed above, if Palestine had been a 'pure' colonial case, the matter of territorial status would have been settled by the legal distinction between the

83. This interpretation was proffered in the South West Africa Opinion (1950), at 131–2.
84. See the case of the Island of Mayotte, whose fate after the independence of the Republic of the Comoros was an object of bitter dispute between France on the one hand (who estimated that the 'people of Mayotte' had spoken in its favour) and the UN, who insisted that the will of the 'people of the Comoros' be respected and the integrity of the territory (composed of four islands) maintained. For further comment see L. Favoreu, 'La décision du 30 décembre 1975 dans l'affaire des Comores (Chronique constitutionnelle française)', (1976) XCII *Revue du Droit Public* 557, and A. Oraison, 'Quelques réflexions critiques sur la conception française du droit des peuples à disposer d'eux-mêmes à la lumière du différend franco-comorien sur l'île de Mayotte', (1983–2) 17 *Revue belge de droit international* 655.
85. See N. Sybesma-Knol, *supra* note 38.

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territory of the metropolis and that of the non-self-governing territory. The prohibition of unilateral territorial modification by the colonial power and the operation of the principle *uti possidetis juris* would have ensured the emergence of one new state, fully formed, on the territory defined by its current boundaries, which, in this case, were already international frontiers.[86]

However, by relinquishing its mandate and turning the matter over to the United Nations, the United Kingdom did allow the UN to gauge the situation on the ground and react accordingly. In recommending the partition of the territory of Palestine into two states, the General Assembly effectively asserted the existence upon that territory of two distinct 'peoples', one Jewish and one Arab, each entitled to its own state.[87] But the United Kingdom could not see through the process by which such a solution would have been secured, and its departure aggravated the violent turmoil already affecting Palestine. As a result, the Arab state never came to life, although its ethereal presence has haunted the region ever since.

Current efforts to secure its advent through the exercise of 'external' self-determination do not pose any problem involving its usually troublesome corollary known as the 'right to secession', since there is here no entity from which to secede. Cisjordania and Gaza are not part of the state of Israel, whose pretensions thereupon do not extend to full sovereignty claims – as evidenced by the very existence of 'settlements' in the zone beyond the Green Line. The Kingdom of Jordan, whose annexation of the territory had taken place under dubious circumstances and whose claims to sovereign possession were highly contested during its administration of the area,[88] publicly abdicated in 1988 any sovereign title it might have possessed, so as to allow the emergence of the new state of Palestine.[89]

Consequently, it would appear that the Palestinians are laying claim to a territory over which no one – that is, no existing state – exercises sovereignty. While this, in days gone by, would have meant that the land in question would be deemed *terra nullius* and open for title acquisition, there is no question of that being the case here.[90] On the contrary, the sovereignty does exist, and it resides in the Palestinian people, although, dormant until such time as they may implement their wish, it can be said to be 'in abeyance'.[91]

The concept of 'sovereignty in abeyance', coined by Judge Sir Arnold McNair in 1950,[92] related to a passage of the Covenant provision regarding mandate, which

86. The link between *uti possidetis* and self-determination was affirmed by a Chamber of the Court in *Frontier Dispute [Burkina Faso/Mali]*, [1986] *ICJ Rep.* 1986, at 533. The Chamber stated: '... the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs'. For a thorough analysis of the principle, see M. Kohen, *Possession contestée et souveraineté territoriale* (1997).
87. This was already implied by the inclusion of the 'Balfour Declaration' in the terms of the Mandate. One can consult the relevant documents in W. Lacqueur and B. Rubin (ed.), *The Israel–Arab Reader: A Documentary History of the Middle East Conflict* (2001), at 16 and 30 respectively.
88. See Mazzawi, *supra* note 62.
89. See 'King Hussein of Jordan: Disengagement from the West Bank' (31 July 1988), in Lacqueur and Rubin, *supra* note 87, at 338–40.
90. See the Separate Opinion of Judge Al-Khasawneh, para. 11, available online at http://www.icj-cij.org/icjwww/idocket/imwp/imwp-advisory-opinion/imwp-advisory_opinion_separate_Al-Khasawneh.pdf.
91. For an excellent analysis on this point, see N. Berman, 'Sovereignty in Abeyance: Self-Determination and International Law', (1988) 7 *Wisconsin International Law Journal* 51.
92. South West Africa Opinion, individual opinion of Judge McNair, at 150.

