

Péter KOVÁCS¹:

**Rather Judgement than Opinion? Or can we speak about a third type
judicial procedure before the International Court of Justice?**

*(Note under the Advisory Opinion of the International Court of Justice delivered about the „wall” built on
Palestinian Territory)²*

On July 9 2004, the International Court of Justice rendered probably one of its most important advisory opinions which will presumably be also among the most controversial ones.³

The facts are well-known: cca. two years ago, Israel took the decision to build an enormous wall surrounding the Palestinian territories in order to prevent the arrival of terrorists.

The different sections of the wall (the already finished one, the section under construction and the one which is only planned) are shown with different colors on the following map:

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² This in an enlarged version of the author's article published in the Anuario de Derecho Internacional (2004).

³ For a very good interpretation issued just after the delivery of the opinion, cf. the commentary written by P.H.F. Bekker, former staff-member of the ICJ:

Pieter H.F. Bekker: The World Court Rules that Israel's West Bank Barrier Violates International Law ASIL Insights July 2004. See also: Princeton prof. emeritus Richard Falk: Support for Wall Mocks International Law (Miami Herald 7/20/04), reprinted in The Middle East Research and Information Project (http://www.merip.org/newspaper_org/newspaper_opeds/oped072004.html)



The construction was conceived as a unilaterally decided element of the „peace process” the ultimate aim of which is the establishment of a Palestinian state. Sharon’s government had to give not only a concession for „hardliners” in the Israeli Parliament to secure their approval of the continuation of internationally mediated talks (the so-called „Roadmap” process) but it was also challenged by the ongoing terrorist acts perpetrated into the *intifada*.

The general idea about the construction is a „Berlin-type” wall but in fact at long sections, „only” installations of barbed-wire, cameras and electric sensors can be seen. At very long, continuous sections however a definite concret wall has been built.



photo from: <http://www.palestinemonitor.org>



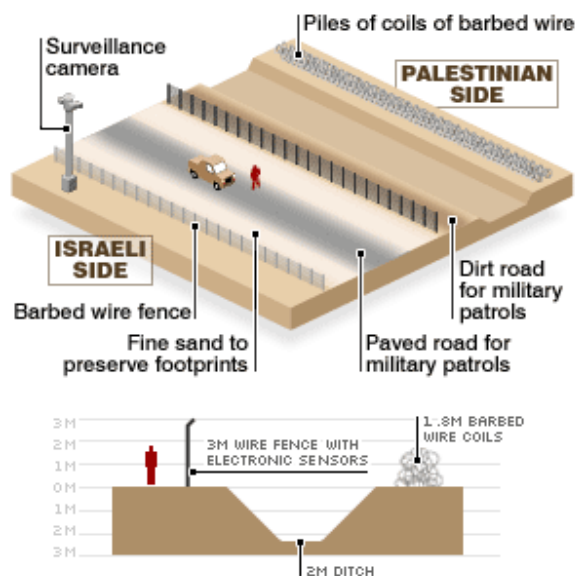
photo from: <http://www.elca.org/middleeast/wall/>



photo from: <http://mrandyc.care4free.net/YorkPSC/wall.htm>



photo from: <http://mrandyc.care4free.net/YorkPSC/wall.htm>



According to pools⁴, the construction of the wall is backed by the immense majority of Israelis, they consider it as an important element of their legitimate self-defense based on the wish to live in peace and security. The results and methods of retaliatory actions of the Israeli army as

⁴ 90 %, according to a radioprogram of the National Public Radio (Written version of the program of September 2, 2003: Analysis: How New Israeli Security Wall is Seen by Israelis?) (<http://www.npr.org/programs/atc/transcripts/2003/sep/030902.kenyon.html>)

well as the measures of self-defence have been criticized in international organizations⁵ and mass media because of loss in civilian life and property. In the meantime, Arafat's Palestinian Authority seems to be unable and maybe unwilling to control the situation on Palestinian side and the *quasi* head of state of the Palestinian Territory lost his credit as well in Israel as in the United States. The photos of Clinton, Rabin and Arafat shaking hands have faded: at the time of the procedure before the ICJ, only Arafat was still in office, but under a *de facto* internment by the Israeli army into the residence of Ramallah, sometimes very similar to a military siege. (Arafat could leave however his headquarter at the end of October 2004 in order to be hospitalized in Paris but even the best French military physicians could not save his life and he died on November 11, 2004.)

The Security Council, as usual, has been unable to act with efficacy in the matter but it has adopted a good number of resolutions in secondary questions of the peace process⁶ and the fight against terrorism. This is the context in which the motion submitted by Arab states was backed by the General Assembly which asked the International Court of Justice to answer the question in the form of an advisory opinion: „*What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?*”

When the International Court of Justice was seized of the matter, it decided to use the new communication facilities thus giving public access not only to memoranda and other written documents of cca. forty states and international organizations but, for the first time, to auditions and the delivery of the opinion, which were transmitted „live” and with replay-possibilities from the World Court's home page.

In the following pages, we try to highlight the most important *dicta* of the ICJ with references to the corresponding paragraphs of the advisory opinion. Our commentary does not want to be exhaustive: on the one hand we would like to put emphasis on top legal arguments related to the case and on general problems of international law as reflected in the opinion, on the other.

⁵ See e.g. Resolution 1544(2004): „The Security Council (...) *Reiterating* the obligation of Israel, the occupying Power, to abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of war of 12 August 1949, *Calling* on Israel to address its security needs within the boundaries of international law (...) *Calls* on Israel to respect its obligations under international humanitarian law and insists, in particular, on its obligation not to undertake demolition of homes contrary to that law (...)”

