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HAGUE INTERNATIONAL TRIBUNALS

International Court of Justice

International Court of Justice Firmly Walled in the Law of Power in the Israeli–Palestinian Peace Process

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Abstract
The impartial and nearly unanimous advisory opinion by the International Court of Justice in the *Wall* case put the role of politics and diplomacy in the settlement of the Israeli–Palestinian conflict in its proper place, within the context of the rule of law. The significance of the opinion goes far beyond the illegality of the construction of the wall in the Occupied Palestinian Territories (OPT). The Court wisely and courageously seized the opportunity of its first direct involvement in the conflict to speak in plain legal terms about the tricky political problems that have ruined the Israeli–Palestinian peace process. It ascertained the present responsibility of the United Nations to protect Palestine's statehood. It affirmed the applicability of the prohibition of acquisition of Palestinian territory by Israel and confirmed the illegality of the Israeli settlements in the OPT. Moreover, the existence of the Palestinian people as the rightful claimant to the OPT is no longer open to question. One may only regret that the UN was not able to ask the Court to throw light on the Palestinian question at a much earlier stage.

Key words
Advisory opinion on legal consequences of the construction of a wall in the Occupied Palestinian Territory; Israeli-Palestinian conflict; League of Nations mandate; law and politics; intertemporal law; occupation

1. IMPORTANCE OF THE *WALL* CASE

1.1. Introductory remarks

Partial and diverging political interpretation of international law called the Palestinian question into being after the First World War and has kept it alive

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ever since. The impartial and nearly unanimous interpretation of the relevant international legal instruments by the International Court of Justice (ICJ) in its advisory opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory (OPT) of 9 July 2004 put the role of politics and diplomacy in the settlement of the conflict in its proper place, i.e. within the context of the rule of law.[1] The significance of the advisory opinion goes far beyond the illegality of the construction of the wall in the OPT. For the ICJ had the courage and the wisdom to seize the opportunity of its first direct involvement in the Israeli–Palestinian question to speak in plain legal terms about the tricky political problems that have ruined the Israeli–Palestinian peace process. The Court ascertained the legal significance of the 'sacred trust of civilization' of the League of Nations (LoN) in respect of the 1922 Palestine Mandate as the origin of the present responsibility of the United Nations for the protection of the statehood of Palestine.[2] In so doing, it rejected the view of Israel that the bilateral character of its dispute with Palestine was an obstacle to the jurisdiction of the Court. The ICJ also affirmed the applicability of the prohibition of acquisition of Palestinian territory by Israel since it is a sovereign state. For that reason, the Israeli settlements in the 1967 OPT are illegal under international law. Moreover, the existence of the Palestinian people as the rightful claimant to the OPT is not open to question any more. One may only regret that the UN was not able to ask the Court to throw light on the Palestinian Question at a much earlier stage.[3]

The decision of the UN General Assembly in 2003 to ask the advisory opinion of the International Court of Justice on the legal consequences of the construction of a wall in the Occupied Palestinian Territory troubled Israel and the western world for obvious reasons.[4] The request made them face the fact that the agreed political Oslo peace process failed because the rules and principles of international law, including the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War – hereafter Fourth Geneva Convention – and relevant Security Council and General Assembly resolutions were conspicuous by their absence except for

1. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, [2004] ICJ Rep.136, hereafter 'the *Wall* case'. The Court found amongst others by fourteen to one – the American Judge Buergenthal – that Israel is under an obligation to terminate its breaches of international law, to cease forthwith the construction of the wall in the OPT and to dismantle forthwith the structure therein situated as well as to make reparation for all damage caused by the construction of the wall (at 201, para. 163 sub B). The designation 'Occupied Palestinian Territory' (OPT) in this article refers to the Palestinian territories which Israel occupied in 1967, i.e. the West Bank, including East Jerusalem, and the Gaza Strip.
2. Ibid., at 165, para. 70; P. J. I. M. de Waart, 'Statehood and International Protection of Peoples in Armed Conflicts in the "Brave New World", Palestine as a UN Source of Concern', (1992) 5(1) LJIL 3, at 11.
3. In February 1988 the Netherlands Organisation for International Development Cooperation (NOVIB) sent a mission to Israel and the OPT, inter alia, to investigate possible contributions towards a political solution of the Israeli–Palestinian conflict soon after the outbreak of the first Intifada in the OPT (December 1987). The very first recommendation of the Mission, in which the present author participated, was to request the Netherlands Ministry of Foreign Affairs to explore in the relevant political fora and among like-minded governments the possibilities of seeking an advisory opinion of the ICJ on the legal status of the OPT and the applicability of the Fourth Geneva Convention (E. Denters, W. Monasso and P. de Waart (eds.), *Proceedings of the International Academic Conference on the Middle East Dynamics of Self-Determination*, Amsterdam 16–18 June 1988 (1988), at 100). See also de Waart, *supra* note 2, at 27. The recommendation did not find fertile soil because the political problem was considered to be too knotty for a legal approach.
4. As for the request of the UNGA, see UN Doc. A/RES/ES-10/14 of 8 December 2003.

the ambiguous Security Council resolutions 242 (1967) and 338 (1973).[5] The widely divergent opinions between the parties to the Oslo Agreements in the 1990s and the Roadmap to Peace in the 2000s on the scope and content of the latter resolutions marked the achievement of 'a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process' as a dead end from the very beginning.[6] The same fate will pursue the Roadmap to Peace of the Quartet, when the advisory opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory will not be complied with by the initiators of the Roadmap: the EU, Russia, the UN and the US.[7]

Some, mainly western, states opposed the request of the UN General Assembly (UNGA) for an advisory opinion of the ICJ under the pretext that such opinions should be seen as a means to enable an organ or agency to obtain clarification for its future action. In their view, the UNGA did not need an opinion in the present case because it had already declared the construction of the wall in the OPT to be illegal and had determined the legal consequences by demanding that Israel stop and reverse its construction.[8] As to their argument that the UNGA had never made it clear how it intended to use the requested opinion, the Court recalled its opinion on the Legality of the Threat or Use of Nuclear Weapons:

> Certain states have observed that the General Assembly has not explained to the Court for what precise purposes it seeks the advisory opinion. Nevertheless, it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.[9]

The Court considered that, at the time of its request for an advisory opinion, the UNGA had not yet determined all the possible consequences of its own resolution on the illegality of the construction of the wall otherwise than deciding to seek such an opinion.[10]

1.2. Participation of Palestine

The Court did justice to the Palestinian people by allowing Palestine to submit a written statement and to participate in the oral proceedings on an equal footing with Israel. In doing so, it upgraded the position of Palestine in the peace negotiations with Israel by rejecting the Israeli argument that Palestine could not participate in

5. On the ambiguity of SC RES. 242 see R. Falk, 'Some International Law Implications of the Oslo/Cairo Framework for the PLO/Israeli Peace Process', in S. Bowen (ed.), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories* (1997), 1, at 17–19; A. Gerzon, *Israel, the West Bank & International Law* (1978) 74, at 76; see also P. J. I. M. de Waart, 'Israel *vs.* Palestine: Who is afraid of international law?', (2001) 11(2) *Studies in Interreligious Dialogue* 148, at 158–60.
6. 'Declaration of Principles on Interim-Self Government Arrangements', 13 September 1993; A performance-based roadmap to a permanent two-state solution to the Israeli–Palestinian conflict' (UN Doc. S/2003/529 of 7 May 2003).
7. P. J. I. M. de Waart, 'International Law the Best Roadmap to Israeli–Palestinian Peace', in A. Jayagovind (ed.-in-chief), *Reflections on Emerging International Law: Essays in Memory of Late Subrata Roy Chowdhury* (2004), 157, at 161–2.
8. See UN Doc. A/RES/ES-10/13 of 21 October 2003.
9. See the *Wall* case *supra* note 1, at 163, para. 61; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, at 237, para. 16.
10. See the *Wall case*, *supra* note 1, at 163, para. 63.

