



OCCUPATION, COLONIALISM, APARTHEID?
A RE-ASSESSMENT OF ISRAEL'S PRACTICES IN THE OPT
UNDER INTERNATIONAL LAW

PALESTINIAN RED CRESCENT SOCIETY, RAMALLAH, 16 AUGUST 2009



— SYMPOSIUM PROCEEDINGS —

**Considerations for an International Court of Justice Advisory
Opinion in response to allegations that Israel is engaged in apartheid
and/or colonial practices in the OPT**

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INTRODUCTION

1. This opinion concerns a report entitled “Occupation, Colonialism, Apartheid: A re-assessment of Israel’s Practices in the occupied Palestinian territories under International Law”, which reflects a study co-ordinated by the Human Sciences Research Council (“the HSRC”). For convenience, we shall refer to the report as “the HSRC report” or “the report”.
2. The last substantive paragraph of the 303-page report states that the conclusions reached in the report provide a basis for urgent consideration by concerned states to call upon the UN General Assembly to request an advisory opinion from the International Court of Justice (“ICJ”) regarding Israel’s practices that appear to constitute a violation of the international law norms prohibiting apartheid and colonialism.
3. Of course, the authors of the study have a recent and relevant precedent to rely on when they make such a recommendation. That comes in the form of a decision by the General Assembly of 8 December 2003 at its Tenth Emergency Special Session to submit the question of the legality of Israel’s wall or barrier in the Palestinian occupied territories (“OPT”) for an advisory opinion.
4. While Israel did not participate in the oral hearings, it chose to submit written submissions. Taking into account that the General Assembly had granted Palestine a special status of observer and that it co-sponsored the draft resolution requesting the advisory opinion, Palestine was allowed to submit a written statement on the question – and to present oral submissions. We know that the Court heard lengthy argument from a number of states and two international organisations during the course of oral hearings held over 23 to 25 February 2004. It delivered its advisory opinion on 9 July 2004. We shall refer to its decision as “the Palestine Wall opinion”.
5. Although these introductory remarks demonstrate that there are strong prospects of the General Assembly obtaining a similar opinion on Israel’s conduct that implicates the norms governing apartheid and colonialism, the purpose of this opinion is to

engage that question more fully. In order to conduct that enquiry, we do the following:

1. We begin by setting out the provisions of the relevant legal instruments that govern the ICJ's procedural powers in order to explain the extent of the ICJ's jurisdiction to give advisory opinions.
2. We then turn briefly to consider, at a level of generality, the approach of the ICJ to its jurisdiction.
3. Having done so, we move to the specific by considering the question of jurisdiction with reference to the Palestine Wall opinion in particular. The focus here being on the jurisdiction of the ICJ to give advisory opinions and the circumstances in which they may be sought, we do not consider the substantive basis of the ICJ's decision.
4. Before concluding the opinion with a brief explanation of our view that it would be desirable for an advisory opinion to be sought, we discuss the potential scope of any proceedings at which the legal issues would be ventilated.