⁶ Supported *inter alia* by the resolutions 1544(2004), 1515(2003), etc. of the Security Council. According to resolution 1515(2003) „The Security Council (...) 1. *Endorses* the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict (S/2003/529); 2. *Calls* on the parties to fulfil their obligations under the Roadmap in cooperation with the Quartet and to achieve the vision of two States living side by side in peace and security; 3. *Decides* to remain seized of the matter.”

1. Does the Court have competence to deliver the opinion?

Participating in the written phase of the procedure, but abstaining from auditions, Israel challenged the legality of the resolution of the General Assembly, considering it as an *ultra vires* action. (§ 24) She also referred to the „*Eastern-Carelia rule*” when pledging the Court not to reply. (§ 46) Israel emphasized the complexity of the highly politicized Near-East issue where law is only one of the elements of a puzzle. (§ 46)

When deciding upon the first objection, the Court examined the regularity of the antecedents and the events of the Tenth Emergency Session of the G.A. and it referred to several aspects of the famous 377(V) resolution, known as „*Uniting for Peace*”. It is worth noting that the wording of the Court apparently does not reveal any doubt on the legality of the resolution so much questioned in the past. (§ 30).

In the traditional duel of the opinion on the *Status of Eastern-Carelia*⁷ versus the opinion on the *interpretation of the peace treaties with Bulgaria, Hungary and Romania*,⁸ the Court points out (§ 44) that „the very particular circumstances of the case” explained the PCIJ’s refusal, thus repeating the words of the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.⁹ Even if, in the given case, it is evident that the advisory opinion would have a considerable impact on the forthcoming phases of dispute settlement, nevertheless the Court repeats *verbatim* from the Peace treaties advisory opinion that consent of States, parties to a dispute have a different vocation in a contentious case than in the procedure of an advisory opinion. (§ 47). The Court emphasizes its discretionary power and refers to the lack of compelling reasons which could oblige her to refuse the delivery of the opinion. (§ 45, 47) For the Court, the main reason is however that the issue is not (only) a bilateral dispute but a genuine matter of international concern: it does not share the view that “the subject-matter of the General Assembly’s request can be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court’s view that the construction of the wall must be deemed to be directly of concern to the United Nations.” (§ 49) The history of the mandate over Palestine and the partition of the territory by the United Nations are also evoked as reasons why the United Nations and especially the General Assembly are entitled to deal with the question of the wall. (§ 49)

Concerning the third objection, it is not surprising that the Court, in conformity with its long-standing jurisprudence, does not accept the argument based on the alleged lack of justiciability: it confirms the well established thesis that legal points can be adjudged in themselves without entering into the realm of politics. (§ 36-41) There is an interesting aspect of this argument which is also referred to as an illustration of the the finality of the advisory opinion *in abstracto* but also *in concreto*, as far as it is evident – and Israel also mentioned this fact in her memorandum - that the General Assembly has qualified the wall illegal long before the advisory opinion. (§ 60-61). According to the Court, as not all the possible consequences have

⁷ July 23 1923, PCIJ, Series B, No. 5 p. 29 “Answering the question would be substantially equivalent to deciding the dispute between the parties.”

⁸ March 30 1950, ICJ Reports 1950 p.71 and ss

⁹ July 8 1996, ICJ Reports 1996 pp. 235-236, para. 14

been determined by the General Assembly, the opinion would have a real contribution in seeing properly the legal issues. (§ 62)

2. Nature and details of applicable law

After the lengthy presentation of the history of the different relevant resolutions of the General Assembly and the Security Council concerning the occupied territories (§ 68-78), the Court proves that the United Nations consequently appealed for the respect of international humanitarian law (in its customary and written forms as well) and for non recognition of territories acquired by force. The geographical and technical details and the history of the construction of the wall are presented mostly on the basis of the Secretary General's report (§ 79-85) and the Court points out that there is sometimes a considerable difference between the Green line, Israel's internationally recognized demarcation line – in lack of a recognized boundary - and the location of the wall. (§ 83) The difference means 975 km² and for the time being it is embracing 237 000 Palestinians, but after the completion of the Wall, another 160000 will be added to them. Moreover, these people are sometimes *quasi* closed in enclaves.

Concerning the applicable law for the status of these territories, the Court refers first to article 2(4) of the United Nations Charter, resolution 2625(XXV), the common article 1 of the 1966 Covenants and the different *dicta* of the judicial interpretation of the self-determination principle. (§ 87-88). Even if Israel is not a contracting party to the Fourth Hague Convention of 1907, the Court does not see any obstacle to the postulation of Israel's obligations on the basis of customary law. (§ 89)

Israel is bound by the Fourth Geneva Convention of 1949 but before the Court, she did not admit its applicability to the occupied territories because of “the lack of recognition of the territory as sovereign prior to its annexation by Jordan and Egypt” and inferring that it is “not a territory of a High Contracting Party as required by the Convention”. (§ 90) It is worth noting that in 1982, the PLO acting as Palestine made a unilateral undertaking for the respect of this Convention even if Switzerland, the depositary did not pass a decision upon its formal request of accession submitted in 1989. Examining the finality of the Convention, as well as its *travaux préparatoires* and also the subsequent positions of the ICRC, the General Assembly and the Security Council, the Court gave a different interpretation to the allusion of article 2 to “contracting parties”. Contrary to its literal meaning “contracting parties” should simply be understood as “parties to the conflict” for the purpose of the applicability of the Convention.(§ 95-99). The Court also notes however that a military order issued in the “Six-Day War”as well as a judgment of Israel's Supreme Court recognized *expressis verbis* the applicability of the Fourth Geneva Convention to the West Bank. (§ 93, 100) Consequently, the Court comes to the conclusion that the Fourth Geneva Convention is pertinent in the assessment of the current situation.