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stated that the territories involved had 'ceased to be under the sovereignty of the states which formerly governed them', without being transferred to the sovereign power of their new metropolis.[93]

Yet as the lands under mandate were deemed 'inhabited by peoples not yet able to stand by themselves',[94] and the new institution implied neither transfer of territory nor transfer of sovereignty, neither the old metropolis, nor the new mandatory power, nor the inhabitants of the territories in question could be said to have sovereignty over them. If the lands could not be considered *terra nullius*, who then held the title thereto? Where had sovereignty over the territories under mandate gone?

Drawing a parallel between the fundamental characteristics of the 'sacred trust of civilization' and those of the 'trust' in Anglo-Saxon civil law,[95] Judge McNair opined:

> The Mandates System (and the 'corresponding principles' of the International Trusteeship System) is a new institution – a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other – a new species of international government, which does not fit into the old conception of sovereignty and which is alien to it. . . . Sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the territory obtain recognition as an independent State . . . sovereignty will revive and vest in the New State.[96]

Israel is not a colonial power and, as a result, is not reputed to hold such a trust or to have submitted to the same obligations as a mandatory power. Nevertheless, as the main thrust of the opinion demonstrates, the law of belligerent occupation similarly precludes it from unilaterally altering the composition of the territory as long as the dispute persists.

As a result, the territory is deemed 'frozen' within the limits of the armistice agreement of 1949 (the famous 'Green Line') pending a resolution of the dispute between Israel and the Palestinians through negotiations.[97] This is not to say that the Green Line is or must perforce become an international border, but its significance as a demarcation is perhaps best summarized by Sir Arthur Watts:

> . . . the Green Line is the starting line from which is measured the extent of Israel's occupation of non-Israeli territory; originating in 1949 as an armistice line, it became in

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93. Neither annexation nor acquisition of title over the territory was legally permissible, as the mandate was held at the behest and on behalf of the League. The mandatory power was legally granted the authority to manage the territory and to exert there a measure of effective control (to a degree that varied according to the type of mandate), but was not allowed to establish its full sovereignty there. Moreover, the very idea of a mandate implies, on the part of the League, the existence of a legal power to terminate the agreement.
94. Article 22 of the Charter, *supra* note 53.
95. Namely, the exercise of the trust in the interest of a third party or of society, a possession fixed and limited by law, and a prohibition to appropriate the patrimony.
96. South West Africa Opinion, individual opinion of Judge McNair, at 150.
97. The Court is well aware of these facts. See 2004 Advisory Opinion, para. 72: 'Articles V and VI of that Agreement fixed the armistice demarcation line between Israeli and Arab forces . . .' It was agreed in Article VI, paragraph 8, that these provisions would not be 'interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties'. It was also stated that 'the Armistice Demarcation Lines defined in articles V and VI of [the] Agreement [were] agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto'. The Demarcation Line was subject to such rectification as might be agreed upon by the parties.

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> 1967 the line to the Israeli side of which Israel had to withdraw its forces, and on the non-Israeli side of which territory was 'occupied' by Israel. The terms of the General Assembly's request for an advisory opinion reflects that consistent United Nations position and involves no implication that the Green Line is to be a permanent frontier.[98]

No matter what the legal status of the territory beyond the Green Line is, it is not and cannot be construed as Israeli territory until an agreement intervenes between the parties, whether to modify it or to transform it into a frontier. In the meantime, the Palestinian title that is a direct emanation of its right to self-determination is confined to the realm of the virtual, and hovers over the Occupied Territories without being able to settle thereupon; the Palestinian people are left 'floating', as it were, until such time as the dispute is resolved and the occupation ceases.