PRIMARY SOURCES OF THE ICJ'S AUTHORITY TO GIVE ADVISORY OPINIONS

6. To begin with, it would be convenient to consider the relevant provisions of the instruments that give content to the ICJ's jurisdiction and powers:
 1. The UN Charter, which is the constitutional statute of the United Nations, specifically deals with the power of the ICJ to issue advisory opinions. Article 96(1) empowers both the General Assembly and the Security Council to ask the ICJ "to give an advisory opinion on any legal question". Importantly, the Charter also provides that "[o]ther organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities".[\[1\]](#)
 2. These principles are confirmed in article 36(1) of the ICJ's Statute, which provides that the Court has jurisdiction in respect of all matters provided for in the UN Charter.
 3. Part IV of the ICJ's Statute deals in more detail with the power of the Court to issue advisory opinions. The Statute essentially mirrors the UN Charter in respect of the Court's power to issue advisory opinions.[\[2\]](#) Significantly, the statute provides that a request for an opinion must be made in writing and be "accompanied by all documents likely to throw light upon the question" to be dealt with by the opinion. The statute also provides that the Court, in exercising its advisory jurisdiction, may be guided by the provisions of the Statute that deal with the Court's powers in contentious cases.[\[3\]](#) It is also noteworthy that the Statute provides for the hearing of oral evidence.[\[4\]](#) It also provides that the ICJ "may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion."[\[5\]](#)
 4. When considering the scope of the ICJ's jurisdiction, it is also important to have regard to its rules. Part IV of the ICJ's Rules deals with its advisory jurisdiction. It is not necessary, for present purposes, to consider these rules in detail. It will suffice to point out that the ICJ's Rules make detailed provision for the exercise by the Court of its advisory jurisdiction.
7. It may thus be hoped that the findings of the HSRC report are regarded by a state or a group of states as the basis for them to agitate within the General Assembly for an advisory opinion. In this respect, there in our view is a significant additional factor which may be relied on by states that are a party to the Apartheid Convention.[\[6\]](#) Article IV of the Convention provides that "[t]he States Parties to the present Convention undertake: (a) To adopt any legislative *or other measures* necessary to

suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations ...”^[7], and Article VIII provides that “[a]ny State Party to the present Convention may call upon any competent organ of the United Nations to take such action under the Charter of the United Nations as it considers appropriate for the prevention and suppression of the crime of apartheid”.

8. These two provisions either singly or in combination provide an entitlement for states that are a party to the Apartheid Convention, in pursuance of their obligation to suppress and prevent the crime of apartheid or its encouragement, to call upon the General Assembly as a competent organ of the UN for an advisory opinion in respect of the findings of the HSRC report regarding Israel’s apartheid practices in the Occupied Palestinian Territories (“OPT”).

THE ICJ’S APPROACH TO ADVISORY OPINIONS

9. The ICJ has, on numerous occasions, exercised the authority given to it by the above provisions to give advisory opinions.^[8] One of the more politically controversial advisory opinions involved South Africa’s occupation of Namibia and its legality.
10. The Namibia advisory opinion is not substantively of relevance to us here – although this opinion concerns a mechanism to gain greater legal clarity on the extent to which Israel’s conduct has acquired the features of apartheid and colonialism, the issues dealt with in the Namibia advisory opinion were, in the main, quite different to the substantive issues dealt with in the HSRC report. However, the Namibia advisory opinion was characterised by certain procedural arguments raised by South Africa, which were rejected by the ICJ. Israel raised similar arguments in the Palestine Wall opinion and the cumulative effect of the two opinions is greatly to enhance the prospects of obtaining an advisory opinion from the Court, even in respect of a politically controversial issue.
11. In short, the ICJ has established a robust approach to advisory opinions in terms of which it readily accepts the invitation to deal with questions presented to it, even in the face of strong objections from states against the interests of which such opinions would operate. This is not to say that the ICJ has a record of adopting a partisan agenda – while aspects of its judgments may properly be criticised and it has not always shown an exemplary approach to legal analysis, it can properly be said that its judgments attempt to analyse the relevant legal provisions and case law dispassionately and in an attempt to find the correct legal position. The point is that the ICJ has shown itself willing to accept hard political questions, which makes the prospect of seeking an advisory opinion in order to address the issues raised in the HSRC report most promising.
12. Rather than conduct a detailed analysis of the Namibia advisory opinion, we shall highlight relevant aspects of it in the discussion of the Palestinian Wall opinion which follows below. Since the most important arguments raised by South Africa in opposition to the ICJ assuming jurisdiction to render the opinion are similar to those adopted by Israel in the Palestine Wall matter, it would be most convenient to consider them together.