The applicability of the two UN human rights covenants of 1966 was similarly refused by Israel. (§ 102). The Court recalls “that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.” In armed conflicts, the covenants (with the restriction above) and also the Convention

on the Rights of the Child can and should be implemented parallelly to humanitarian law instruments. (§106). A country must not limit the applicability of these Covenants solely to her own territory when she is exercising a *de facto* power elsewhere on a territory under jurisdiction namely by military occupation. (§ 107-113). Here, the Court can also rely on the position of the UN Human Rights Committee.

The Court puts that “that the existence of a «Palestinian people» is no longer in issue” and the true existence of this people and their “legitimate rights” under which the right to self-determination is to be understood were recognized not only by the United Nations but also by Israel in different phases of the peace-negotiations (§ 118). The Court warns that there is “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.” (§122)

The Court also gives interpretation of Article 49, paragraph 6 of the Fourth Geneva Convention: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” According to the Court “That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.” Recalling the relevant Security Council documents, the Court concludes “that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.” (§ 120) Although Israel gave “assurance (...) that the construction of the wall does not amount to annexation and that the wall is of a temporary nature” 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.” (§ 121)

As far as the Hague and Geneva Conventions are concerned, the Court cites mostly the rules concerning the respect of civilian property, the minimum intervention into day-to-day life and work of civilians. (§ 126).

From the International Covenant on Civil and Political Rights, the Court refers to Article 12 (1) (“Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”) and Article 17(1) (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”) The Court notes that Israel made use of the possibility of derogation under article 4 but only *vis-à-vis* article 9 of the ICCPR i.e. the *habeas corpus* rule. (§126) The Court combines the interpretation of these rules with obligations to grant free access to the Holy Places, as guaranteed in different documents in particular the 1878 Berlin Treaty, the 1922 British Mandate and 1949 General Armistice, stipulating the so called Green line as demarcation line between Israel and Jordan. (§ 129) As far as the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child are concerned, the Court refers mainly to the right to education, to an adequate standard of living, right to work, etc. (§ 130-131)

The Court seems to be shocked that “Qalqiliya, a city with a population of 40,000, is completely surrounded by the wall and residents can only enter and leave through a single military checkpoint open from 7 a.m. to 7 p.m.” (§ 133) and it considers that the construction of the wall has “serious repercussions for agricultural production” (§ 133). The Court builds its argumentation on the lengthily cited assessment of facts by different special rapporteurs appointed by the Secretary General.

The Court comes to the conclusion that “the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Last, the construction of the wall and its associated régime, by contributing to the demographic changes referred to in paragraphs 122 and 133 above, contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council resolutions.” (§ 134)

It is certainly true that military necessities can be invoked by States to avoid abiding to some rules of humanitarian law but the Court emphasizes that according to the text of the Geneva Convention e.g. the prohibition of the transfer of population cannot be suspended on this basis. This exception can theoretically live together with the rule of the respect of property and interdiction of destruction, but the Court is not convinced about the existence of such an *absolute* necessity as required by the Convention. (§ 135) In the interpretation of the so called limitation rules of the Covenants, the Court puts emphasis on the finality and proportionality of the intervention of a State (for public order or national security) in the enjoyment of these rights, conditions which are not met in the present issue, as the ICJ underlined. (§ 136-137)

Israel also invoked the legitimacy of self-defence in order to justify the construction of the wall. (§ 138). The Court recognizes the applicability of self-defence in international law only in a state-to-state armed attack: in a very elegant (but slightly contradictory) way, it refuses the transposition of the “9/11 self-defence” concept although it recognizes retroactively the correctness of the relevant Security Council resolutions adopted in the aftermath of the WTC-tragedy. “The Court also notes 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.” (§ 139)

The Court asks whether the state of necessity can be evoked in this case as an eventual exculpation of wrongfulness. The International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts is used for this purpose and especially the reference to “grave and imminent peril”. The answer is however negative: “In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.” (§ 140) Although recognizing that Israel has “the right, and indeed the duty, to respond in order to protect the life of its citizens” (§ 141), the Court warns

that “the measures taken are bound nonetheless to remain in conformity with applicable international law” (§ 141). Accordingly, the Court comes to the conclusion “that the construction of the wall, and its associated régime, are contrary to international law.” (§ 142)

3. Legal consequences of the judicial appreciation of the situation

The Court considers that the consequences of this statement concern essentially Israel, but also other countries and “where appropriate” the United Nations as well. (§ 148)

First, “Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law. Furthermore, it must ensure freedom of access to the Holy Places that came under its control following the 1967 War.” (§ 149) Secondly, “Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory.” (§ 150) This means not only that Israel should put an end to the construction but she should repeal all legislative and administrative acts related thereto. (§151) Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned (§ 152) and in case of immobile properties (where possible) to apply the principle of the *in integrum restitutio*, and where this is impossible, to compensate damages and losses. (§ 153)

The Court adds that “both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court’s view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions”. (§ 162)

Laying stress on the *erga omnes* character of some violated norms (i.e. self-determination (§ 155-156) and humanitarian law (§ 157-158)), the Court proclaims the obligation of all the States i.e. “not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.” (§ 159) Moreover – even if it is not really clear how States can do so – the Court calls them “to ensure compliance by Israel with international humanitarian law (...)” (§ 159)

What are the duties of the United Nations and in particular those of the General Assembly and the Security Council?