### 4.2. The Israeli violations

Having asserted that the Palestinians are undoubtedly a people and, as a result, that they hold the right to self-determination, the Court endeavored to ascertain whether, and, if so, how the construction of the wall runs afoul of the principle.

#### *4.2.1. The 'facts on the ground'*

In paragraphs 115–22, the Court paid close attention to the impact of the edification of the wall on the Palestinians' right. In so doing, the Court identified and assessed the effect of two types of erosion favored by the presence of the wall.

*4.2.1.1. Territorial erosion.* As depicted in the annex to the report of the Secretary-General entitled 'Summary Legal Position of the Palestine Liberation Organization', the PLO's position was that the '*de facto* annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination'.[99] Leaving aside the terms of 'territorial sovereignty', the Palestinian memoir contended:

> To the extent that the Wall departs from the Green Line and is built in Occupied Palestinian Territory, including East Jerusalem, it severs the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination. To the same extent, the Wall is also a violation of the legal principle prohibiting the acquisition of territory by the use of force.[100]

The Court notes that the sinuous route of the wall appears to have been traced with a view to protect a great majority of the Israeli settlers deployed in the occupied Palestinian Territory.[101] Underlining that the Jewish settlements, established in manifest contravention of the Fourth Geneva Convention,[102] are illegal, the Court

98. Oral Pleadings, Kingdom of Jordan, *Verbatim Record of the Public Sitting Held on Tuesday 24 February 2004, at 10 a.m., at the Peace Palace*, UN Doc. CR 2004/3, 55, at 64.
99. The Court relies on this shorthand version in 2004 Advisory Opinion, para. 115.
100. See *Written statement submitted by Palestine* (available online at http://www.icj-cij.org/icjwww/idocket/imwp/imwpstatements/iWrittenStatement_08_Palestine.pdf), at 305.
101. 2004 Advisory Opinion, para. 119.
102. Ibid., para. 120.

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foresees the possibility of the inclusion of the area so delimited in the territory of Israel, and suggests that this would indeed constitute both a unilateral amputation of the spatial referent of Palestinian self-determination and an acquisition of territory by force, and so breach international law.[103]

*4.2.1.2. Demographic erosion.* The Court also points to the effect of the wall's presence on the composition of the population of the Occupied Territories as a hindrance to the rights of the Palestinians. Addressing the various human rights violations entailed by the wall and its assorted administrative policies within certain areas (such as restrictions on freedom of circulation or of choice of residence, and on access to health care and food), the Court observes that:

> . . . since a significant number of Palestinians have already been compelled by the construction of the wall and its associated régime to depart from certain areas, a process that will continue as more of the wall is built, that construction, coupled with the establishment of the Israeli settlements mentioned in paragraph 120 above, is tending to alter the demographic composition of the Occupied Palestinian Territory.[104]

The demographic shifts and imbalances unilaterally provoked by the choice of location for the building of the wall, and the deliberate creation of enclaves and isolated pockets within the Occupied Territories, would prove, in the eyes of the Court, contrary to Israel's obligations under international law, and could, in particular, hinder the right of Palestinians to self-determination:

> In other terms, the route chosen for the wall gives expression in loco to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council . . . . There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing . . . to the departure of Palestinian populations from certain areas. That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right.[105]

Consequently, the annexation of territory and the alterations of the demographic make-up of the territory are here held by the Court as breaches of Israel's obligation to respect the Palestinian's right to self-determination . . . or are they?

#### *4.2.2. What are the averred violations?*

In fact, the exact character of the violations indicated is not immediately clear. While the conclusion that seizing territory by force and forcing demographic changes through population displacement or settler infusion policies is, to paraphrase the Court, irreproachable, the breaches imputed to Israel in this instance seem to share a striking, if slightly disquieting, feature.