THE ICJ ADVISORY OPINION ON THE WALL

13. In our consideration of the ICJ’s Palestine Wall opinion, our main focus is on the procedural aspects of seeking an advisory opinion and the bases upon which this may be done. We are not, as a consequence, concerned with the substantive reasoning of the ICJ on the legality of the wall. For the sake of convenience, we shall deal with the Palestine Wall opinion on the basis of the different themes raised in the judgment relevant to the question whether an opinion may be sought on the questions posed in the HSRC report. These are:
 1. The Court’s general approach to its advisory jurisdiction;

2. The role of the Security Council and the extent to which the ICJ's rendering of an advisory opinion would undermine it;
3. The extent to which the question raised qualified as a "legal question" as required by article 96 of the UN Charter;
4. The desirability of the ICJ considering a political question; and
5. Whether the Court should exercise its discretion to grant an advisory opinion.

On Jurisdiction Generally

14. As noted by the Court, the very first question with which it had to deal, was whether it had jurisdiction to entertain the request for an advisory opinion at all. For our purposes, it is important to have regard to the fact that the ICJ confirmed the test applicable to answering this question:[\[9\]](#)
 1. The opinion must be requested by an organ duly authorised to seek it under the Charter;
 2. The opinion must engage a legal question; and
 3. The question must arise from the scope of activities of the requesting organ (unless it is the General Assembly or Security Council to which this limitation does not apply).
15. The Court then noted that, even though the power of the General Assembly to request advisory opinions is not limited to the scope of its activities, the ICJ had previously considered the question whether the subject matter of the requested opinion was linked to the activities of the General Assembly.[\[10\]](#) This, in our view, is merely an expression of the trite principle, more commonly of application in domestic law, that a judgment or opinion of a court ought to have some practical use. In any event, it is unnecessary for us to consider this question in any more detail here because the Court confirmed the somewhat obvious observation that the legal consequences of Israel's occupation of Palestinian territories was of concern to the General Assembly. That conclusion would naturally apply with equal force to the subject matter of the opinion proposed by the HSRC report.

On the Role of the Security Council

16. One of the objections by Israel to the ICJ's jurisdiction was based on its contention that the Security Council was already seized of the matter. Specifically, Israel complained that, because the Security Council was already dealing with the question of the Israeli-Palestinian conflict, the General Assembly had acted *ultra vires* the UN Charter,[\[11\]](#) by requesting the opinion.
17. It is unnecessary to consider this aspect of the decision in much detail, because it involves interpretations of various provisions of the Charter[\[12\]](#) dealing with the interaction between the General Assembly and the Security Council, which are not directly relevant to this opinion. It would be sufficient for us to note that the bases upon which this argument was rejected were:
 1. First, that the practice of the General Assembly and the Security Council had evolved to the point where these bodies often dealt with the same issue in parallel, albeit with slightly different focuses;[\[13\]](#) and
 2. Secondly, with reference to the principle that the General Assembly is obliged to consider a matter that threatens international peace and security when the Security Council is deadlocked, the Court noted that the Security Council had indeed been deadlocked in respect of the legality of the Wall and that the General Assembly was therefore entitled to deal with the matter.[\[14\]](#) Once again, this reasoning would be relevant to the question of Israel's conduct most generally and, in particular, to any comparison between Israel's conduct and the practices of apartheid and colonialism.

Whether the Request for an Opinion Concerned a “Legal Question”