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the advisory procedure because it is 'neither a state entitled to appear before the Court, nor an international organisation'.[11] The Court decided that:

> in the light of resolution ES-10/14 and the report of the Secretary-General transmitted with the request, and taking into account the fact that the General Assembly had granted Palestine a special status of observer and that the latter was co-sponsor of the draft resolution requesting the advisory opinion, Palestine might also submit a written statement on the question within the above time-limit . . . .[12]

Palestine also took part in the public hearings.[13] The decision of the Court was taken unanimously and without separate opinions. Judge Owada (Japan) only raised the thought-provoking question of what would have happened had Israel insisted on the appointment of a judge ad hoc when it had not refused to participate in the public hearing:

> It goes without saying that such a course of action would have complicated the situation, due to the fact that the other party to this dispute, Palestine, is an entity which is not recognized as a state for the purpose of the Statute of the Court. What would happen then, if one of the parties directly interested is in a position of appointing a judge *ad hoc*, while the other is not? Fairness in the administration of justice could be questioned from this angle . . . [14]

Israel's refusal to participate in the advisory procedure, apart from submitting an extensive written statement, spared the Court the trouble of showing its colours in that respect. Nevertheless, its decision to treat Palestine on an equal footing with Israel in the context of the advisory procedure is by itself a step forward on the road to peace, given that even the SC has now declared itself openly for the two-state solution.[15]

1.3. Containing the law of power

If things are as they seem, politics is not captivated by the advisory opinion at all. It looks very much as if the present resumption of direct peace negotiations between Israel and Palestine results more from the death of the Palestinian President Yasser Arafat than from the advisory opinion. As for the UN, after the adoption of the advisory opinion by the UNGA no action has been taken in order to realize Israel's pulling down of the wall in the OPT and payment of reparation for all damage caused by the construction of the wall.[16] A UN International Meeting on

11. Written Statement of the Government of Israel on Jurisdiction and Propriety of 30 January 2004, at 13, paras. 2.14–5.
12. See the *Wall* case, *supra* note 1, at 141, para. 4.
13. Ibid., para. 5.
14. See the *Wall* case, *supra* note 1, *Separate Opinion* (Judge Owada), at 266–7, para. 19.
15. See *supra* note 6 and UN Doc. SC/RES/1397 (2003) of 12 March 2002.
16. UN Doc. A/ES-10/15 of 20 July 2004, adopted by 150 votes in favour and six against (Israel, US, Australia, Micronesia, Marshall Islands and Palau) with ten abstentions (including Canada). In a letter dated 11 January 2005 to the President of the UNGA, Secretary-General Kofi Annan announced the establishment of a Registry to list and record the fact and the type of damage caused as a result of the construction of the wall. The registration of damage is, according to the letter, a technical fact-finding process. It is not 'a compensation commission or a claims resolution facility, nor is it a judicial or quasi-judicial body. The act of registration of damage, as such, does not entail an evaluation or an assessment of the loss of damage' (Doc. A/ES-10/294 of 13 January 2005).

the Question of Palestine at Geneva on March 9th and 10th 2005 could do no more than call on the international community to adopt measures that would persuade the government of Israel to comply with international law and the ruling of the ICJ and to welcome the London Meeting on Supporting the Palestinian Authority on 1 March 2005.[17] However, the Israeli government had let there be no mistake about the value of the advisory opinion being at nil.[18] Western states, which bear the main responsibility for the origin and existence of the Palestinian question, encouraged the Court to decline jurisdiction 'because of the presence of specific aspects of the General Assembly's request that would render the exercise of the Court's jurisdiction improper and inconsistent with the Court's judicial function'.[19]

Great Britain, whose Balfour Declaration in 1917 marked the beginning of the Palestinian question, tried to keep the ICJ out of that question under the pretext that an opinion on the matter 'would be likely to hinder, rather than assist, the peace process'.[20] The US, whose partial assistance of Israel has kept the Israeli–Palestinian dispute alive, had urged the Court to avoid any steps that would interfere with the complex diplomatic process or make it more difficult.[21] Other Western states shared that view. The Netherlands, for instance, stated that the request for an advisory opinion would not help the efforts of the two parties to re-launch a political dialogue and was therefore inappropriate.[22] In short, western states did everything to convince the Court that the requested opinion lacked any useful purpose.[23] Happily, they were not successful, and the Court went carefully through all the points on which feelings ran so high: the legal validity of the 1922 LoN Palestine Mandate and the 1947 UN Plan of Partition.[24]

17. UN Doc. CPR/IM/2005/1 of 9 March 2005, Final Document of the UN International meeting on the Question of Palestine. The London meeting (only) re-affirmed the commitment to the Roadmap and to achieve a resolution of the Israeli–Palestinian conflict through direct negotiations leading to the goal of two states. There was no reference in the conclusions of the meeting to the advisory opinion on the Wall and its adoption by the UNGA ([http://www.fco.gov.uk/Files/kfile/LondonMeeting010305_Conclusions.pdf). Even worse, there was no reference to the UN at all.
18. G. Fitleberg, 'Israel Disagrees With International Court of Justice', *TruthNews*, 23 February 2005 (http://www.truthnews.net/): 'The ruling last year by the International Court of Justice on the separation fence between Israel and the Arab "Palestinian" was based on erroneous and outdated information, the state Prosecution said Wednesday, in the first official reaction to the Hague court's ruling in July.'
19. See the *Wall* case, *supra* note 1, at 156, para. 43.
20. Written Statement United Kingdom of Great Britain and Northern Ireland, January 2004, at 2, para. 4. The declaration of 2 November 1917 of the then British Minister of Foreign Affairs Lord Balfour read: 'Dear Lord Rothschild, I have much pleasure in conveying to you, on behalf of His Majesty's Government, the following declaration of sympathy with Jewish Zionist aspirations which has been submitted to, and approved by, the Cabinet. "His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country." I should be grateful if you would bring this declaration to the knowledge of the Zionist Federation. Yours sincerely, Arthur James Balfour'. See UN Doc. *The Origins and Evolution of the Palestine Problem 1917–1988* (1990), 278, at 8. The text of the declaration was approved by the then American President Wilson and endorsed by the French and Italian governments. See British Mandatory Administration (hereafter BMA), *A Survey of Palestine Prepared in December 1945 and January 1946 for the Information of the Anglo-American Committee of Inquiry*, two volumes (1946; reprinted 1991), Vol. I, at 1.
21. Written Statement of the United States of America, 30 January 2004, at 32, para. 5.4.
22. Written Statement of the government of the Kingdom of the Netherlands, 30 January 2004, at 4, para. 9.
23. See the *Wall* case, *supra* note 1, at 162, para. 59.
24. See *infra*, para 4.1.