*4.2.2.1. Unrealized violations.* The Israeli answer to the Palestinian claims of disguised annexation rested heavily on the role of the 'security fence' as an anti-terrorist

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103. Ibid., para. 121.
104. Ibid., para. 133.
105. Ibid., para. 122.

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measure and upon its temporary character. It was asserted that the works, which could and allegedly would be dismantled upon the achievement of a negotiated settlement and the alleviation of Israel's very real security concerns, were not intended in any way to alter the legal status of the territory and had no political significance.[106]

In its treatment of the question, the Court is adamant in its insistence that although the evidence points to a possibility of an Israeli land grab in the Occupied Territories by way of incorporation of the settlements reinforced by the wall's presence, no such annexation has occurred yet.

> Whilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature (see paragraph 116 above), it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudge the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers 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, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to de facto annexation.[107]

Apparently, the 'fait accompli', arguably constitutive of the infraction, has not yet become a 'fait illicite'. The situation, which 'could well become permanent', at which point it would become 'tantamount to de facto annexation', has not yet crystallized into the territorial appropriation feared by the Palestinians, even though the wall's construction may facilitate its realization. If the annexation itself constituted the substance of the breach in this instance, one would be forced to consider that Israel's behavior is but a violation *in statu nascendi*.

The same can be said, although perhaps to a lesser degree, of the demographic impact of the wall's construction. While the Court did observe a shift in the make-up of the population in certain areas, where 'Palestinians have already been compelled ... to depart', and expects the trend to continue as further sections are added to the works, it averred only that the policy is 'tending to alter' the demographic composition of the Territories, and that there is 'a risk of further alterations' resulting from the construction of the wall and the ensuing population displacement.[108]

The impression left by such wording is that of potential, rather than concrete, violations, insofar as they are not yet fully realized. And yet the Court, on the basis of what, irrespective of the probabilities involved, amounts to possibilities of annexation and demographic shifts due to the presence of the wall and the constraints created by the assorted administrative regimes, has found that the construction nevertheless 'severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right'.[109]

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106. Ibid., para. 116: 'Israel has repeatedly stated that the Barrier is a temporary measure. ... It did so inter alia through its Permanent Representative to the United Nations at the Security Council meeting of 14 October 2003, emphasizing that "[the fence] does not annex territories to the State of Israel", and that Israel is "ready and able, at tremendous cost, to adjust or dismantle a fence if so required as part of a political settlement" (S/PV.4841, p. 10)'.
107. 2004 Advisory Opinion, para. 118.
108. Ibid., paras. 122 and 133.
109. Ibid., para. 122.

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*4.2.2.2. Risks as violations.* A very interesting conclusion can be drawn from the peculiar attitude of the Court towards the breach of Israel's obligation in this instance. While the annexation and demographic alterations envisaged would certainly constitute violations in their own right, one is led to believe that the mere *possibility* of such things happening as a result of the unilateral action of a party is already a violation of the right. In that sense, it is not Israel's territorial acquisition or the population displacements themselves that are here sanctioned, but the willful establishment of a set of circumstances that would make these further breaches possible. And this affects not the outcome of self-determination as much as its process.

A critique voiced by Judge Higgins points to the obvious fact that the construction of the wall in the Occupied Territory has no immediate impact on the *outcome* of self-determination:

> . . . it seems to me quite detached from reality for the Court to find that it is the wall that presents a 'serious impediment' to the exercise of this right. The real impediment is the apparent inability and/or unwillingness of both Israel and Palestine to move in parallel to secure the necessary conditions – that is, at one and the same time, for Israel to withdraw from Arab occupied territory and for Palestine to provide the conditions to allow Israel to feel secure in so doing. The simple point is underscored by the fact that if the wall had never been built, the Palestinians would still not yet have exercised their right to self-determination. It seems to me both unrealistic and unbalanced for the Court to find that the wall (rather than 'the larger problem', which is beyond the question put to the Court for an opinion) is a serious obstacle to self-determination.
>
> Nor is this finding any more persuasive when looked at from a territorial perspective. As the Court states in paragraph 121, the wall does not at the present time constitute, per se, a de facto annexation. 'Peoples' necessarily exercise their right to self-determination within their own territory. Whatever may be the detail of any finally negotiated boundary, there can be no doubt, as is said in paragraph 78 of the Opinion, that Israel is in occupation of Palestinian territory. That territory is no more, or less, under occupation because a wall has been built that runs through it . . . [110]

While Judge Higgins's diagnosis is probably right as concerns the issues that prevent the resolution of 'the larger problem', the 'smaller' impact of the wall's construction might not be as indifferent to the exercise of self-determination as it would appear from her comments. For it is in the provision of the process, and not in the realization of the outcome, that the problem arises.

A colonial power would have been compelled by the law of decolonization to set up a process affording the population of a non-self-governing territory under its rule a chance to exercise self-determination.[111] In its absence, the struggle to achieve self-determination would have been protected by international law, even when such a struggle implied the use of force. This is, in fact, what underpins the body of rules governing the action and protection of national liberation movements and the conduct of wars of national liberation.

Israel, as we have said, is not a colonial power. It is not 'entrusted' with the care of the population under its authority in quite the same way, although some duties are imposed upon it by the law of belligerent occupation. As such, it might not be

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110. Separate Opinion of Judge Higgins, *supra* note 60, paras. 30–1.
111. See text *supra*, 2.1.2.2.

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under a duty to *provide* a process of self-determination (since a negotiated resolution of the conflict and an end of the occupation would yield, in some form or another, the desired outcome), but it certainly has an obligation not to hamper or thwart it.

The import of negotiations in this instance – and their impact of the eventual exercise of self-determination owed to the Palestinians by the international community – means that unilateral action aimed at changing the respective positions on the ground and altering the terms of the negotiations must be construed as a serious hindrance to the provision of a satisfactory process.

The answer to a question asked by Judge Kooijmans, who acknowledges that the erection of the wall constitutes an impediment to the exercise of self-determination, but wonders if '*every impediment to the exercise of the right to self-determination is a breach of an obligation to respect it*',[112] is that, in this case, the impediment runs counter to an obligation that is directly correlated to the exercise of self-determination, that is, the right to enjoy a due process leading to it, even if that process is based on negotiations.

In that sense, unilateral actions that tend to prejudice or impede the process (such as the attempt to consolidate a form of *uti possidetis de facto* through the establishment and subsequent protection of settlements in occupied territories) can be construed as violations of the right. In that regard, the temporary nature of the structure is irrelevant, insofar as the mere possibility of an annexation (be they actions that may facilitate a land grab, or a creeping acquisition of barter chips for future negotiations) or of enforced demographic shifts places Israel in breach of its obligation to respect the Palestinians' right; as it has a duty to do nothing that might impede the enjoyment thereof, skewing the terms of the negotiation in such a fashion violates the principle.

## 5. Tear down this wall: the consequences

Having 'concluded that the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to various of Israel's international obligations' and that, as a result, 'the responsibility of that state is engaged under international law',[113] the Court naturally moved on to the consideration of the consequences to be drawn from such breaches. In so doing, it established a distinction 'between, on the one hand, those arising for Israel and, on the other, those arising for other states and, where appropriate, for the United Nations'.[114]

### 5.1. The consequences for Israel

To no one's surprise, the first order of business was to demand that Israel comply with all the international obligations it was held to have breached, including its obligation to *respect* the right of the Palestinian people to self-determination. But as what follows can appear to the casual reader as par for the course, in the familiar chorus of consequences, one note strikes an unusual tone.

