CONTENT

# I. INTRODUCTION

This thesis is (also) written for people without extensive juridical knowledge of international law. The basics are explained throughout the thesis, but mainly in the second chapter. Its purpose is to combine the juridical discussion about the effectiveness of international law, with the knowledge of a conflict-studies approach in the Israeli-Palestinian conflict. The aim is to keep the discussion about international law alive, while evaluating the use of the underestimated advisory opinion of the International Court of Justice in a conflict that will not be solved by judicial interference only.

International law has to cope with a difficulty that goes back to the Enlightenment. With the *trias politica*, the separation of powers, Montesquieu introduced a system that lies at the very basis of modern democracies. However, the institutional independency as such, creates a dependency on the other powers at the same time. The idea of the tripod is that one leg, or institution, cannot remain upright without the support of the others. Often heard criticism in international law is that due to the lack of (effective) enforcement mechanisms, because of state sovereignty, the function of the adjudicating institutions is undermined.[1] The difficulty, some even call it a paradox, is summarised by the question how international law can function without the strong arm of the law to execute its adjudications.

Nonetheless, in many conflicts international law has proven itself to be a very useful contribution to the peace process, but not all conflicts are the same. One of the particularly rare conflicts is the Israel-Palestine one, which not only affects the bilateral relationship between them, but also gets a grip of the Middle East region and to some extent even the whole world. UN Secretary-General Ban-Ki Moon recently stressed the importance of the coming year for resolving the Israeli-Palestinian conflict. He said: "I strongly support the current negotiations and urge the parties to make the courageous commitment needed to end the occupation and achieve a two-State solution."[2]

Between those two states stands a tall structure that is literally in the way, both in the way of terrorists planning harmful attacks, as well as in the way of peace negotiations. That particular structure has already been deemed illegal in 2004 by the International Court of Justice, the World Court. Nonetheless, it still stands tall, blocking the way to a more constructive peace process in what is perhaps the world's most far-reaching conflict.

The idea of the trias politica in governing the world, the difficulty of obedience in international law and the many influences involved in the 2004 decision of the Court due to the wider conflict, resulted in the following research puzzle:

**Given that according to the ICJ's 2004 ruling 'the Wall' is deemed illegal, but nonetheless still stands tall and thus continues to infringe international law, how come the consequences of international law fail in practice when the 'losing' state**

[1] Rubin, 1997.
[2] Ban-Ki Moon, United Nations News Center, 17 January 2014.

**apparently disagrees with the Court's ruling and how can that discrepancy be fixed?**

In order to moot an answer to the research puzzle, this thesis will introduce a metaphor called the political-judicial Waltz. The Waltz is a smooth and progressive dance, primarily performed in a closed position and will exemplify the proposed cooperation between the institutions. In order to get to the conclusions, first some issues will have to be dealt with.

The second chapter will deal with the origin, development en constituent partners of the political-judicial Waltz. The first questions that rise are: what are those institutions? And why are they the ones charged with the application of international law and politics? To understand the next chapters it is elementary to be aware of the knowledge as set out in the second one.

The third chapter will deal with the theoretical and practical difficulties of obedience in international law. Having the institutions and their functioning explained in the second chapter, the third chapter will dig deeper into both the legal as well as the philosophical aspect of international law. Why do nations obey international law and why not? What are the different views on the compliance questions? What are the means available? Is the International Court of Justice some sort of ultimate judge? Why, and at the same time, why not? What are the factors that influence the willingness to obey international law, especially in the Israel-Palestine conflict? How are powers distributed among the institutions and do they contribute to a constructive peace process?

Having set out the lines and arguments of the debate in chapters two and three, the debate will be applied to the Israel-Palestine conflict in the fourth chapter. Why is this conflict suitable to explain the debate? The focus will lie on the construction of the Wall in the wider conflict. How does the conflict fit in the complication of the research puzzle? What exactly is this wall and why is it so controversial?

The fifth chapter will zoom-in on the 2004 advisory opinion of the International Court of Justice. The legal meaning of the advisory proceedings in general is already set out in chapter three; this chapter will focus on the influence of the legal formalities in the particular opinion. How was the request for the advisory opinion formulated and could the Court have declined its own jurisdiction? If so, on what grounds? What were the views of both Israel and Palestine on the advisory proceedings? How did the Court judge on political influenced merits submitted by the participants? In other words, what is the Court's stance, taken the difficulties of the previous chapters into account?