2. Explanation of international law

2.1. Nature of the dispute

2.1.1. Views of Israel and Palestine

Israel underlined in vain in its written statement that, in the absence of its participation on the substance of the request, the Court would have to make assumptions about arguments of law which were not before it such as the interpretation and application of 'the broad series of other instruments that might be relied upon by "Palestine"'.[25] Israel thus tried to discourage the Court from giving the requested advisory opinion and from interpreting and applying basic legal instruments such as the LoN Palestine Mandate and the UN Plan of Partition in what it considered a contentious case.[26] However, Israel based its rejection of the jurisdiction of the Court not only on the alleged contentious nature of the *Wall* case but also on its right to self-defence against Palestinian terrorist attacks in Israel proper since the beginning of the second Intifada as of September 2000. Moreover, it argued that the UNGA had acted ultra vires because the Security Council had not failed to exercise its primary responsibility and because the tenth special emergency session was reconvened while the UNGA was simultaneously meeting in a regular session.[27] In sum, according to Israel the ICJ should not have exercised its jurisdiction regarding the legal consequences of the construction of a wall by Israel in the OPT because the question posed by the UNGA 'is an integral part of the wider Israeli–Palestinian dispute concerning questions of terrorism, security, borders, settlements, Jerusalem and other related matters'.[28]

Palestine argued in its written statement that '[t]he notion of two territorial entities emerging from 'Mandated Palestine' is evident in General Assembly and Security Council resolutions on Palestine'.[29] In so doing it confirmed once again that:

> [d]espite the historical injustice inflicted on the Palestinian Arab people resulting in their dispersion and depriving them of their right to self-determination, following upon U.N. General Assembly Resolution 181 (1947), which partitioned Palestine into two states, one Arab, one Jewish, yet it is this Resolution that still provides those conditions of international legitimacy that ensure the right of the Palestinian Arab people to sovereignty.[30]

25. See Written Statement of Israel, *supra* note 11, at 111, para. 8.10.
26. According to its Statute the ICJ must, whenever one of the parties does not appear before it, satisfy itself that the claim is well founded in fact and law (Art. 53).
27. See Written Statement of Israel, *supra* note 11, at 74, paras. 4.30–40. According to the Uniting for Peace resolution the UNGA may meet in emergency special session, if not in session at the time, when the SC fails to exercise its primary responsibility because of lack of unanimity of the permanent members (UN Doc. A/RES/377 (V) of 3 November 1950).
28. See Written Statement of Israel, *supra* note 11, at 99, para. 7.3 and the *Wall* case, *supra* note 1, at 152, para. 46.
29. Written Statement of Palestine, 30 January 2004, at 172, para. 382.
30. State of Palestine Declaration of Independence of 15 November 1988; cf. State of Israel Proclamation of Independence of 14 May 1948: 'On the 29th November, 1947, the United Nations General Assembly passed a resolution calling for the establishment of a Jewish state in Eretz-Israel; the General Assembly required the inhabitants of Eretz-Israel to take such steps as were necessary on their part for the implementation of that resolution. This recognition by the United Nations of the right of the Jewish people to establish their independent state is irrevocable.'

2.1.2. Opinion of the ICJ

The Court denied that the subject matter of the request could be regarded only as a bilateral matter between Israel and Palestine, for UN responsibility in this matter had its origin in the Palestine Mandate and the Partition Resolution and has been described by the UNGA as 'a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy (General Assembly resolution 57/107 of 3 December 2002)'.[31] In the light of these circumstances the Court did not consider that its opinion 'would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground'.[32] Moreover, the Court observed that the lack of consent to its jurisdiction by interested states – in this case Israel – 'has no bearing on the Court's jurisdiction to give an advisory opinion'.[33] The Court rightly extended the subject matter to the LoN Palestine Mandate, since it was part of the Plan of Partition, which for its part was referred to in the request for an advisory opinion.[34] This resolution clearly linked the partition of the mandated territory to the termination of the Palestine Mandate.[35]

2.2. Status of the construction site

In order to determine whether or not the construction of the wall breached international law, the ICJ presented the following brief analysis of the status of the construction site of the wall. It first recalled that at the end of the First World War a class 'A' Mandate for Palestine was entrusted to Great Britain by the LoN.[36] It then immediately recalled that:

> in its Advisory Opinion on the *International Status of South West Africa*, speaking of mandates in general, it observed that 'The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general with an international object – a sacred trust of civilization' (*I.C.J. Reports* 1950, p. 132). The Court also held in this regard that 'two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being of . . . peoples [not yet able to govern themselves] form[ed] "a sacred trust of civilization"'[37]

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31. See the *Wall* case, *supra* note 1, at 158–9, para. 49.
32. Ibid., at 159, para. 50.
33. Ibid., at 157–8, para. 47.
34. UN Doc. A/RES/ES-10/14 of 12 December 2003', Preamble, para. 5: 'Recalling relevant General Assembly resolutions, including resolution 181 (II) of 29 November 1947, which partitioned mandated Palestine into two states, one Arab and one Jewish . . . '.
35. UN Doc. A/RES 181 (II), Part I Future constitution and government of Palestine, Section A: Termination of Mandate, Partition and Independence, para. 1: 'The Mandate for Palestine shall terminate as soon as possible but in any case not later than 1 August 1948'; para. 4: 'The period between the adoption by the General Assembly of its recommendation on the question of Palestine and the establishment of the independence of the Arab and Jewish states shall be a transitional period.'
36. Ibid., at 165, para. 70. Article 22(4) of the LoN Covenant read: '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.' However, the League of Nations entrusted the Palestine Mandate to Great Britain without taking into account the wishes of the 'non-Jewish communities'.
37. Ibid., at 131.See the *Wall* case, *supra* note 1, at 165, para. 70. According to Article 22(3) of the LoN Covenant, 'The character of the mandate must differ according to the stage of the development of the people, the

The remainder of the brief analysis recited the following facts as relevant for the indication of the legal consequences of the construction of the wall in the OPT:[38]

- the announcement of the United Kingdom in 1947 of its intention to complete evacuation of the mandated territory in 1948;
- the adoption of the Plan of Partition by the UNGA in 1947 and its rejection by the Arab population of Palestine and the Arab states because of its lack of balance;[39]
- the armed conflict between Israel and a number of Arab states in 1948; the conclusion in conformity with SC Resolution 62 (1948) of general armistice agreements in 1949 fixing the demarcation line between Israeli and Arab forces, known as the 'Green Line';[40]
- the occupation by Israeli forces in 1967 of all the territories which had constituted Palestine under the 1922 Mandate;
- SC Resolution 242 of 22 November 1967 emphasizing the inadmissibility of acquisition of territory by war, calling for the 'Withdrawal of Israeli armed forces from territories occupied in the recent conflict' and 'termination of all claims or states of belligerency';
- UN rejection of measures taken by Israel from 1967 onwards changing the status of East Jerusalem;[41]
- the peace treaty between Israel and Jordan of 26 October 1994 fixing the boundary line between the two states with reference to the boundary definition in the Mandate 'without prejudice to the status of any territories that came under Israeli military government control in 1967';
- the agreements signed between Israel and the Palestinian Liberation Organisation (PLO) since 1993.

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geographical situation of the territory, its economic conditions and other similar circumstances'. On the basis of their stage of development the mandates varied from class 'A' (high) to class 'C' (low). See also *infra*, section 3.