18. One of the jurisdictional complaints raised by Israel related to the question posed by the General Assembly in its referral. This, in our view, is an important aspect of the Court’s reasoning on jurisdiction, because a similar attack could be directed to future requests for an opinion. At the very least, the complaint raised by Israel, and the response to it by the ICJ, provide guidance on the way in which future questions might be phrased. Even though the ICJ rejected Israel’s objection in this regard, the lesson is that it would be advisable for great care to be taken in the formulation of the question. Of course, this is really a consideration for the General Assembly itself, since it is the entity that must seek the opinion, but the state or states that call for the advisory opinion would assist the General Assembly by themselves carefully formulating the question.
19. Israel’s complaints may safely be summarised as amounting to an allegation that the question was impermissibly vague and an argument that the question required the Court to advise on a hypothetical issue.^[15] In so far as the first issue is concerned, Israel raised the complaint that the question posed by the General Assembly failed to specify the entity in respect of which the legal consequences were to be assessed.
20. The Court rejected these arguments. It held that the question was framed in terms of, and raised problems concerning, international law. Not only was it susceptible to a reply based on law, but it could scarcely be answered in any other way. It was therefore a question with a legal character.^[16] In any event, the Court pointed out that the lack of clarity in a question does not, in and of itself, deprive the Court of jurisdiction. Rather, ambiguity in a question will require it to be interpreted by the Court. The ICJ referred to other cases in which this exercise had been conducted.^[17] While the Court was willing to find that lack of precision in the framing of the question does not *per se* have the effect of depriving the Court of advisory jurisdiction, there is obvious value nonetheless in drafting the question to be answered by the Court as clearly as possible.

Political Questions

21. One of the most important jurisdictional issues, for our purposes, raised in the Palestine Wall Opinion, relates to the political nature of the question. It had been argued that the Court should decline jurisdiction on the basis that the question raised political issues that ought not to be decided by a Court. This is clearly of fundamental importance to any future attempt to seek an advisory opinion, given the political nature of any assessment of Israel’s conduct. This argument is similar to the argument advanced by South Africa in the Namibia case to the effect that the court should decline to exercise jurisdiction over an issue in respect of which it would be subjected to political pressure.
22. In rejecting the notion that the political nature of the question militated against the Court accepting jurisdiction, the ICJ in its wall advisory opinion referred to previous authority in which the proposition that the political nature of the issue precluded jurisdiction had been rejected. Most notably, this point had been made in the Namibia advisory opinion in which it was held that the ICJ acts only on the basis of law.^[18] The true test is whether the question calls on the Court to discharge a judicial function by assessing the legality of the conduct of States. If it does, then its political nature cannot determine the extent of the Court’s jurisdiction. Indeed, the Court pointed out that the contentious, political nature of an issue might suggest that an advisory opinion, dealing only with the legal aspects, would be particularly useful.^[19]
23. The Court therefore concluded that it had jurisdiction to give the advisory opinion that had been requested.

The Exercise of the Court’s Discretion

24. That was not, however, the end of the matter. The Court also had to consider whether to exercise the discretion conferred on it by article 65 of the ICJ Statute to give the advisory opinion. This issue arises from the wording of article 65, which permits but does not oblige the ICJ to give advisory opinions when requested to do so.
25. This aspect of the decision is particularly important for the purpose of this opinion because it engages questions relevant to all future requests for an opinion on issues relating to Israel's occupation.
26. The Court began by explaining that, although the clear text of article 65 envisages that the ICJ has the discretion whether to give an advisory opinion, in principle a request for an opinion should not be refused. Therefore, the applicable standard is that a request for an advisory opinion should only be refused in the presence of "compelling reasons".^[20] The Court held that, despite the fact that it had never declined to give an advisory opinion in the exercise of its discretion (and its predecessor had only once, in very particular circumstances^[21]), it had a duty to consider each of the arguments to the effect that compelling reasons existed not to give the opinion. We deal with these arguments in turn, because they are as relevant to the present matter.
27. The first argument was that the issue of the legality of the wall was part of the broader dispute between Israel and Palestine. Since Israel had repeatedly refused to have that dispute settled by the ICJ or any compulsory adjudicative process, and the parties had in fact agreed to settle the dispute by negotiations, the Court should decline to hear the matter. A similar argument had also been raised in the Namibia matter.
28. In response, the ICJ said the following:
 1. The Court pointed out that there is a legitimate concern about inappropriately accepting jurisdiction in cases where one of the parties to a contentious dispute had objected to jurisdiction.
 2. However, the fact that one of the interested parties objects to the Court's jurisdiction should not, in itself, militate against the Court hearing the matter because the ICJ renders its opinions for the organ that requested them and not for states.^[22]
 3. In this case, the General Assembly had a vital interest in resolving the Israeli and Palestinian conflict and it would not be appropriate, in this context, for the Court to decline to give the opinion.^[23] This reasoning is not based merely on a technical distinction – it in fact reveals the important difference between the role of the ICJ in resolving contentious disputes between states (and the relief that it can grant in the process of playing this role) and its role when it renders advisory opinions. The primary purpose of the former is to facilitate the vindication by the aggrieved state of its international-law rights, while the primary purpose of the latter is to resolve complicated legal questions in order to assist the organ that requested the ruling.
29. Another argument against the ICJ giving the opinion was that in doing so the Court could impede a negotiated settlement to the matter and, in particular, frustrate the Roadmap in terms of which each of the parties was obliged to comply with certain obligations by certain times.
30. In rejecting this argument, the ICJ said the following:
 1. The Court had confronted such arguments in previous cases concerning requests for advisory opinions.
 2. In this case, the Court pointed out that participants had expressed varying opinions on the effect that the Court's opinion might have on the negotiations. In such circumstances, the Court could not decline jurisdiction.^[24] A proper reading of this aspect of the ICJ's opinion, in our view, suggests that had cogent evidence been presented by Israel (or another state) to demonstrate that the negotiations would indeed have been frustrated