The Court hereby emphasizes “the urgent necessity for the United Nations as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy conclusion, thereby establishing a just and lasting peace in the region.” (§ 161) The Court is going further when referring 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.” (§ 162)

Here – with all the respect due to the judges – we are far from the wording of the original demand for an advisory opinion. These wishes – let us hope that not merely wishful thoughts – draw the great lines of a comprehensive solution. Certainly, there is nothing here which could not be backed by series of resolutions adopted by the Security Council or the General Assembly, nevertheless this *obiter dictum* is very close to what one could qualify as judicial activism.

4. Effective contribution to the peace process?

It is of paramount importance that the decision about the jurisdictional competence of the Court to give the advisory opinion was adopted with total unanimity and the decision about complying with the request was adopted in *quasi* unanimity with only one vote against, namely Buergenthal's, the American judge's. The same 14:1 score can be seen in the different subpoints, with the exception of the reference to obligations binding in this matter all the states when judge Buergenthal was backed by judge Koijmans.

Judges Koroma, Higgins, Koijmans, Al-Khasawneh, Elaraby and Owada appended separate opinions to the advisory opinion, and judge Buergenthal appended a declaration thereto.

It is not easy to foresee the real impact of the advisory opinion on the issue itself. The first official reactions in Israel were very negative and reflected a complete refusal. (It is known however that the already mentioned decision of the Supreme Court¹⁰ legally obliged the Israeli government to change slightly the exact line of the wall and the government promised to execute¹¹ this ruling.) Even if there are considerable differences between the two documents,

¹⁰ See Sliman's commentary on the decision in ASIL Insights July 2004

Nidal Sliman: Israeli High Court Decision on Location of West Bank Barrier

See also Molly Moore: Israeli Court Orders Changes in Barrier (Route Through West Bank Found to Violate Palestinians' Right (Washington Post Foreign Service July 1, 2004)

<http://www.washingtonpost.com/wp-dyn/articles/A16630-2004Jun30.html> and

Conal Urquhart: Israel wall must be re-routed says court (The Guardian July 1, 2004)

<http://www.guardian.co.uk/international/story/0,3604,1251137,00.html> and

Court orders changes to West Bank wall (The Guardian, June 30, 2004)

<http://www.guardian.co.uk/israel/Story/0,2763,1250608,00.html>

¹¹ „Israeli Deputy Defense Minister, Zeev Boim, said «we are going to implement the Supreme Court's decision, but we hope that in the future things will not drag on too long and will allow us to get on with building this project, which is a necessity for security».”

Israeli Court Freezes Work on Part of West Bank Barrier in: U.N.Wire Friday, July 2, 2004, http://www.unwire.org/UNWIRE/20040702/449_25509.asp

„In a statement issued after the ruling was announced, the Defense Ministry said: «The defence establishment respects the judgment of the Supreme Court concerning those sections of the security fence that require replanning. The replanning of these sections will be based on...the proper balance between security and humanitarian considerations.» Molly Moore: *loc.cit.*

starting with the actual case under examination¹² but especially the fact that the Supreme Court is accepting security as basic motivation of the construction policy¹³, it is very important however to see how close the logic of the Israeli Supreme Court and the International Court of Justice are to each other in the assessment of the pertinence of relevant international humanitarian law treaties and the ensuing consequences.¹⁴ „The route disrupts the delicate balance between the obligation of the military commander to preserve security and his obligation to provide for the needs of the local inhabitants. (...) The route that the military commander established for the security fence ... injures the local inhabitants in a severe and acute way while violating their rights under humanitarian and international law.”¹⁵ Related to the specificities of the war against terrorism, one of the basic thoughts of the Supreme Court could also have been pronounced by the ICJ "at the end of the day, a struggle according to the law will strengthen [Israel's] power and her spirit. There is no security without law."¹⁶

The American government, either republican¹⁷ or democate¹⁸ will hardly exercise any pressure for compliance with the *dicta* of the opinions the *advisory* nature of which were emphasized in the American media, even if Sir Gerald Fitzmaurice, one of the best known international lawyer of the English speaking world rightly pointed out before the International Law Commission of the UN (and in a similar manner as his predecessors in the thirties¹⁹) that „although advisory opinions are not binding, there are two cases in which they would appear

¹² The case submitted before the Supreme Court concerned only a 40 km section of the Wall.

¹³ „The High Court accepted the State’s argument that the wall is constructed for security purposes and rejected the petitioner’s contention that the construction is motivated by political considerations.” Sliman, *op. cit.*

¹⁴ „Using as a point of departure that Israel holds the Occupied West Bank in belligerent occupation, the High Court said that the authority of the military commander in that area flows from the provisions of public international law established principally in the 1907 Hague Regulations, which reflect customary international law, and the humanitarian provisions of the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War. The High Court cited Articles 23(g) and 52 of The Hague Regulations and Article 53 of the Fourth Geneva Convention as authorizing the Occupant to confiscate private property if it is necessary for military purposes, provided that compensation is paid. In addition, it recalled its previous decisions justifying the taking of private property to build military compounds, fencing outposts, providing temporary housing for soldiers, securing transportation, building civil administration facilities, and stationing soldiers on private property. However, the military commander must take the needs of the local community into consideration, but this question pertains to the route of the wall, not to the authority to build it.” Sliman, *op. cit.*

¹⁵ Cited by: Court orders changes to West Bank wall – Guardian, June 30, 2004, referred *supra*.