The thesis will end with a conclusion of the findings in the light of the theory of the political-judicial Waltz. The bricks of the research puzzle as evaluated throughout the thesis will build a structure that aims to contribute to the discussion concerning the power-distribution in international law. A hypothetical answer to the question of how the discrepancy that follows from the research puzzle can be fixed will then be deducted from this thesis.

## II. THE ORIGIN OF THE POLITICAL JUDICIAL WALTZ IN INTERNATIONAL LAW

As set out in the introduction the questions to begin with are: who are the institutions to dance the Waltz? And why are they the ones to do so? To understand the metaphor of the Waltz as a way of increasing the effectiveness of international law, first the partners, i.e. the political and judicial bodies, have to be evaluated.

### A. APPLICATION OF THE TRIAS POLITICA

To fully understand the comparison with the Waltz, the preliminary issue to determine is the applicability of the trias politica on international law in order to be able to identify its partners. In the trias politica, as explained in the introduction, the idea is the interdependency of the three powers on each other. In international law the strict division in the tripod of powers is best made clear within the organization of the United Nations (UN). The UN is an intergovernmental organisation composed of sovereign states. All states can become a member, as long as certain criteria are met. The UN is the world's most extensive organisation and the division between the powers of its institutions is based on the trias politica. The geopolitical and geojudicial problems concerning the Wall in the Israel-Palestine conflict are (among others) dealt with by the institutions of the United Nations. Therefore the UN and its institutions serve best to research the political-judicial Waltz in one of the world's most difficult conflicts to resolve, the Israel-Palestine conflict.

### B. THE GENESIS OF THE UN

After the misery of WW II the superpowers issued a joint declaration "recognizing the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of international peace and security."[3] Starting-off with 51 peace-loving States the United Nations was born on the 24 October 1945, following-up the League of Nations and from then on the UN was to serve four purposes according to its Charter, namely:

- to maintain international peace and security;
- to develop friendly relations among nations;
- to cooperate in solving international problems and in promoting respect for human rights;
- and to be a centre for harmonizing the actions of nations.[4]

The six principal bodies are the General Assembly (GA), the Security Council (SC), the International Court of Justice (ICJ), the Economic and Social Council, the Secretariat and the Trusteeship Council. In this thesis the focus will lie on the first three, from now on also referred to by their abbreviation between brackets. The General Assembly being the main deliberative body, the Security Council for being the responsible body in maintaining international peace and security and the International Court of Justice for being the main judicial body of the United Nations.

[3] ICJ website, section 'Court', subsection 'History', last visited 2 February 2014.
[4] UN Website, section 'Main page' last visited 17 January 2014.

To clarify the principle of the separation of powers within the institutions of the UN, first the different institutions and their basis of existence need to be reiterated. A good understanding of the institutions and their competences is elementary in understanding the scope of the subsequent chapters and the idea of the Waltz. This thesis does not provide in a complete overview of the competences, but instead focuses on the relevant ones in the context of the Wall separating Israel and Palestine. Paragraph C of this chapter sets out the political element, encompassing the GA and the SC. Paragraph D will provide a disquisition of the ICJ and its competences. The sequence in which the institutions are dealt with is arbitrary.

## C. THE POLITICAL ELEMENT

Besides the six primary bodies of the UN, there are multiple specialized agencies that develop legal instruments. Examples are the 'one-issue' agencies, such as the International Labour Organization and the International Maritime Organization. There are also subsidiary organs, which report to one of the main bodies, such as the UN Institute for Disarmament Research reporting to the GA and the Counter-Terrorism Committee reporting to the SC. Those organs might have a political function as well, but are usually restricted to their own field of work and are therefore left aside in this thesis.

### 1. GENERAL ASSEMBLY

The GA comprises all of the 193 members of the UN. It plays a significant role in the process of developing international law and serves as a forum to discuss international issues regularly. Barring the exception when the Security Council is discussing an issue, the GA can make recommendations on questions relating international peace, security and any other question within the scope of the Charter. Other powers of the GA are "initiating studies and making recommendations on the promotion of international political cooperation, the development and codification of international law, the realization of human rights and fundamental freedoms"[5] and collaboration in other fields within the Charter. The powers form the effectuation of the abovementioned general purposes of the UN. The GA has a highly political way of functioning, to some extent comparable to the government of a democratic state.