38. See the *Wall* case, *supra* note 1, at 165–8, paras. 71–9.
39. The Plan of Partition allocated 54% of the mandated territory to the Jewish state, 45% to the Arab state and 1% to Jerusalem as *corpus separatum*. On the question whether or not the United Kingdom had the right to discharge itself unilaterally from its mandate in 1948, see J. H. W. Verzijl, *International Law in Historical Perspective* (1969) Vol. II, 564: 'Impatient of the lack of progress in the liquidation of the Mandate, the United Kingdom took the unusual and, in my opinion, illegal step of authoritatively renouncing her Mandate as from 15 May 1948, thus provoking the unilateral proclamation of the sovereign state of Israel by those controlling the Jewish people, along the lines of the Partition Plan of 1947, a concentric attack by the surrounding Arab countries on the new state and the latter's eventual *de facto* emergence as such, confined however within narrower limits, never definitively recognized by the adjoining states, only laid down in armistice agreements in 1949, and lately in June 1967 considerably extended westward and eastward, as the consequence of a short new Israeli–Arab war.'
40. The ICJ underlined that the demarcation lines according to the armistice agreements would not 'be interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties' and were 'without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto' (Wall case, *supra* note 1, at 166, para. 72).
41. The Court referred to SC resolutions 298 (1971) of 25 September 1971 and 478 (1980) of 20 August 1980 (Ibid., at 165–6, para. 75).

2.2.1. 1949 Armistice Agreements

The 1949 Armistice Agreements between Israel and its Arab neighbours stated that no provision in them should in any way prejudice the rights, claims and positions of the parties in the ultimate peaceful settlement of the Palestine question.[42] The Palestinian people were no party to these agreements. From that perspective the so-called Green Line between the West Bank, including East Jerusalem, and Israel did by itself not affect the boundaries between the Jewish state and the Arab state as drawn in the Partition Plan. The Court let there be no mistake that the UN concern originated not only in its powers and responsibilities in questions relating to international peace and security but also in the Palestine Mandate and the Partition resolution.[43] This implied the rejection of the view that the UNGA, when on 14 May 1948 it relieved the Palestine Commission from further exercise of responsibilities under the Partition Plan:

> implicitly renounced its supervisory responsibilities for mandated Palestine. Consequently Palestine became a *terra derelicta* and a 'sovereign vacuum' ensued. It was now up to the Jewish and Arab populations to fill this vacuum by proclaiming the independence of their respective states.[44]

As for the legal validity of restricting the right to self-determination of the Palestinian people to the OPT, the following matters. The 1974 definition of aggression states that it does not in any way prejudice the right to self-determination, freedom and independence, as derived from the UN Charter.[45] From that perspective it may be argued that the acquisition of territory by military force in excess of the UN partition of the Palestine Mandate between the future Arab and Jewish states during the fight between the Jewish and Palestinian peoples in the 1940s did not violate the principles of non-annexation and the prohibition of the use of force. However, these principles have been applicable for Israel after 14 May 1948, when it proclaimed its independence and since its membership of the UN in 1949, and for Palestine as of 15 November 1988, when it declared its independence and after its admission to UN membership.[46]

In accordance with the Palestine Mandate, the Mandatory Great Britain and the LoN Council aimed at the creation of a unitary state for both Jewish and non-Jewish communities with an Arab majority. However, the creation of a Jewish state in the whole of Palestine was the originally hidden and later outspoken Zionist ambition from the very beginning of the Palestine Mandate.[47] Palestinism responded

42. See the *Wall* case, *supra* note 1, at 166, para. 72.
43. Ibid., at 158–9, para. 49; See also text *supra* section. 2.1.2.
44. See F. L. M. van de Craen, 'Palestine', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (hereafter EPIL) (1997), Vol. III, at 864; UN Doc. A/554 of 14 May 1948, sub A.
45. UN Doc. A/RES/3314 (XXIX) of 14 December 1974.
46. See *infra*, para. 4.2.2.
47. Y. Ezrahi, *Rubber Bullets: Power and Conscience in Modern Israel* (1997), at 288–9; J. R. Hiltermann, *Behind the Intifada: Labor and Women's Movements in the Occupied Territories* (1991), at 43; E. W. Said, *The Question of Palestine* (1992), at 230–1 and 234; T. Segev, *One Palestine Complete: Jews and Arabs under the British Mandate* (2000), at 109–10.

with a similar ambition.[48] The resulting moral corruption gave rise to a demagogic use of religious symbols under the pretext of founding a legal right. The 1948 Israeli Proclamation of Independence and the 1988 state of Palestine Declaration of Independence were imbued with such ideas.[49]

2.2.2. Legal context of occupation

The ICJ concluded that the territories between the Green Line and the former eastern boundary under the Palestine Mandate, including Eastern Jerusalem, 'remain occupied territories and that Israel despite subsequent events in these territories to the contrary, has continued to have the status of occupying Power'.[50] The legal status of an occupied territory has been defined in the Regulations Respecting the Laws and Customs of War, annexed to the Fourth Hague Convention of 1907 (Hague Regulations) to which Israel did not become a party after its establishment and the Fourth Geneva Convention, to which Israel is a party as of 6 July 1951. As for the Hague Regulations, the ICJ observed that they have become part of customary international law and are applicable to occupying powers.[51] Both international legal instruments are applicable regardless of whether an occupying power has a valid title to sovereignty. To put it differently, even when a state has such a title it may not use military force to realize its claim. If it does so it becomes an occupying power, to which the Regulations apply and also the Fourth Geneva Convention, if it is party. This explains that the latter Convention is applicable when an armed conflict has arisen between two contracting parties, in this case Israel and Jordan as to the West Bank, including East Jerusalem, and Israel and Egypt as to the Gaza strip.[52] The ICJ rejected the argument that the Palestinian territory is not occupied but only disputed.[53]

In sum, the Court found that the construction of the wall in the OPT is in violation of the Regulations and the Fourth Geneva Convention. It is now beyond legal doubt that under common Article 1 of the Geneva Conventions every state party to the Fourth Geneva Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.[54] This finding does not include by itself a definitive answer as to the status of the OPT under international law besides the present situation of occupation. Neither does the otherwise important conclusion of the Court that the 1966 International Covenants on Civil and Political Rights and Economic, Social and

48. S. K. Aburish, *Arafat: from Defender to Dictator* (1998), at 321; B. Beit-Hallahmi, *Original Sins: Reflection on the History of Zionism and Israel* (1992), at 98–100; I. Kershaw, *Hitler 1936–1945: Nemesis* (2000), at 134; Segev, *supra* note 47, at 393–4, 469.
49. See Segev, *supra* note 47, at 303.
50. See the *Wall* case, *supra* note 1, at 167, para. 78, [1971] quoting ICJ Rep., at 31, paras. 52–3. 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, [1995] ICJ Rep. at 102, para. 29).
51. See the *Wall* case, *supra* note 1, at 172, para. 89.
52. Ibid., at 174, para. 94.
53. Ibid., at 173–4, para. 93 and at 177, para. 101. Israel argued that it has a better claim to sovereignty than any other party to the conflict and therefore may apply the Fourth Geneva Convention not de jure but de facto, i.e. at its discretion. See Gerzon, *supra* note 5, at 235.
54. See the *Wall* case, *supra* note 1, at 185–7, paras. 124–6 and at 199–200, para. 158.