112. Separate Opinion of Judge Kooijmans, *supra* note 6, paras. 32–3.
113. Ibid., para. 147.
114. Ibid., para. 148.

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### *5.1.1. The usual, with a twist*

Among the consequences flowing from the illegality of the construction of the structure, one found, of course, the obligation to terminate the work forthwith and dismantle the sections of the wall already built in the Occupied Territories, and the repeal of all legislative and regulatory acts associated with the regime established in its wake. After the demands for cessation came the requisite calls for reparation and compensation for the damages caused, backed by a classic reference to the case of the factory at Chorzów.[115] And it is there that one notices an interesting discrepancy.

While there is nothing revolutionary in asking a party held responsible for international law violations to make reparation, such an obligation is usually due to another state. This obligation placed upon one state by another is indeed the relationship described in the Chorzów case, and it is that relationship that is usually at stake in cases involving state responsibility. But the obligation imposed here upon Israel is not directed to another state:

> Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from *any natural or legal person* for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an *obligation* to compensate the persons in question for the damage suffered. The Court considers that Israel also has an *obligation to compensate*, in accordance with the applicable rules of international law, *all natural or legal persons* having suffered any form of material damage as a result of the wall's construction.[116]

Nothing leads the reader to believe that the Palestinian Authority is entitled to act here as a state would and filter the compensation to its constituents. Accordingly, Israel's obligation is due directly to the Palestinians themselves, in their individual capacity, with no intervening state filter.

### *5.1.2. Negotiation and contingent self-determination*

This peculiar factor notwithstanding, none of the consequences the Court spells out for Israel in the late paragraphs of the opinion come as a great surprise. What is interesting lies beyond, in the care with which the Court will deal with the political process surrounding the conflict as a whole.

As we have seen, in more 'normal' circumstances the zone delimited by the Green Line would constitute the valid territorial unit on which the self-determination of the Palestinian should be realized. The very fact that the exercise of the Palestinian right to self-determination, up to and including the fixation of the appropriate area on which it is to take place, is tempered and made contingent upon the satisfaction of certain conditions to be agreed upon beforehand (regarding peace and security, notably) is a significant departure from previous practice and a unique feature of this protracted dispute. This requirement also puts paid to critical comments according to which Israel's interests were not taken into account in the opinion.

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115. *Factory at Chorzów, Merits*, Judgment No. 13, (1928) P.C.I.J., Series A, No. 17, at 47.
116. 2004 Advisory Opinion, para. 153 (emphasis added).

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A colonial or dominant power would normally have no say in the delimitation of the sphere of exercise of self-determination, given the classical definition of a people as 'the population of a given territory' identified for the purpose.[117] Any unilateral modification of the territory or, indeed, forcible transfer of population would have a negative impact on the vested right and constitute a violation on the part of the metropolitan state.[118] The law inherited from decolonization affirms unequivocally that the parent state is not authorized to parcel out the territory of the self-determination unit, once identified, or even to conduct separate consultations or fragment the result thereof in different areas.[119]

In that sense, when a territory is identified as a self-determination unit (that is, as containing 'a people'), one of the effects of the right is usually to guarantee it against any dismemberment in the name of that people, even though it has not yet attained, and perhaps never will attain, the status of a sovereign state. Secure in their spatial reference frame, the people can thus be said to benefit from an anticipated right to territorial integrity, which is, in fact, one of the defining features of the right to self-determination.[120]

However, in this instance, Israel is not compelled to grant self-determination unconditionally to Palestinians within the area now known as the Occupied Territories. On the contrary, as indicated before, the final title to territory seems to be hovering over the land, waiting to settle and solidify upon the boundaries eventually agreed to between the parties on the basis of that initial matrix. The very fluidity of the final result compounds the obligation placed upon Israel not to perform unilateral changes in the composition of the territory or to alter its demographic make-up before such an agreement is reached.