### 2. SECURITY COUNCIL

The SC consists of 15 members, five permanent members with veto power and ten non-permanent members elected by the GA for a two-year term. The idea of the veto power and membership dates back to 1945, when the United Kingdom, Russia (USSR), France, China, the United States and Germany were the world's (super)powers. For obvious reasons Germany didn't get a seat in the SC. In contrast to the General Assembly, which makes recommendations, the Security Council is assumed to have the power to make binding decisions. Member states are obliged to implement its decisions under the Charter, but "the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration. Even a wartime occupation of a country or territory cannot operate to do that. It must await the peace settlement. This is a

[5] UNGA website, section 'About the General Assembly', subsection 'Functions and Powers of the General Assembly'.

principle of international law that is as well-established as any there can be."[6] Thus the SC, even being one of the UN's most important political bodies, does not have the power to settle conflicts over territorial rights by itself. Therefore one may also conclude its resolutions remain mere recommendations.[7]

Together, the General Assembly and the Security Council form the main platform for world politics. Although the GA and the SC produce a lot of easily accessible documents on their meetings, world politics happening outside their scope are difficult to prove. Diplomatic actions usually take place behind closed doors and thoughts behind actions are often left to the guessing of the public. The WikiLeaks website, although being an interesting source, only provides in a certain amount of documents. Nonetheless, taken together, the SC and GA are best comparable to the legislative branch of the trias politica. According to the principle of the separation of powers, the legislative or political element needs a judiciary branch to function as a balanced government. Which introduces the next paragraph.

## D. THE JUDICIAL ELEMENT

There are multiple institutions that deal with international law. Examples are the Sixth Committee and the International Criminal Court, all with different functions and powers. Although both are charged with judicial powers, the International Court of Justice is the primary judicial organ of the United Nations, which acts as a world court.[8] The question *why* the ICJ is said to be the primary organ will be dealt with after a brief history, which is somewhat different than those of the abovementioned political organs. Only the relevant events of the history in the context of this thesis will be mentioned. An explanation why the ICJ is the primary judicial body will follow, which will lead to the outset of the different functions of the Court.

### 1. HISTORY

The Hague Peace Conference of 1899 marked the beginning of the contemporary ICJ. The Conference resulted in adopting the Convention on the Pacific Settlement of International Disputes, "which dealt not only with arbitration but also with other methods of pacific settlement, such as good offices and mediation."[9] Those methods are still recognizable today.

Later on it evolved into the drafting of the Statute of the Permanent Court of International Justice. "Article 14 of the Covenant of the League of Nations set out the responsibility for the Council to formulate plans for the establishment of a Permanent Court of International Justice. Such a court to be competent not only to hear and determine any dispute of an international character submitted to it by the parties to the dispute, but also to give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."[10] The ICJ's predecessor thus already made a

[6] ICJ, Namibia (South West Africa), dissenting opinion Fitzmaurice, Par. 115 p. 294.
[7] Pomerance, 2005, p. 39.
[8] Article 92 UN Charter.
[9] ICJ website, section 'Court', subsection 'History', last visited 2 February 2014.
[10] Ibidem.

distinction between the determination of a conflict submitted to it by the parties and giving an advisory opinion, acting as a preliminary legal council for the decision-making process of the legislative power.

Governed by its own Statute and Rules of Procedure and being binding on the submitting parties, the PCIJ was revolutionary. Although working together with the League of Nations, it was not part of it. In less than two decennia, the PCIJ dealt with 29 cases between states and delivered another 27 advisory opinions. During WW II the importance of the PCIJ diminished and the first preparations for a new international court were made. The UK took the initiative to constitute an informal Inter-Allied Committee to examine the extension of the jurisdiction of such an international court. In the 1944 report "the Committee recommended that the Statute of the new court should be based on that of the PCIJ, the advisory jurisdiction should be retained, acceptance of the jurisdiction shouldn't be compulsory and the Court should have no jurisdiction in dealing with essentially political matters."[11] Remember the latter. During the drafting of the Statute of the new court the Committee already felt constraint to leave certain issues open for the Conference to decide on. Apparently they foresaw problems if the court was going to mingle in essentially political matters. It was still four years before the establishment of the State of Israel. Other long-existing and still relevant thoughts were whether the court's jurisdiction should be compulsory, and if so, to what extent?