Cultural Rights as well the 1989 UN Convention on the Rights of the Child, to which Israel is a party, are applicable in the OPT and have been violated by the construction of the wall.[55] After all, in doing so, the Court only did not accept Israel's view that the human rights instruments are not applicable in the OPT. Israel based that position on 'the well established distinction between human rights and humanitarian law under international law'.[56] Admittedly, the Court observed in this connection that, 'while jurisdiction of states is primarily territorial, it may sometimes be exercised outside the national territory'. However, this observation was apparently inspired by the consideration that 'the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying power'.[57]

2.3. Self-defence

As for the right of self-defence, the Court argued that Israel had not claimed that the attacks against it are imputable to a foreign state. The Court also noted that:

> Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.[58]

Consequently, the Court concluded that Article 51 of the Charter had no relevance in this case. Although she found the arguments of the Court unpersuasive, Judge Higgins did not vote against because she remained unconvinced that:

> non-forcible measures (such as the building of a wall) fall within self-defence under Article 51 of the Charter as that provision is normally understood. Second, even if it were an act of self-defence, properly so called, it would need to be justified as necessary and proportionate. While the wall does seem to have resulted in a diminution of attacks on Israeli civilians, the necessity and proportionality for the particular route selected, with its attendant hardships for Palestinians uninvolved in these attacks, has not been explained.[59]

According to Judge Kooijmans the decisive argument for the dismissal of Israel's claim that it was merely exercising its right of self-defence was that the right of self-defence as contained in the Charter is a rule of international law and thus relates to international phenomena:

> Resolutions 1368 and 1373 refer to acts of *international* terrorism as constituting a threat to *international* peace and security; they therefore have no immediate bearing on terrorist acts originating within a territory which is under control of the state which is also the victim of these acts. And Israel does not claim that these acts have their origin elsewhere. The Court therefore rightly concludes that the situation is different from

55. Ibid., at 177–81, paras. 102–13 and at 187–9, paras. 127–31.
56. Ibid., at 180, para. 112.
57. Ibid., at 179, para. 109 and at 180–4, para. 112.
58. Ibid., at 194, para. 138.
59. Ibid., *Separate Opinion* (Judge Higgins), at 215–16, para. 35.

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> that contemplated by resolutions 1368 and 1373 and that consequently Article 51 of the Charter cannot be invoked by Israel.[60]

Judge Buergenthal opposed the 'Court's formalistic approach to the right of self-defence', which enabled it 'to avoid addressing the very issues that are at the heart of this case', but:[61]

> given the demonstrable great hardship to which the affected Palestinian population is being subjected in and around the enclaves created by those segments of the wall, I seriously doubt that the wall would here satisfy the proportionality requirement to qualify as a legitimate measure of self-defence.

3. Relevance of South West Africa cases

The Court seized its first opportunity to give a view on the position of the OPT and the Palestinian people under international law in the aftermath of the former Palestine Mandate and the resulting responsibilities of the UN to recall the relevance of the advisory opinions in respect of the (former) LoN Mandate South West Africa/Namibia.[62] The legal significance of the Court's brief analysis of the status of the territory concerned – the West Bank – extended clearly beyond the construction of the wall in the OPT by touching upon the heart of the matter: the responsibility of the UN for the OPT as a 'sacred trust of civilization'. The Court put the legality of the 1922 LoN Palestine Mandate and the 1947 UN Plan of Partition beyond doubt once and for all. In so doing, the advisory opinion outdated ideas among Palestinians and other Arabs that Israel still has no right to exist and among Jewish and Christian Zionists that the territory of Eretz Israel, including the Palestine Mandate, still belongs to the Jewish people because of the Old Testament Land Promise.[63]

The reference to the advisory opinion on the international status of South West Africa indicated that the fiasco of the Plan of Partition and the termination of the Palestine Mandate have not relieved the UNGA of the 'sacred trust of civilization' in respect of the Palestinian people in the OPT. After all, according to the opinion, the international rules regulating the Mandate constituted an international status for the territory.[64] This international status and the resulting responsibility of the UNGA for a proper fulfilment of the 'sacred trust of civilization' continued when the UNGA terminated the Mandate for South West Africa in 1966 and until Namibia became a sovereign state and a member of the United Nations on 23 April 1990. The international status of the Palestine Mandate therefore also continued after the termination of that mandate in 1948 for the territory of the future Arab state – now Palestine – and until Palestine has been recognized by the UN as a sovereign state, which may apply for membership. The key

60. Ibid., *Separate Opinion* (Judge Kooijmans), at 230, para. 36.
61. Ibid., *Declaration* (Judge Buergenthal), at 242–3, para. 6, and at 244, para. 9.
62. Ibid, at 152–5, 158, 162–3, 165 and 171–2, paras. 35, 38, 40, 48, 60, 70 and 88. See also *supra* text at notes 36 and 37.
63. Genesis 12:7; BMA, *supra* note 20, Palestine Mandate, Preamble, para. 2 and Article 4, at 5. See also text *infra* section 3.1.
64. International Status of South West Africa, Advisory Opinion of 11 July 1950, [1950] ICJ Rep. 128, at 132.

question is whether the territory has remained as it was defined in the Plan of Partition.[65]

3.1. International status of the OPT

Three judges underlined in their separate opinions the significance of the reference to the 'sacred trust of civilization' in the context of the present advisory opinion. Judge Abdul G. Koroma (Sierra Leone) considered the finding of the Court important in that:

> the international community as a whole bears an obligation towards the Palestinian people as a former mandated territory, on whose behalf the international community holds a 'sacred trust', not to recognize any unilateral change in the status of the territory brought about by the construction of the wall.[66]

Judge Awn Al-Khasawneh (Jordan) focused on certain salient points that merited some elucidation, particularly the continuing international legal status of the OPT:

> Whatever the merits and demerits of the Jordanian title in the West Bank might have been, and Jordan would in all probability argue that its title there was perfectly valid and internationally recognized and point out that it had severed its legal ties to those territories in favour of Palestinian self-determination, the fact remains that what prevents this right of self-determination from being fulfilled is Israel's prolonged military occupation with its policy of creating faits accomplis on the ground. In this regard it should be recalled that the principle of non-annexation is not extinguished with the end of the mandate but subsists until it is realized.[67]

Finally, Judge Nabil Elaraby (Egypt) addressed in his separate opinion the nature and scope of the UN responsibility, the international legal status of the OPT and the law of belligerent occupation. He interpreted the reference to the advisory opinions and judgments of the ICJ in the *South West Africa* (*Namibia*) case as an affirmation of the international status of the OPT indeed and that as a basis for two imperative conclusions:

1 The United Nations is under an obligation to pursue the establishment of an independent Palestine, a fact which necessitates that the General Assembly's special legal responsibility not lapse until the achievement of this objective.

2 The transitional period referred to in the Partition Resolution serves as a legal nexus with the Mandate. The notion of a transitional period carrying the responsibilities emanating from the Mandate to the present is a political reality, not a legal fiction, and finds support in the dicta of the Court, in particular, that former mandated territories are the 'sacred trust of civilization' and 'cannot be annexed'. The stream of General Assembly and Security Council resolutions on various aspects of the question of Palestine provides cogent proof that this notion of a transitional period is generally, albeit implicitly, accepted.[68]

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65. See *supra* note 39.
66. See the *Wall* case, *supra* note 1, *Separate Opinion* (Judge Koroma), at 205, para. 7
67. Ibid., *Separate Opinion* (Judge Al-Khasawneh), at 237, para. 9.
68. Ibid., *Separate Opinion* (Judge Elaraby), at 252. In so doing he referred to paras. 70 and 71 of the Advisory Opinion. See *supra* notes 36–8.