by the Court's opinion, the outcome might have been different. Since such evidence is unlikely to exist (to the extent that the proposition is even susceptible to objective evidentiary proof), the approach of the Court is not a source of concern to those who would seek advisory opinions regarding Israel's conduct in the future. However, it is important to be mindful of the fact that the Court's rejection of this argument was based more on the facts that had been adduced to support the argument than on any principled reason for rejecting it.

31. The ICJ also rejected an argument to the effect that the question of the wall was only part of a much greater dispute and that it could not be properly assessed in isolated proceedings. The Court pointed out that it was required only to consider the legal issues relating to the wall, and need only consider other issues to the extent that they were relevant to the question posed by the General Assembly.[\[25\]](#) There was therefore no reason why the Court could not engage the legal issues before it.
32. The next issue relating to the Court's discretion is particularly important: it was argued that the Court would not have sufficient facts at its disposal to resolve the legal question presented and should not do so in the absence of a proper understanding of the security risk facing Israel which led to the construction of the wall. It was argued that, since much of that information was solely in Israel's knowledge, the ICJ would be ill-equipped to deal properly with the question presented by the General Assembly.
33. In response, the Court held that:
 1. The question whether there is sufficient information and evidence for the ICJ to render an opinion had to be decided on the facts of each case.[\[26\]](#)
 2. In this case, the ICJ had at its disposal the report and comprehensive dossier submitted to the Court by the Secretary-General. The report dealt with several relevant matters – including the socio-economic and humanitarian consequences of the wall – and included reports of several special rapporteurs and organs of the UN. Other participants had provided detailed information and Israel's submission itself, even though limited to issues of jurisdiction, canvassed certain relevant aspects of the matter before the ICJ.[\[27\]](#)
 3. The Court was of the opinion that it had before it sufficient facts to give the opinion and the fact that some might interpret its opinion from a subjective or political perspective was irrelevant to the question whether it should exercise its discretion to give the opinion.[\[28\]](#)
34. Another important objection, which is also directly relevant here, related to the fact that the General Assembly had not shown what purpose the opinion would serve. This was raised in the context of the fact that the General Assembly had already declared the construction of the wall to be illegal and could not therefore claim to need the opinion to guide its future conduct. The Court rejected this argument on the basis that it was not for the Court to determine whether the advisory opinion would be useful to the General Assembly and to interrogate the purpose to which it would be put – these were questions for the General Assembly to decide.[\[29\]](#)
35. The Court summarily dismissed the last argument put to it in support of the notion that it should decline jurisdiction – that the Palestinians had, through their conduct, caused the wall to be constructed in the first place and could not now approach the Court with “dirty hands” seeking judicial relief. The Court rejected this argument on the basis that it was neither parties nor states that sought advisory opinions, but rather organs of the United Nations such as the General Assembly.[\[30\]](#) It was inappropriate, therefore, to view these proceedings as if they were contentious proceedings instituted by Palestine as a party.[\[31\]](#)