When the International Court of Justice was established, its Statute was annexed to and forming part of the UN Charter. Therefore being placed on the same footing as the other bodies of the UN.[12]

## 2. MAIN JUDICIAL BODY

The Court is said to be the main judicial body of the UN, but not the sole organ answering legal questions. The questions that rise are both of a material and a formal order, respectively: what makes the ICJ different than other judicial institutions? And why is the ICJ the one charged with those special functions? The answer to the latter question is the culmination of elements of the history. The UN felt it was more appropriate to establish a new court, rather than reviving the 'old' Permanent Court of International Justice, which was linked to the League of Nations and the dominance of European states. With concern to the material question, the comparison to the abovementioned Sixth Committee and the International Criminal Court will serve as an example.

The International Criminal Court is based on the Rome Statute and prosecutes individuals (rather than states) for grave crimes against humanity. The only connection with the UN is an extension (being an exception) of its jurisdiction if the Security Council authorizes it. The Sixth Committee is the legal committee of the United Nations General Assembly. It serves as a forum for the GA to discuss legal questions. In contrast to the ICC it is strongly connected with the UN, being an integral part of the Assembly, i.e. the political branch. In the light of the trias politica, it sketches the need for an independent court, being able to advocate its power regardless of jurisdictional issues.

[11] ICJ website, section 'Court', subsection 'History', last visited 2 February 2014.
[12] Ibidem.

## 3. JURISDICTION

The International Court of Justice has a dual jurisdiction.[13] Traditionally, its main purpose is to decide on issues, submitted by states, concerning international law that have binding power. It thus acts as a world court; this form is called the jurisdiction in contentious cases. The Court is therefore (legally) independent of other institutions and fulfils the need for such a court according to the separation of powers.

The other part of its jurisdiction is the ability to give an advisory opinion (AO) on legal questions when requested upon by UN organs and specialized agencies authorized to do so. Also known as the advisory jurisdiction. The AO derives its legal effect from the fact that it is the official opinion of the UN's main judicial body.[14] However, an Advisory Opinion is not binding by its nature because of being both an opinion and merely a legal advice. Therefore, in most of the literature discussing the effectiveness of international law, the AO is left aside. If it's not binding in itself, why bother to discuss its implementation by those subject to the advice? In the next chapter these questions about the obedience of international law will be dealt with.

Since the first contentious case before the ICJ on 22 May 1947, to 23 January 2014, 156 cases were entered in the General List.[15] Since its existence, the Court has been asked only 26 times to give its Advisory Opinion. How come there's such a big difference in the numbers? Is it perhaps because sovereign states can ask for the Court's legal opinion by submitting their contentious case? The decision of the Court only affects a bilateral (or multilateral) relationship between the parties then. While in a request for an advisory opinion, geopolitical concerns might play a role in taking a stance in the requesting political body, which might be limiting the amount of legal opinions asked for.

To understand the outline of the rest of this thesis, it is elementary to understand the differences as set out above. Though not being a complete overview of the UN's structure, the outline of this chapter will be used for further reference in this thesis.

[13] ICJ website, section 'Jurisdiction', last visited 2 February 2014.
[14] Bekkert, 2005, p. 564.
[15] ICJ website, section 'Cases', last visited 2 February 2014.

## III. THE DIFFICULTY OF OBEDIENCE IN INTERNATIONAL LAW

This chapter will deal with the theoretical and practical difficulties of obedience in international law. It is a multidisciplinary part of the puzzle; therefore this chapter will dig deeper in both the legal and philosophical aspect of it. Obedience in international law is in itself an issue extensive enough to devote multiple theses on. The relevant factors are used to illustrate the issue in relation to the context of this thesis.