3.2. Misconceived analogy?

The Judges Higgins and Kooijmans disputed the notable analogy between the present request of the UNGA on the legal consequences of the construction of the wall in the OPT and the request of the SC in 1971 for an advisory opinion on the legal consequences for states of the continued presence of South Africa in Namibia (South West Africa). They considered as misconceived the analogy, casual or not, between the legal consequences of the conduct of states in violation of SC resolutions 242 (1967) by Israel and 276 (1970) by South Africa.

Judge Higgins argued that in the *Namibia* case the SC sought legal advice on the consequences of the necessary decisions of the UNGA and the SC on the matter in hand, particularly the power to terminate an LoN mandate:

> But Assembly resolutions are in most cases only recommendations. The Security Council, which in certain circumstances can pass binding resolutions under Chapter VII of the Charter, was not the organ with responsibility over mandates. This conundrum was at the heart of the Opinion sought of the Court. Here, too, there is no real analogy with the present case.[69]

The crux of the matter, however, in the *Wall* case, was not so much the termination of the Palestine Mandate but whether the inherent 'sacred trust of civilization' still justifies a continuing responsibility of the UNGA towards the OPT apart from its powers and responsibilities in maintaining international peace and security.

According to Judge Kooijmans, the request as formulated by the UNGA did not make it necessary for the Court to determine the obligations for states which ensue from the Court's findings. In this respect he considered that an analogy with the structure of the opinion in the *Namibia* case was not appropriate, for in that case 'the question about the legal consequences for states was at the heart of the request and logically so since it was premised on a decision of the Security Council'. Judge Kooijmans underlined that a similar situation did not exist in the *Wall* case, where the Court's view was not asked of the legal consequences of a decision taken by a political organ of the United Nations but of an act committed by a member state. That did 'not prevent the Court from considering the issue of consequences for third states once that act has been found to be illegal but then the Court's conclusion is wholly dependent upon its reasoning and not upon the necessary logic of the request'.[70]

It is striking that both separate opinions did not deny that the present responsibility of the UN is still based on the 'sacred trust of civilization' in respect of the Palestinian people and the resulting international status of the 1967 OPT. For that reason, the advisory opinion on the wall has become an authoritative affirmation of the legal context for determining the legality of successively the LoN Palestine Mandate, the UN Plan of Partition, the UN membership of Israel and the right of the Palestinian people to the Palestinian territory, occupied by Israel in 1967. In sum, the ICJ gave clear answers to troubling questions of intertemporal law, which

69. See the *Wall* case, *supra* note 1, *Separate Opinion* (Judge Higgins), at 208, para. 5.
70. Ibid., *Separate Opinion* (Judge Kooijmans), at 219–20, para. 1.

prevented the UN, Israel and Palestine from following the straight and narrow path of international law to a just and lasting peace in the Middle East for much too long.

4. Significance of intertemporal law

The rules of international law which are in force at the time of the conclusion of a treaty or the acquisition of territory may change. Such changes may create problems between the parties involved as to whether the interpretation of the treaty or the determination of the sovereignty over the territory should comply with the old rules or the new rules and to what extent both sets of rules should be applied.[71] Practice shows that disputes over territory gave rise to more wars than disputes over the interpretation of treaties, with the exception of treaties on boundaries.[72] The *uti possidetis* doctrine owes its emergence to that very fact.[73] The complexity of the issue of territory appears also from the linking of self-determination as a principle of international law and as a human right to the prohibition of secession.[74]

4.1. Legal validity of the Palestine Mandate

It is striking that the Court took the legal validity of the Palestine Mandate and the Plan of Partition for granted, although doubts have been expressed as to that. Arabs had believed that the Balfour Declaration implied a denial of the right of self-determination. On 21 February 1922 a delegation of Arab leaders in London informed the Secretary of State 'that 'the People of Palestine' could not accept the Balfour Declaration or the Mandate and demanded their national independence'.[75] According to the authoritative report 'A Survey for Palestine', prepared in December 1945 and January 1946 for the information of the Anglo-American Committee of Inquiry, it had become obvious that

> the Arab objection was, not to the way in which the Mandate might be worked, but to the whole policy of the Mandatory, and that by no concession, however liberal, were the Arabs prepared to be reconciled to a regime which recognised the implications of the Balfour Declaration.[76]

On 13 November 1945 then British Secretary of State for Foreign Affairs Ernest Bevin declared in the House of Commons: 'The House will realise that we have inherited in Palestine a most difficult legacy, and our task is greatly complicated by undertakings given at various times to various parties, which we feel ourselves bound to honour'.[77] Small wonder that also the legality of the UN Partition Plan was challenged.[78] It was

71. S. D'Amato, 'International Law, Intertemporal Problems', in EPIL, *supra* note 44, (1995) Vol. II, at 1235.
72. Ibid., at 1234.
73. F. Wooldridge, 'Uti Possidetis Doctrine', in EPIL, *supra* note 44, (2000) Vol. IV, at 1259.
74. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations, UN Doc. A/RES/2625 (XXV) of 24 October 1970, Principle V; Vienna Declaration and Programme of Action, UN Doc. A./CONF.157/23 of 12 July 1993, para. I(2).
75. See BMA, *supra* note 20, Vol. I, at 17 and 19.
76. Ibid., at 22; see also Craen, *supra* note 44, at 862.
77. See BMA, *supra* note 20, at 102.
78. P. J. I. M. de Waart, *Dynamics of Self-determination in Palestine: Protection of Peoples as a Human Right* (1994), at 121–5.

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even said that whatever its legal validity, the Palestine Mandate ended with the dissolution of the LoN and that for that reason the UNGA had had no authority in 1947 to 'deprive the Palestinian people of their right to self-determination to the whole of their homeland'.[79]

The Palestinian people stuck to the invalidity of the Balfour Declaration and successive legal instruments based thereupon for quite some time. Until its amendment in 1996, the 1968 Palestinian Charter stated that 'the Balfour Declaration, the Mandate for Palestine and everything that has been based upon them, are deemed null and void'.[80] This statement overlooked the impact of intertemporal law in respect of acquisition of territory and self-determination.

4.2. Acquiring territory

4.2.1. Conquest

Titles to territory have proven to be particularly susceptible to being disputed on the ground of changes in rules of international law and state practice after their acquisition. The UK Balfour Declaration, the LoN Palestine Mandate and the UN Plan of Partition have become tragic examples of that. They are illustrative examples of the impact of changed circumstances on the scope and content of international law. In 1917 conquest was a generally accepted mode of acquiring territory.[81] The Palestine Mandate was in line with the then existing norms of international law when it took note of the agreement between the Principal Allied Powers that Great Britain as the mandatory was responsible for putting into effect its own Balfour Declaration. The 1919 Peace Conference 'gave the victorious Powers the substance of their territorial ambitions, but in the form, and with the limitations, of League mandates'.[82] These limitations gave rise to new emerging principles for the mandatories such as the principles of non-annexation, tutelage by advanced nations, self-government or independence and international supervision. The mandate system thus blended, as it were, the traditional right of victorious power to acquire territory by conquest with a number of new emerging principles of international law, interpreted progressively by advocates and restrictively by opponents.