¹⁶ Sliman, *op. cit.*

¹⁷ See the official American governmental position e.g. in the statement of ambassador Danforth before the General Assembly, July 16, 2004: cited in USINFO.STATE.GOV:

<http://usinfo.state.gov/mena/Archive/2004/Jul19-585878.html> or in the part „explanation of votes” of the Press Release GA/1488 (July 20, 2004)

¹⁸ Statement by John Kerry on International Court of Justice Ruling Regarding Israel’s Security Fence (US Newswire – Medialink Worldwide, 7/9/2004) „I am deeply disappointed by today’s International Court of Justice ruling related to Israel’s security fence. Israel’s fence is a legitimate response to terror that only exists in response to the wave of terror attacks against Israel. The fence is an important tool in Israel’s fight against terrorism. It is not a matter for the ICJ. I have made very clear from the start that I do not believe that the ICJ should even be considering this issue given that they do not have jurisdiction.”

¹⁹ PCIJ: Sér. E. n°4, p. 72: „...the view according to which advisory opinions have not compulsory force is rather theoretical than legal.” („En réalité ...il n’y a qu’une différence purement nominale entre les affaires contentieuses et les affaires consultatives.” *loc. cit.*)

See also about a *de facto* obligation: Dotremont, Stanislas: L’arbitrage international et le Conseil de la SDN, Bruxelles 1929 p.125 and Fachiri A.P.: The Permanent Court of International Justice, Its Constitution, procedure and Work, London 1932 (2nd) p. 80 and International Law and the PCIJ. Problems of Peace, Geneva, Institute of International relations, 2, series 1928 p.83

to be in practice negatively binding, i.e. to have prohibitory force, namely, *first*, where the opinion indicates that a certain course of action would be contrary to international law or to the Charter or to some other international instrument – in such a case it would be virtually impossible for the requesting organ to follow that course, and difficult for any individual Member state to do so; *second*, where the opinion indicates that, of various possible courses, only one is the correct course legally – here again, if anything is done at all, it would appear difficult in practice not to follow the course advocated by the Court.”²⁰. Nevertheless, there are minor signs that Washington has expectations of changes in Israeli policy²¹. In this way, the US confirms the critical approach²² which could be observed already in 2003 parallel to the veto against a draft resolution condemning the wall. It is to note however that the United States is concerned by the ruling not only as Israel’s closest ally, but also by the substantive article (§§ 138-139, precited) about legitimate self-defence. In the debate of the General Assembly, the American ambassador criticized this point sharply, representing the refusal of the so-called enlarged self-defence concept of today’s America fighting against international terrorism.²³ The European Union’s position submitted before the Court by Ireland²⁴, assuming the tasks of the presidency in rotation, was however ambiguous: it condemned the wall²⁵ but it also opposed

²⁰ Yearbook of the International Law Commission, Vol. 29 (1952), pp.54-55, cited by Ian Brownlie before the International Court of Justice at the public sitting held on October 17 1997 in the case concerning Questions of Interpretation and application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya *vs.* United States of America) in § 16 of the *verbatim* record.

²¹ „The Bush administration strongly signalled Israel this week that its patience is flagging with respect to continued work on the fence. The White House came closer than ever before to linking the barrier project to its stance on settlement construction, which Washington has condemned for decades as a central obstacle to Middle East peace. (...) «We have made our concerns known. Those concerns remain,» White House Press Secretary Scott McClellan said of the dispute over the security fence.” Bradley Burston: Background / Fence divides Israel and U.S., Israeli and Israeli. Haaretz, October 28, 2004 – See on <http://www.haaretz.com> and www.haaretzdaily.com

²² In October 2003, news agencies reported that „after publicly criticised the fence and the wall that Israel is building in the West Bank, the Bush Administration is quietly negotiating with the Israeli Government to change the route of the barrier.” Mark Matthews: US leans on Israel to change route of its security wall (The Baltimore Sun, Agence France Press, Associated Press, October 14, 2003)

<http://www.smh.com.au/articles/2003/10/13/1065917343961.html>

„President George Bush had merely called the barrier a «problem».”US blocks action on Israeli ‘wall’ BBC October 15, 2003 http://news.bbc.co.uk/1/hi/world/middle_east/3192762.stm

²³ „So the Court opinion, which this resolution would accept, seems to say that the right of a State to defend itself exists only when it is attacked by another state, and that the right of self-defense does not exist against non-state actors. It does not exist when terrorists hijack planes and fly them into buildings, or bomb train stations, or bomb bus stops, or put poison gas into subways. I would suggest that if this were the meaning of Article 51, then the United Nations Charter could be irrelevant in a time when the major threats to peace are not from states, but from terrorist.”] <http://usinfo.state.gov/mena/Archive/2004/Jul19-585878.html>

²⁴ The brief written on January 30, 2004 by Brian Cowen, minister for foreign affairs of Ireland was in fact only a formal notification of handing in the written form the statement of Marcello Spatafora, Italian ambassador to the UN, made on behalf of the EU on December 8, 2003 before the General Assembly. Its most relevant parts are as follows: „The European Union regrets the fact that Israel, according to the report of the Secretary General pursuant to General assembly resolution ES-10/13 is not in compliance with the Assembly’s demand that it stops and reverses the construction of the wall in the Occupied Palestinian Territories. The European Union believes that the proposed request for an Advisory Opinion from the International Court of Justice will not help the efforts of the two parties to relaunch a political dialogue and therefore inappropriate. (...) While recognizing Israel’s right to protect its citizens from terrorist attacks, the European Union urges the Government of Israel, in exercising this right, to fully respect international law in particular human rights and international humanitarian law.”