### 5.2. The consequences for other states

In a previous case, the ICJ famously asserted the *erga omnes* character of the *right*.[121] By choosing to deal with the consequences that a violation of the Palestinians' right to self-determination entails for states other than Israel, the Court attempted to provide further insight into that *erga omnes* character, although it may have muddied the waters a bit as to what the qualification actually entails when applied to the right to self-determination and to the obligations flowing therefrom. Not only are the two things different, but they cannot even be said to be two sides of the same coin.[122]

#### *5.2.1. Self-determination as a right erga omnes*

A right erga omnes is by definition a right 'opposable to all'. While this in itself is nothing particularly revolutionary, this qualification carries some weight primarily in a procedural sense: by virtue of its paramount importance, every state can be said

117. See text *supra*, at 4.1.2.
118. On that last, see E. Kolodner, 'Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination', (1994) 27 *New York University Journal of International Law and Politics* 159.
119. See text *supra*, at 4.1.2.
120. One sees here a link with the previously evoked grant of a 'potential sovereignty'; see text *supra*, at 4.1.1.
121. East Timor Case, *supra* note 10, at 102, para. 29.
122. For a subtle development of this essential difference, see S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États* (2005), at 100–1.

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to have a 'legal interest' in the protection of such a right (whether this right aims to protect interests of an individual or a collective character), sufficient to warrant them bringing a claim before a tribunal.[123] This does not mean that substantial obligations are thereby imposed on all, but it does indicate that the right is of such social significance that interest in its protection transcends the immediate relationship linking the holder of the right and the bearer of the obligation, to encompass all the members of the community to which they belong. Accordingly, when faced with a breach of such a right, all states *may* seek its protection, although they do not *have* to.

As a result of the right of self-determination being opposable to all, peoples can claim from the state exercising authority over them the right to make a choice and see it respected, and the protection of that right is a matter of interest for all other states. As Judge Higgins observes, this 'has nothing to do with imposing substantive obligations on third parties to a case'.[124]

### 5.2.2. *Respect for self-determination as an obligation* erga omnes

Yet having reaffirmed this feature of the principle, the Court precisely took that step further by consecrating the *erga omnes* character of the *obligations* flowing from a violation of the right.

An obligation *erga omnes* is not necessarily the counterpart of a right *erga omnes*. It is not, for instance, an obligation 'owed *by* all', but an obligation 'owed *to* all'. The correlative of such an obligation is a right vested directly in every other state, establishing a direct responsibility link between the bearer of the obligation and all the community members as right-holders. Hence a state raising a claim arising from a violation of the obligation would not be protecting someone else's right in which it has an interest, but its own. By affirming that the violation of self-determination by Israel entails that of an obligation *erga omnes*, the Court here seems to assert that correlative rights could be claimed by all subjects of international law directly against it.

Whether that is the result the Court sought to achieve is far from certain. From the context in which the issue is framed, it seems that the obligations really referred to are obligations borne *by* all whenever the violation of a right occurs. As a result of the right to self-determination being read in this light, peoples can claim respect for the choice they made not only from the state directly involved, but from all other states as well, who conversely owe them such respect. Such is also the case, for instance, of the duty placed upon all to secure compliance from the state primarily responsible, such as the occupying power. The violation of such an obligation – say, to refrain from lending assistance to the commission of an illicit act – could conceivably be the object of a direct claim between Palestine and a third state, bypassing Israel

123. This was the perceived wrong inherited from the late-term abortion of the South West Africa cases, that the Court's famous *obiter dictum* (*Barcelona Traction, Light and Power Company (Belgium/Spain)*, 2nd phase, [1970] ICJ Rep. 16, para. 32–33) apparently intended to rectify. See, e.g., O. Schachter, 'International Law in Theory and in Practice', 178 RCADI 1 (1982-V), at 341, or H. Thirlway, 'The Law and Procedure of the International Court of Justice', (1989) LX BYIL 8, at 94 .