PARTICIPATION IN AND SCOPE OF THE PROCEEDINGS

36. The above discussion demonstrates that the ICJ's robust approach to its entitlement to render advisory opinions makes the possibility of seeking such an opinion in the context of Israel's conduct highlighted in the HSRC report realistic. A related question pertains to the scope of the proceedings to be conducted before the ICJ. Which entities could participate and what would be the extent of their participation?
37. When it comes to the information that may be presented to the ICJ in proceedings concerning advisory opinions, the following is of relevance:
1. Article 65(2) of the ICJ Statute provides that "[q]uestions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, *and accompanied by all documents likely to throw light upon the question.*"[\[32\]](#)
 2. In addition, article 34(2) provides that the ICJ, "subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by *such organizations on their own initiative.*"[\[33\]](#) This provision does not apply specifically to advisory opinions and must be read with article 66(2), which provides:

"The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question."
 3. Article 68 of the Statute is very important. It provides that "[i]n the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable." This approach is confirmed by article 102(2) of the ICJ's rules. The importance of this provision is that, in our view, it confers upon the Court a wide discretion to adopt the procedures applicable to contentious cases in a hearing aimed at addressing the question raised in an advisory opinion. Of particular relevance here are the detailed mechanisms in the ICJ's rules relating to the gathering of evidence.[\[34\]](#) Admittedly, the Court is yet to embrace its powers to hear oral evidence and to subpoena witnesses in a hearing concerning an advisory opinion, but it has used its power, which in any event applies explicitly to advisory opinions, to invite international organisations to present information to it.[\[35\]](#) In addition, states have routinely, pursuant to article 66(2), made submissions before the court in proceedings concerning advisory opinions.
38. The importance of these provisions is that there is potentially scope for public organisations other than states to present information to the ICJ on the question presented by a request for an advisory opinion. Our view is that article 66(2) read with that aspect of article 34(2) that obliges the Court to receive information presented by public international organisations of their own initiative, means that it is not necessary for public international organisations that believe that they can contribute to the issue before the ICJ in advisory proceedings to wait for an invitation to provide such information. Indeed, the League of Arab States and the Organisation of the Islamic Conference requested the opportunity to present information and participate in the hearing of the Palestine Wall matter and, although not referring to article 34(2) of its statute, the ICJ acceded to this request. Although this does not necessarily constitute precedent[\[36\]](#) supporting the possibility of a wide range of international organisations presenting information to the Court (both of these organisations, after all, constitute organisations representing states), it is our view that

the provisions discussed above present various possibilities, some of them untested, of international organisations presenting information to the Court in proceedings concerning an advisory opinion. Whether the Court would be willing to hear oral evidence or simply (as it has done in the past) to receive written statements (including evidence), there are promising possibilities for international organisations to approach the Court with a view to providing assistance in respect of the issue under consideration.