²⁵ While Germany and Great Britain abstained, France and Spain voted in the Security Council in favour of the draft vetoed by the US on October 15, 2003.

the delivery of the advisory opinion as politically inappropriate. Nevertheless, the countries of the European Union abstained at the voting on the motion about the request of the General Assembly, but voted in favour of resolution ES-10/L.18, adopted in the aftermath of the pronouncement of the ruling which was received „with respect” and which „(1) *Acknowledges* the advisory opinion, (2) *Demands* that Israel, the occupying Power, comply with its legal obligations as mentioned in the Advisory Opinion, (3) *Calls upon* all States Members of the United Nations to comply with their legal obligations as mentioned in the Advisory Opinion” etc..

5. Looking further...

The view of the ICJ about the failure of execution of international commitments and the breaches of international law can hardly be challenged: what the judges said did not differ from what had already been said several times by the political organs of the United Nations, sometimes also by the Security Council, not to speak of other international organizations, the International Committee of the Red Cross, most state-chancelleries, UN-special rapporteurs, etc. It is true that the comprehensive, judicial recapitulation of previous resolutions and evaluations, the authoritative interpretation of commitments based on treaty law as well as hard and *soft law* type UN-documents created a qualitatively different situation. Richard Falk is rightly stating that „such a plain-spoken ruling from the characteristically cautious International Court of Justice will test the respect accorded international law.”²⁶

A most important issue of recent judicial stock-taking has already been raised in the title: can the decision of the ICJ be considered as an opinion or is it a *quasi* judgement disguised in the form of consultative opinion.?

The logic of the wall opinion suggests that since July 9 2004, a *UNO vs. State* dispute can apparently be adjudged without explicit statutory habilitation. Does this mean that a third type judicial procedure was born in the practice of the International Court of Justice?

It is certainly a delicate situation when procedures launched on the basis of headquarter-agreements should be qualified as advisory opinion. It is also clear that some international organizations can live together with *Organization vs. State* (or *vica versa* *State vs. Organization*) lawsuits, the best known example being the internal judicial complex of the European Communities.

In the history of the International Court of Justice, one cannot forget the Advisory Opinion concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*²⁷, which was delivered in a similar situation, even if posterior to the real decision i.e. the revocation of the mandate by the General Assembly and the Security Council. The advisory opinion about *certain expenses of the United Nations*²⁸ is also an example for the conflict between the Organization and – in the given case not one but two - failing states. The advisory opinion

²⁶ Falk: *loc.cit*

²⁷ Delivered on June 21, 1971

²⁸ Delivered on June 20, 1962

on *Western Sahara*²⁹ was *de facto* an appreciation of the legal and historical backgrounds of Mauritanian and Moroccan territorial pretensions over the territory: here, the Assembly acted *quasi* as the representant of a people, beneficiary of the right of self-determination. In the *Mazilu-case* (advisory opinion on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*)³⁰, the Economic and Social Council asked the ICJ whether the mentioned point was applicable to the situation of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities which was unsuccessfully denied by Ceausescu's Romania. However the introductory phrase already clearly reflected that the the issue had organization *vs.* state nature.³¹ The advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*³², was linked to a similar organization *vs.* State type conflict concerning the status of Cumaraswamy, Special Rapporteur on the Independence of Judges and Lawyers.³³

In the jurisprudence of the Permanent Court of International Justice, the possibilities to disguise the apprehension of the Organization for breaches of international law committed by a state in form of an advisory opinion, were even more evident. It mustn't be forgotten that the separation of interstate litigations and advisory opinions has never been very clear either in the Covenant, in the statute and rules of the Permanent Court of International Justice³⁴ or in its jurisprudence. The simplicity with which a particular state *vs.* state problem was transformed into an advisory opinion³⁵ is spectacular. In the thirties, Csiky, a Hungarian international lawyer belonging to the Buza-school³⁶ called this phenomenon as „adjudging opinion”³⁷ in his book about the PCIJ³⁸. Csiky's approach³⁹ (which is however not completely identical with the

²⁹ Delivered on October 16, 1975

³⁰ Delivered on December 15, 1989

³¹ „a difference has arisen between the United Nations and the Government of Romania as to the applicability of the Convention”. ICJ Reports 1989 p.177-178

³² Delivered on of April 29, 1999

³³ The Court formulated also that „Malaysia is obligated the obligation to communicate [the] advisory opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and [Mr.] Cumaraswamy's immunity be respected”. (ICJ Reports 1999, § 65)

³⁴ According to article 14 of the Covenant „The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.”

³⁵ „Les avis consultatifs étaient demandés à la Cour, soit sur un point abstrait de droit international, soit sur un litige concret, né et actuel(...) en pratique, le Conseil pouvait demander un avis à l'instigation d'un ou de plusieurs Etats intéressés.” Rousseau, Charles: *Droit international public*, Tome V, Sirey 1983 Paris p.421 et 423

³⁶ Named after László Búza, academician and the most influential international lawyer in Hungary between 1920-1968.

³⁷ In Hungarian „bíráskodó vélemény”, translated in Csiky's French summary as „avis juridictionnel”.