The mandatory system gave, as it were, traditional colonialism only a modern outlook.[83] The LoN mandates were administered by their mandatories as if they were their colonies.[84] As for the Palestine Mandate, it caused a serious misunderstanding of the concept of a Jewish national home in the Palestine Mandate among the international Zionist movement, the Palestinians and the Arab world. The Zionist movement read it as if Great Britain could give it a free hand to create a Jewish state

79. H. Cattan, *The Palestinian Question* (1988), 32–41.
80. Palestine National Charter, Art. 20; de Waart, *supra* note 78, at 46 and 141; G. W. Watson, *The Oslo Accords: International Law and the Israeli-Peace Agreements* (2000), at 13 and 205. See also R. Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian territories* (1997), 145–6.
81. E. Kussbach, 'Conquest', in EPIL, *supra* note 44, Vol. I (1992), 756–9, at 756.
82. G. Schwarzenberger, *Power Politics: A Study of World Society* (1964), 470; D. Rauschning, 'Mandates', in EPIL, *supra* note 44 (1997), Vol. III, 280, at 281.
83. Segev, *supra* note 47, at 118.
84. Rauschning, *supra* note 82, at 285: 'As reflected in the terms of the mandates, there was a common agreement that the mandated territories were to be administered in a way similar to that of the colonies of the mandatories.'

in the whole of Palestine, i.e. including Trans-Jordan, by virtue of the then traditional right of a victorious power to conquest. The decision to establish a separate mandate for Trans-Jordan and to exempt it from the undertaking in respect of a Jewish national home in Palestine therefore hit the Zionist movement hard. As of then, it was put forward by it as an argument that the Palestinians should establish their state in Trans-Jordan.[85] The Arab world supported the view of the Arab Palestinians that the concept was illegal by virtue of the emerging new international law in respect of the Palestine Mandate as a 'sacred trust of civilization'. In the view of Great Britain there has never been any question of the exclusive establishment of a unitary Jewish or Arab state in the territory of the Palestine Mandate, with which Palestinian Muslims, Christians, and others had to comply.[86]

4.2.2. Non-annexation

Israel has never been the Mandatory Power of Palestine. Therefore, the above-mentioned limitations of LoN mandates do not apply. Nevertheless, it may not annex the OPT because the illegality of territorial acquisition resulting from the threat or use of force has become a peremptory norm of international law. For that reason, the advisory opinion on the wall refers not only to the principle of non-annexation but also to the prohibition of conquest as a mode of acquiring territory and to the right to self-determination.[87] But, according to the Palestine Mandate, the Administration of Palestine should not only facilitate Jewish immigration under suitable conditions but also encourage, in co-operation with the Jewish Agency, recognized as a public body, close settlements by Jews on the land, including state lands and waste lands not required for public purposes.[88]

The Zionist movement indeed had it in mind to buy Palestine, first from the Turkish sultan, later from the British Mandatory Power. A Jewish National Fund was established at the beginning of the twentieth century in order to acquire as much property as was possible.[89] The underlying idea was that by buying land from the authorities and/or from the Arab or Turkish landowners, Zionism could have it ready for Jewish immigrants. Be this as it may, the provisions on acquiring land undoubtedly favoured Jewish immigration to Palestine. But they did not support any Jewish claim to sovereignty. After all, state territory is not for sale between individuals and authorities. A state can buy such land only from another state. In this particular case, the Ottoman Empire had refused to sell land, and even if it had done so, it could have been only to another state, not to a non-state entity like the Zionist Movement.

85. See BMA, *supr*a note 20, at 13–14.
86. Ibid., at 91, Statement of Policy 1939: 'The Royal Commission and previous Commissions of Enquiry have drawn attention to the ambiguity of certain expressions in the Mandate, such as the expression 'a national home for the Jewish people', and they have found in this ambiguity and the resulting uncertainty as to the objectives of policy a fundamental cause of unrest and hostility between Arab and Jews.'
87. See the *Wall* case, *supra* note 1, at 165, para. 70 and at 171, para. 87. See also UN Doc. SC res. 242 (1967) of 22 November 1967 on the establishment of peace in the Middle East, which emphasized the inadmissibility of the acquisition of territory by war.
88. See BMA, *supra* note 20, at 5.
89. See Segev, *supra* note 47, at 273.

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As for the Administration of Palestine, Great Britain was, as mandatory, 'responsible for seeing that no Palestinian territory shall be ceded or leased to, or in any way placed under the control of, the Government of any foreign Power'.[90] The provisions on Jewish immigration and purchase of land, which made the Palestine Mandate different from other 'A' Mandates, became the very basis for the present big issues of residence and the land property in the Israeli–Palestinian conflict. For they caused an active policy by the Jewish Agency and individual Jews of buying land from the Administration of Palestine and Turkish and Arab landowners. This development caused such heavy tensions between Jews and Arabs in Palestine that a two-state solution emerged in the 1930s as second best to the intended unitary state for both Arabs and Jews.[91]

During the Palestine Mandate the incompatible Arab and Jewish territorial claims gave rise to such bloody clashes that the mandatory and the LoN considered the necessity of dividing the territory into an Arab (Palestinian) state and a Jewish state. The Zionist movement was willing at the time to face the necessity of the partition of the Palestine Mandate by the LoN, because it would bring nearer its dream of a Jewish state in the whole of Palestine to some extent. The Palestinian Arabs did not agree. In their eyes, an Arab state in the whole of Palestine was the only acceptable outcome of the 'sacred trust of civilization'.[92] Hopefully, the opinion on the wall has now made both parties wise to the fact that international law does not support a claim of either Israel or Palestine to the whole mandated territory of Palestine.

4.3. Self-determination

The Court recalled in the *Wall* case its finding in the *Namibia* case that current developments in international law regarding non-self-governing territories leave little doubt that the ultimate objective of the sacred trust referred to in Article 22, paragraph 1, of the LoN Covenant was the self-determination of the peoples concerned.[93] This confirms that the right of the Palestinian people to self-determination is rooted in the LoN Mandate and is not subject to the prohibition of secession.[94] After all, in the case of the creation of Palestine there is no question of dismembering or impairing the territorial integrity or political unity of Israel but of the fulfilment of the 'sacred trust of civilization' by the UN.