CONCLUSION – THE ADVANTAGES IN SEEKING AN OPINION

39. In discussing the Palestine Wall opinion we highlighted various objections raised to the jurisdiction of the ICJ to give the opinion. We have considered it particularly important to engage these objections, because they prefigure Israel's attitude to the Court's advisory opinion – that it is there to be ignored. Ironically – at least in our view – these objections highlight precisely the importance of the Court taking the effort to give its views on the legal rules applicable.
40. While some may dismiss the Court's opinion as just that – an opinion, cast into a world in which there are heavily contested views of the conflict – it is important to be reminded that it is more than just another voice competing to be heard. It is the voice of an impartial judicial body of diverse and respected jurists who constitute the principal judicial organ of the United Nations. As Justice Kirby – the respected Australian judge – reminds us 'one settled human rights principle is addressed to the judiciary itself'.^[37] That principle is encapsulated in Article 14 of the International Covenant on Civil and Political Rights, which requires not only that judges should be competent and independent, but also that they should be impartial in the discharge of their duties. Aside from impartiality, judges have a duty, as Lord Steyn – now retired from the House of Lords in the United Kingdom - has put it, 'of reaching through reasoned debate the best attainable judgments in accordance with justice and law'.^[38] This may seem an obvious point, but one that should not be overlooked in appreciating the importance of an advisory opinion.
41. The Palestine/Israel conflict is political, historical and religious – and every inch of the conflict, like the land that underpins it, is vigorously contested, often violently. But the contest and the conflict do not take place in a legal black hole. On the contrary, a panoply of legal rules are implicated. Importantly – as the slow demise of South Africa's apartheid state teaches us – no state that wishes to be accepted as a respected member of the international community can forever ignore authoritative rules that are binding upon it. There is much therefore to be said for allowing an impartial body of independent judges to grapple with the serious legal questions that are inevitably raised by the competing claims of Israel and Palestine. The parties to the conflict, the world community of states, and the United Nations itself, must benefit from judges engaging critically and openly with those claims, scrutinised against the standards of the law.
42. The HSRC report has demonstrated that there is a case to meet that Israel's regime in the OPT has acquired some of the characteristics of colonialism and apartheid. The findings in the study raise a number of questions which call for an answer. For example, in light of Israel's colonial and apartheid practices, does it continue to be a lawful regime? And what are the legal consequences for the occupied people, the occupying Power, third States, and international organisations such as the UN?
43. The HSRC report contains a comprehensive assessment of the many legal questions raised by Israel's occupation in this context. It is unnecessary for us to repeat them here. However, it is important to emphasise that obligations *erga omnes* generated by a breach of a peremptory norm of international law are imposed on the international community as a whole and are thus imposed equally on intergovernmental organisations as well as States. As the ICJ said in the Palestine Wall opinion, the United Nations bears a special responsibility for the resolution of

- the Israel-Palestine conflict. The General Assembly in particular has an interest in obtaining clarity on the important legal issues raised by Israel's occupation.
44. Professor Dugard has asked where questions about Israel's colonial and apartheid practices should not be settled by judicial resolution. The authors of the HSRC report agree with Professor Dugard's suggestion that the parameters of these duties might best be delineated by seeking advice from the International Court of Justice. As we hope this opinion has demonstrated, there is a strong legal basis for the power of the General Assembly and relevant organs of the UN to seek an advisory opinion from the ICJ.
 45. It is true that the Palestinian Wall opinion has not had the desired effect of compelling the United Nations to take firmer action against the construction of the Wall. There has been much criticism of the Quartet, for instance, and of which the UN is a quarter-member, for its failure even to acknowledge the opinion. In particular, on 24 October 2007, at the 62nd session of the General Assembly Third Committee, the Special Rapporteur on the situation of human rights in the OPT called for the Secretary General and his senior staff "to consider the role of the UN in the Quartet with special regard to the human rights situation".
 46. On the other hand, advisory opinions serve an important clarificatory function. If there is a failure by certain parts of the UN body to deal meaningfully with the Israel/Palestine situation, then it remains important to direct energy towards that part of the body that will. In this respect, it should be stressed that the ICJ – as the main judicial organ of the United Nations – is vested with certain responsibilities regarding international law and its respect by Member States. Because its fidelity is to the law it has the ability to introduce an objective account of the legal rules applicable into an otherwise politically controversial situation. We already have experience of that, when the ICJ rose to the occasion with a careful and considered objective account of the legal rules applicable to Israel's building of the wall.
 47. So there remains hope that the ICJ may decide – in response to an appropriate request by the General Assembly – to consider now the questions raised in the HSRC report. And there remains hope that a second advisory opinion arising from the fraught situation of Israel's occupation of the OPT, will be a further elucidation of the legal rules that should guide the UN and the international community in its response to the situation. As Professor Dugard is fond to remind: the United Nations requested four advisory opinions from the International Court of Justice to guide it in its approach to South Africa's occupation of South-West Africa/Namibia. While the opinions were repudiated by South Africa, they became the basic law of the UN on Namibia, and in 1990 full effect was given to them when South Africa withdrew its administration and Namibia became independent.^[39] In these circumstances – and with that hope – a request for another advisory opinion warrants serious consideration.