³⁸ Csiky János: *Az Állandó Nemzetközi Bíróság véleményező hatásköre* (The advisory competence of the Permanent Court of International Justice) Szeged 1935 Szeged Városi Nyomda p.1-171

³⁹ The characteristics of the adjudging opinion are the following, cited from the French summary of Chiky's book: „1. La participation du Conseil n'est qu'une activité purement *formelle*, de *transmission*. 2. Les *Etats* deviennent ici les *vraies parties* („il (le Conseil) prie les deux gouvernements de porter cette question devant la Cour”), tandis que là ils ne sont que parties *immédiates*, *informatrices*, *quasi-parties*. Et enfin 3. les parties acceptent l'avis de la Cour comme *obligatoire*. – Ce type d'avis qui peut être nommé *l'avis juridictionnel*, est presque *identique à une décision*. La seule différence essentielle est la *contrainte*, l'*exécution*: les articles 13 et 16 du Pacte ne sont pas derrière lui et tellement il est en s'appliquant à *l'honneur national* une forme d'arrangement des différends internationaux de *grand avenir*. En cas d'*inexécution* on n'engagerait que la procédure souple et diplomatique renfermée dans *l'art. 15 du Pacte*.” Csiky: *op. cit* p. 154

„Ainsi il est évident que si le Conseil *déviât au futur* de l'avis de la Cour, cette attitude *serait la violation d'une norme internationale existante*.” Csiky: *op. cit* p. 162

characteristics of the UN debate about the Wall⁴⁰) was not at all completely incompatible with authoritative tendencies of the contemporary doctrine: thus on the basis of the report presented by the French Albert de Lapradelle and the Rumanian Démètre Négulesco, judge of the PCIJ, the Institute of International Law adopted in 1937 a resolution on the legal nature of advisory opinions of the Permanent Court of International Justice and on their value and significance in international law⁴¹ calling on the use of advisory opinion procedure in case of impossibility of submitting interstate claims.⁴² According to Négulesco and Lapradelle⁴³, one can speak in these cases about an „advisory arbitration” (*arbitrage consultatif*) and Robert Redslob called the same possibility as „limited arbitration” (*arbitrage limité*).⁴⁴ This could complement the possibility what de Vischer qualified as an abstract advisory opinion having the vocation to exclude the emergence of an eventual (or even probable) dispute on interpretation in the future.⁴⁵

The competences attributed to the Permanent Court of International Justice in the system of the protection of minorities under the auspices of the League of Nations show some theoretical similarities with the present issue because the demands for advisory opinions were always linked to real problems, breaches of law, alleged by petitions or claims submitted by states. Even if *de jure*, the examination of the complaints in the League of Nations was the duty of the Council, behind the questions submitted by the Council for advisory opinions to the PCIJ, concret allegations were recognizable. Let us refer, first of all to the well known *Mossoul-issue*⁴⁶ where the PCIJ confirmed that the Council was entitled to take a binding decision *quasi* in the capacity of an arbitral tribunal, mandated by the common will of the

⁴⁰ As cited *supra*, on the basis of the previous cases Csiky emphasized, that states in dispute *agree* to bring the case before the PCIJ not as an interstate legal dispute but as a request for opinion where the Council performs only a procedural service when complying with the states' proposal.

⁴¹ September 3, 1937, Luxembourg Session

⁴² „L'Institut de Droit International, Considérant que, aux termes de l'article 14 du pacte de la Société des Nations incorporé dans le Statut de la Cour permanente de Justice internationale, la Cour peut être saisie d'une demande d'avis consultatif par l'Assemblée ou le Conseil de la Société des Nations sur tout „différend” out out „point”; Considérant qu'en droit, et dans l'état actuel des textes, quel que soit l'objet de la demande de l'avis consultatif, celui-ci se présente, conformément à la nature juridictionnelle de la Cour, comme une solution de droit, sans caractère obligatoire; Considérant, en outre: Que la procédure consultative, entourée des garanties de la procédure judiciaire, contribue à la formation et au développement du Droit des Gens; Que la procédure consultative, facilitant le règlement judiciaire des conflits internationaux là où l'arbitrage fait défaut, rend les plus grands services à la solution pacifique des différends; Exprime le voeu: 1. Que dans le cas où les puissances ne jugeront pas possible de soumettre leurs conflits au règlement judiciaire par la procédure contentieuse, elles en saisissent le Conseil, en lui demandant d'obtenir de la Cour un avis consultatif sur un ou plusieurs points litigieux; 2. Que dans les traités où ne s'inscrit pas, pour tous les différends qui pourraient surgir de leur application ou interprétation, la clause compromissoire, instituant obligatoirement l'arbitrage ou le règlement judiciaire, soit expressément prévue la faculté pour l'une ou l'autre des Parties de s'adresser au Conseil sur tous différends nés et actuels, pour lui demander de saisir la Cour pour avis consultatif; 3. Que dans les hypothèses prévues aux §§ 1 et 2 ci-dessus, le Conseil de la Société des Nations veuille prendre la requête des Parties en très sérieuse considération.”

⁴³ Lapradelle – Negulesco: Rapport sur la nature juridique des avis consultatifs de la CPJI, leur valeur et leur portée positive en droit international, Annuaire de l'Institut de Droit Internationale 1928 p.45

⁴⁴ Redslob, Robert: Revue de droit international de sciences diplomatiques, politiques et sociales (Genève, Sottile) 1924 p.10

⁴⁵ Vischer, Charles de: Les avis consultatifs de la CPJI, Recueil des Cours de l'Académie de Droit International de La Haye RCADI 1929 p. 24

⁴⁶ Delivered on November 21, 1925 about article 3, paragraph 2 of the treaty of Lausanne (Frontier between Turkey and Iraq), Collection of Advisory Opinions Serie B n°12

parties as reflected in the peace treaty⁴⁷. The disguised character of interstate disputes is manifest in some advisory opinions delivered in the protection of minorities, e.g. i. *on certain questions relating to settlers of German origin in the territory ceded by Germany to Poland*⁴⁸, ii. *on the access to German minority schools in Upper Silesia*⁴⁹ and iii. *on minority schools in Albania*⁵⁰.