The Court observed as regards the principle of the right to self-determination that the existence of a Palestinian people is no longer an issue. It also considered that the legitimate rights of the Palestinian people, referred to in the 1995 Israeli–Palestinian Interim Agreement on the West Bank and the Gaza Strip, include the right to self-determination.[95] In so doing, the Court related the right to

90. Palestine Mandate, Article 5.
91. See BMA, *supra* note 20, at 94 and de Waart, *supra* note 7, at 172.
92. See Segev, *supra* note 47, 402–3.
93. See the *Wall* case, *supra* note 1, at 171–2, para. 88; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), [1971] ICJ Rep., at 31, paras. 52–3.
94. See *supra* text at note 74 and P. J. I. M. de Waart, 'Self-rule under Oslo II: the state of Palestine within a Stone's Throw', in Anis. F. Kassim (ed.-in-chief), *The Palestinian Yearbook of International Law* (1996) Vol. VIII 1994/95, 36, at 44–6.
95. See the *Wall* case, *supra* note 1, at 182–3, para. 118.

self-determination apparently to the 1967 OPT and not to the territory of the Arab state as determined in the 1947 UN Plan of Partition. For, the Court noted:

> 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.[96]

Moreover, the Court ruled that it is for all states, while respecting the UN Charter and international law, 'to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end'.[97] It should be recalled that the 1967 OPT occupy less than half of the territory of the Palestine Mandate allocated in the Plan of Partition to the Arab state.[98] The leaders of the Jewish settlements in Palestine had only reluctantly accepted the Plan of Partition because it left Jewish settlements outside the boundaries of the future Jewish state and inside the future Arab state, such as the settlements in Western and Upper Galilee.[99]

5. Follow up of the *Wall* case

According to the Preamble of the UN Charter, 'We the Peoples of the United Nations' are determined 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'. The advisory opinion in the *Wall* case established such conditions by codifying effectively the legal framework for solving the Israeli–Palestinian issue by the UN. There is no excuse for the UN and its member states to fail any longer to take common responsibility for the peaceful settlement of the Palestinian question.[100] The UNGA should take the lead in supervising the Israeli–Palestinian peace process, and, if necessary, should cut the knot when the peace process goes wrong. In this connection the UN should take into account the division of roles between the UNGA and the SC in respect of fulfilling the 'sacred trust of civilization' towards the Palestinian people. In the *Namibia* case the Court considered that

> when the SC adopts a decision under Article 25 in accordance with the UN Charter it is for member states to comply with that decision, including those members of the Security Council which voted against it and those members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.[101]

96. Ibid., at 184, para. 122.
97. Ibid., at 61, para. 159.
98. See *supra* note 39 and text at note 45.
99. B. Morris, *The birth of the Palestinian refugee problem, 1947–1949* (1987), 124–5, 129–30, and 180: 'The Plan of Partition was a peacetime solution to Palestine's problems. The war undermined its 'sanctity".
100. See the *Wall* case, *supra* note 1, at 201–3, para. 163 sub. E.
101. See the *Namibia* case, *supra* note 93, at 54, para. 116. Art. 25 of the UN Charter states: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'. See B. Simma, *The Charter of the United Nations, A Commentary* (2002), 42, at 461–2. Professor

The UNGA should ask the SC, as it did in the *Namibia* case, to take the necessary action towards Israel, if it persists in refusing to terminate the breaches of international law and to cease forthwith the works of the construction of the wall being built in the OPT, to dismantle the structure therein situated and to make reparation for all damage caused by the construction of the wall.[102] No veto can prevent the validity and binding nature of such a decision.

The Court affirmed the obligation of all states not to recognize the illegal situation resulting from the construction of the wall and to ensure compliance by Israel with international humanitarian law as embodied in the Fourth Geneva Convention.[103] The advisory opinion implies the legal duty of all states to co-operate effectively with the UN to impress on Israel that international law not only restrains the construction of the wall in the OPT but also requires the element of negotiation in the complex diplomatic process for turning to the right track for peace in the Middle East. This duty is embodied in the pledge of all UN members to take joint and separate action in co-operation with the UN for creating conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples.[104] The advisory opinion thus underlines the special responsibility of the Quartet to prevent the Roadmap from maintaining the illegal situation resulting from the construction of the wall.

The advisory opinion in the *Wall* case clearly shows that any prolongation of the tremendous suffering of Israelis and Palestinians stemming from further delay, if not cancellation, of the two-state solution is totally irresponsible. It is now beyond doubt that Israel has to withdraw from the Palestinian territory it occupied in 1967. SC resolution 242, on which the Oslo Agreements and the Roadmap base the permanent status of the OPT, the two-state solution, gives it a free hand to determine if and to what extent it should withdraw its forces from the OPT.[105] Placing the construction

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J. Salmon argued in his plea in favour of Palestine before the Court on 23 February 2004: 'If Israel persists in its refusal to apply the above-mentioned rules of international law and does not accept the consequences of its responsibility, the General Assembly is entitled to expect the Security Council to take the necessary coercive measures which, in the case of violations of mandatory legal rules, should not be amenable to the use of a veto by any member of the Council.'

102. See the *Wall* case, *supra* note 1, at 201–2, para. 163, sub B and C, adopted with 14 votes in favour and one against (Judge Buergenthal).

103. Ibid., para. 163 sub. D, adopted with 13 votes to two (Judges Kooijmans and Buergenthal). Kooijmans' negative vote did not concern the obligation not to render aid or assistance in maintaining the situation created by the Israeli serious breach of international law. See *Separate Opinion* (Judge Kooijmans), at 232, para. 45.

104. UN Charter, Articles 55 and 56.

105. Ibid., at 45, para. 117. See *supra* note 5. See also 'Declaration of Principles on Interim Self-Government Arrangements', Article I '. . . It is understood that the interim arrangements are an integral part of the whole peace process and that the negotiations on the permanent status will lead to the implementation of Security Council Resolutions 242 and 338' (See Shehadeh, *supra* note 80, at 191); UN Doc. S/2003/529, *supra* note 6, para. 3: 'A settlement, negotiated between the parties, will result in the emergence of an independent, democratic, and viable Palestinian state living side by side in peace and security with Israel and its other neighbors. The settlement will resolve the Israel–Palestinian conflict, and end the occupation that began in 1967, based on the foundations of the Madrid Conference, the principle of land for peace, UNSCRs 242, 338 and 1397, agreements previously reached by the parties, and the initiative of Saudi Crown Prince Abdullah – endorsed by the Beirut Arab League Summit – calling for acceptance of Israel as a neighbor living in peace and security, in the context of a comprehensive settlement.'

of the wall by Israel in the OPT in a more general context, the Court observed that the present tragic Palestinian question

> can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The 'Roadmap' approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. 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.[106]

A negotiated settlement between Israel and Palestine on the basis of international law as ascertained by the Court requires that states – mainly in the west – who have not yet recognised Palestine as a state within the boundaries of the OPT are obliged to do so in order to enable Palestine to negotiate with Israel on an equal footing and not on the basis of permanent status of the OPT or within the scope and content of a two-state solution but based on a real peace treaty between the two states. In so doing, they will act in accordance with the call of the UNGA upon all states to comply with their legal obligations as mentioned in the advisory opinion.[107] When (western) governments continue to fail to take international law seriously in their guidance of the Israeli–Palestinian peace process the hundreds of civil organizations for peace, democracy and community development from Israel, Palestine and Europe should prevent on behalf of the civil society all actors involved from transgressing any longer the borderline between law and politics in the Israeli–Palestinian power game. This would be wholly in line with the shared responsibility of states, international organizations and civil society for a more secure world.[108]

106. See the *Wall* case, *supra* note 1, at 200–1, para. 162.
107. UN Doc. A/RES/ES-10/15 of 2 August 2004, para. 1.
108. UN Doc. *Report of the High-Level Panel on Threats, Challenges and Change* (2004), which recommended that preventive diplomacy and mediation should take into account the need of the UN to have, amongst others, greater consultation with and involvement in peace processes of important voices from civil society, especially those of women, who are often neglected during negotiations, at 38, para. 103. See also UN Doc. A 59/2005, *In Larger freedom: towards development, security and human rights for all*, Report of the Secretary General, para. 162.