[1] See article 92(2) of the UN Charter.

[2] See article 65(1).

[3] Article 68 of the Statute.

[4] See articles 43(5), 48, and 51.

[5] Article 50 of the ICJ Statute.

[6] International Convention on the Suppression and Punishment of the Crime of Apartheid, Adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII) of 30 November 1973, entry into force 18 July 1976, in accordance with article XV. For a list of the Convention's 101 states parties, see http://www.unhchr.ch/html/menu3/b/treaty8_asp.htm

[7] Emphasis added.

[8] For a list of the advisory opinions of the ICJ, and the full text of the opinions, visit <http://www.icj-cij.org/docket/index.php?p1=3&p2=4>.

[9] Palestine Wall Opinion at para 14.

[10] Palestine Wall Opinion at para 15.

[11] Or, put differently, beyond its powers in terms of the Charter.

[12] Most notably article 12.

- [13] Palestine Wall Opinion at para 27.
[14] Palestine Wall Opinion at para 31.
[15] Palestine Wall Opinion at para 36.
[16] Palestine Wall Opinion at para 37.
[17] Palestine Wall Opinion at paras 38-40.
[18] Namibia Advisory Opinion at para 29.
[19] Palestine Wall Opinion at para 41.
[20] Palestine Wall Opinion at para 44.
[21] These were that the matter subject to the request concerned a dispute that already existed involved states that had objected to the proceedings and were not members of the League of Nations – see para 44.
[22] Palestine Wall Opinion at para 49.
[23] Palestine Wall Opinion at para 50. See similar reasoning in the Namibia Advisory Opinion at paras 31-4.
[24] Palestine Wall Opinion at para 52.
[25] Palestine Wall Opinion at para 54.
[26] Palestine Wall Opinion at para 56.
[27] Palestine Wall Opinion at para 57.
[28] Palestine Wall Opinion at para 58.
[29] Palestine Wall Opinion at para 61.
[30] Palestine Wall Opinion at para 64.
[31] It is, of course, necessary to proceed here from the fiction of Palestine already being a recognised state because only states may participate in contentious proceedings before the ICJ.
[32] Emphasis added.
[33] Emphasis added.
[34] See, in particular, articles 44 to 72 of the ICJ's rules.
[35] See, for example, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion ICJ Reports 1996 226* at para 4 where the ICJ considered the UN as an organisation to be able to furnish useful information to it; see also the Palestine Wall opinion in which the League of Arab States and the Organisation of the Islamic Conference were considered likely to be able to furnish information on the question under consideration (see para 6).
[36] We do not here wish to engage in the debate about the extent to which advisory opinions (or any decision of the ICJ for that matter) constitute binding precedent in the sense understood by domestic law. At the very least, a ruling by the ICJ on procedural matters is likely to be followed in subsequent cases, regardless of their nature.
[37] The Hamlyn Lectures *Judicial Activism, Justice Michael Kirby AC CMG, Justice of the High Court of Australia* (2004) at pg 72.
[38] Johan Steyn *Democracy Through Law: Selected Speeches and Judgments* (May 2005) at pg 130.
[39] See Dugard *International Law: A South African Perspective* 3 ed (2005) at pgs 475-6.

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