124. Separate Opinion of Judge Higgins, *supra* note 60, para 37.

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altogether. Accordingly, the obligations spelled out by the Court, obtaining to third states as a result of the violation committed by one of them, may be better qualified as obligations *omnium* than as obligations *erga omnes*.

The Court apparently avers here that the principle of self-determination, embodying a right *erga omnes*, also gives rise to obligations *omnium* rooted in the social importance of the interests protected. This parallel effect is a feature of norms that benefit from a strengthened legal protection because of their paramount value for the community that secreted them. Yet the Court seems to have managed, in a familiar sidestep, to avoid stating the obvious consequence of that dual character – once again, we are faced with the *jus cogens* that dares not speak its name.

## 6. Conclusion

The advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* is a momentous decision, and this is no less true in the field of self-determination as it is in other areas of interest touched upon, although its salience may not be as readily apparent as one might have expected of a case in which self-determination plays such a cardinal role. One may nevertheless affirm that, in providing a consensual (if not unanimous) legal answer to a very explosive question, the Court has duly played its jurisdictional role, 'stating the law' on the matter at hand under extremely stressful conditions.

The opinion confirmed previous jurisprudence concerning self-determination, reaffirming its status as an essential principle of international law and rooting it unquestionably in the Charter itself. It also expanded upon the *erga omnes* character of the principle, and all but confirmed that the principle belongs, as is often asserted, to the category of *jus cogens*.

In confirming decisively that the Palestinians are indeed a people entitled to self-determination, the Court also reinforced the legal standing of the General Assembly's often reiterated position and that of Palestine in its demands for recognition and respect of its 'inalienable rights'. In allowing Palestinian representatives to participate in the proceedings and granting, for the first time, *locus standi* to a non-state entity that is not an international organization, the Court may have added a new privilege to the list of benefits reaped as a result of being duly recognized as a people.

The decision also consolidates the widely held belief that self-determination is essentially a territorially based right and that there is an organic, definitional link between a 'people' and the territorial base upon which they claim to exercise their right to self-determination. It also gives credence to the idea that, in certain circumstances, sovereignty over a territory may be placed 'in abeyance' and vested in an entity left temporarily incapable of exercising it, while international law precludes its being subsumed or destroyed in the intervening period. The opinion also proved instructive as to the ways in which the right to self-determination may be breached, not limiting itself to violations affecting the expected outcome but taking into account hindrances that *may* thwart the process by which its exercise is to be secured.

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Moreover, the care with which the Court insisted that any satisfactory solution must be achieved through negotiations and address the legitimate concerns of all parties, notwithstanding the less compromising stance suggested by the existing law, bears witness to its sensitivity to the political context and to Israel's understandable preoccupation with ensuring its own security, without condoning the overextension of the concept of self-defence that underscored the main objections voiced by Israel.

It is perhaps useful to recall in closing the obvious yet often overlooked point that the opinion deals not with the illegality of Israel's construction of a 'security fence', but with the illegality of such a construction *in the Occupied Territories*. The issue is not trivial, insofar as the contention of necessity based on self-defence may prove a double-edged sword.

If the argument is based on efficiency ('the wall works' in reducing terrorist attacks) and on attempts to secure *territorial* protection, it would be necessary to demonstrate why it would not work equally well if it were erected on terrain belonging unquestionably to Israel. If, on the other hand, the wall's construction is deemed essential to protect settlements (already held as illegally established) because they are populated by Israeli citizens owed protection by the state, the incorporation of those settlements in a proper zone of self-defence would give credence to the belief that the territory in question is indeed considered part of Israel. If this is the case, the construction of the wall would already, *ipso facto*, represent an annexation. Such an undisputable violation of the Palestinians' right to self-determination could arguably reach a point such that armed resistance – though not recourse to terrorism, which is never justifiable – could be construed as legal, and even, if one sticks to the letter of Resolution 2625(XXV), generate a duty of assistance on the part of third states. It seems highly dubious that this is the result that Israel would wish to gain from this line of reasoning.

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