The former two were linked to a legal dispute between Germany and Poland, the latter concerned a tension between Greece and Albania. In the two opinions on schools the questions⁵¹ submitted to the PCIJ are evidently linked to the merits of the case, so the answer to the question could have had a decisive effect on the settlement of the dispute, respectively with the success of the German and the Albanian positions. In the opinion on settlers the wording of the original question⁵² and that of the reply⁵³ show astonishing similarity with the opinion on the wall. There is another similarity between minority protection issues and the wall case, namely the role played by the two organizations, respectively the League of Nations as guardian and guarantor of the minority commitments⁵⁴ and the United Nations having a charter proclaiming the right to self-determination and the task of the Organization to secure international peace and stability, rules containing arguments in favor of a special *locus standi*. Moreover, the deep involvement of the UNO from the beginning in the realisation of coexistence between Israel and a Palestinian state could also be felt by the judges as justifying

⁴⁷ See Péter Kovács: Paul Teleki et le règlement de l'affaire de Mossoul dans la Société des Nations (in: Kovács (ed) *Historia ante portas* (L'histoire en droit international / History in International Law Bibor Kiadó 2004 Miskolc p.188-220 or in the n°2 issue of the Miskolc Journal of International Law vol.1 (2004) (<http://www.mjil.hu> or directly at <http://www.uni-miskolc.hu/~wwwdrint/20042kovacs1.htm>))

⁴⁸ Delivered on September 10, 1923, Collection of Advisory Opinions Serie B n°6

⁴⁹ Delivered on May 15, 1931, Judgments, Orders and Advisory Opinions Series A/B n°40

⁵⁰ Delivered on April 6, 1935, Judgments, Orders and Advisory Opinions Series A/B n°64

⁵¹ „Can the children who were excluded from the German Minority schools on the basis of the language tests provided for in the Council's Resolution of March 12th, 1927, be now, by reason of this circumstance, refused access to these schools?” Series A/B n°40 p.5

„whether regard being had to the above-mentioned Declaration of October 2nd, 1921, as a whole, the Albanian Government is justified in its plea that, as the abolition of the private schools in Albania, constitutes a general measure applicable to the majority as well as to the minority, it is in conformity with the letter and the spirit of the stipulations laid down in Article 5, first paragraph, of that Declaration;” Series A/B n°64 p.5

⁵² „1. Do the points referred to (...) involve international obligations of the kind contemplated by the Treaty (...) signed at Versailles on June 28th, 1919 and do these points come within the competence of the League of Nations as defined in that Treaty?

Should the first question be answered in the affirmative, the Council requests the Court to give an advisory opinion on the question whether the position adopted by the Polish Government (...) is in conformity with its international obligations.” Serie B n°6 p.7

⁵³ „The Court is of the opinion that the points referred to (...) do involve international obligations of the kind contemplated by the Treaty (...) and that these points come within the competence of the League of Nations as defined in the Treaty;

That the position adopted by the Polish Government, and referred to (...) was not in conformity with its international obligations.” Serie B n°6 p.43

⁵⁴ The wording of the pertinent peace treaties, conventions and unilateral declarations was nearly *verbatim* identical: „(...) the stipulations in the foregoing Articles of this Section, so far as they affect persons belonging to racial, religious or linguistic minorities, constitute obligations of international concern and shall be placed under the guarantee of the League of Nations. They shall not be modified without the assent of the majority of the Council. (...) any Member of the Council of the League of Nations shall have the right to bring to the attention of the Council any infraction or any danger of infraction of any of these obligations (...) any difference of opinion as to questions of law or fact (...) shall be held to be a dispute of an international character (...) The (...) Government hereby consent that any such dispute shall, if the other party thereto demands, be referred to the Permanent Court of International Justice. (...)” (e.g. text from article 60 of the Hungarian Peace Treaty of Trianon.)

the interests of the organization. In a similar way, neither the LON Covenant, nor did the UN Charter recognize *expressis verbis* this competence based on other treaties and hard & *soft law* type documents of the respective organizations.

It should certainly be left to future judgement whether the International Court of Justice took here the politically right decision.⁵⁵ In the Near-East, no interstate questions can be answered solely on the basis of international law. This is actual reality: hopefully, the present decision of the International Court of Justice will contribute to the birth of a climate where the contradictory and *prima facie* inconciliable interests can equally be taken into consideration during the final settlement under the patronage of the United Nations.

Does this very special advisory opinion – which was, in fact, a *quasi* judgement (even if, of course, without a direct, binding nature) - falling upon a State in a lawsuit launched on a very peculiar basis remain an isolated phenomenon or does it mean the opening of a new jurisprudence in the metamorphoses of international law and the United Nations at the Millennium? Although the answer to this question is a matter of the future, nevertheless a few examples can be found in the practice of the Permanent Court of International Justice and the International Court of Justice that the judges in The Hague can rely upon.

⁵⁵ It is at least shocking that the logic of today's criticism *vis-à-vis* the ruling of the ICJ coincides perfectly with the classic marxist approach, witnessed by an excerpt from Haraszti's contribution remembering the advisory opinion on the peace treaties: „Hence, recourse to the International Court of Justice for advisory opinions on questions of predominantly political character is also practically inexpedient and even detrimental both to the United Nations and to the International Court.”

Haraszti, György: The Problem of International Jurisdiction, in *Questions of International Law*, Budapest 1964 Hungarian Branch of the International Law Association p. 37