*"Constant development is the law of life, and a man who always tries to maintain his dogmas in order to appear consistent drives himself into a false position."*
- Mahatma Gandhi

### A. DEVELOPMENT

For the United Nations and international law to keep on developing, critique on its functioning is of elementary importance. Although the focus of many studies on the obedience of international law is aimed at underpinning Louis Henkin's assertion that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[16] Not taking Henkin's assumptions for granted, but rather focusing on the cases he excludes is the way to ascertain development. *Why* do nations obey and *why not*? Rather than do nations usually obey? *How* is implementation reached and which cases lack those factors? And again, *why* does it lack those factors? Rather than in how many cases is implementation successful? The compliance questions are divided among four strands of thinking. Koh summarizes the ways of thinking as follows:

> "The first was an Austinian, positivistic realist strand, which suggests that nations never "obey" international law, because "it is not really law." The philosophical tradition of analyzing international law obligation had bifurcated into a Hobbesian utilitarian, rationalistic strand, which acknowledged that nations sometimes follow international law, but only when it serves their self-interest to do so, and a liberal Kantian strand, which assumed that nations generally obey international law, guided by a sense of moral and ethical obligation derived from considerations of natural law and justice. Bentham's international law writings suggested a fourth, process-based strand, which derived a nation's incentive to obey from the encouragement and prodding of other nations with whom it is engaged in a discursive legal process."[17]

The outline of these four strands will be used to guide through the compliance questions. In order to keep the structure clear, this chapter will deal with the same order as used in the quote. While at the same time referring to the underlying questions of *why* and *how*.

[16] Koh, 1997, p. 2599.
[17] Ibidem, p. 2611.

## B. OBEDIENCE OF ADJUDICATIONS

The first and often-heard statement that international law is not law, because it lacks the power to enforce could by countered by stating the lack of ability to enforce is irrelevant, because like most laws and adjudications, they're usually obeyed.[18] Claiming the irrelevancy of a statement is a clincher, killing the development of the discussion. Not obeying an adjudication of the International Court of Justice despite its binding power is exceptional, but not unthinkable. The ICJ's 1984 case of Nicaragua v. The United States of America[19] was disturbed on several occasions. First the USA refused to participate in the proceedings after its argument that the ICJ lacked jurisdiction was rejected by the Court. The Court ordered the USA to pay for reparations. After not following up on the Court's order, the USA used its veto in the Security Council to block enforcement of the adjudication.[20] The General Assembly, though not binding in its resolutions, called twice for "full and immediate compliance" with the decision of the ICJ. On both occasions Israel backed the USA in voting against the resolution. The first time El Salvador joined the opposition; the second time it was the USA and Israel versus the rest.[21] The refusal to comply with the Court's decision illustrates the second, rather rationalistic claim, stating nations only obey when it suits their self-interest.[22]

## C. BINDINGNESS

As explained in the second chapter, the advisory opinion of the Court is not binding, but the Court's adjudication is. As illustrated by the 1984 case of the ICJ, the effectuation of a binding decision is subject to the compliance of the involved states. Therefore the statement that a Court's decision, no matter the form in which it's provided, i.e. adjudication or advisory opinion, is not binding by nature could be deemed valid. If the nature of a Court's decision is to be not binding, then what makes subjects binding themselves to the decision? And what are the factors influencing the lack of obedience? A contrary statement that the decision of the Court, no matter the form, is (or at least should be) binding is often stressed in the literature. Underlying reasons, to name a few, for the statement are the authority of being the UN's main judicial body[23] and the usual obedience of states as mentioned above. While others may stress that "if they [advisory opinions] were treated as authoritative and given without the consent of an interested state, compulsory jurisdiction would be introduced through the advisory back door."[24] In conclusion, one could say the opinions on the 'bindingness' differ. One could argue that the advisory opinion binds, but isn't binding. Or that it does not bind, but should be acknowledged as binding. There is not an absolute truth; the outcome rather depends on the arguments used.

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[18] Koh, 1997, p. 2603.
[19] ICJ, Nicaragua v. USA.
[20] UNSC, document S-18428, 28 October 1986.
[21] UNGA, Resolution 31, session 41, 3 November 1986.
[22] Koh, 1997, p. 2601.
[23] Bekkert, 2005, p. 564.
[24] Pomerance, 2005, p. 27.

## D. RIGHTS INVOKED

The third, Kantian strand as described by Koh encounters another discrepancy in the case of the 2004 Advisory Opinion. The Court ruled "that Israel's right to security cannot be invoked to deny the Palestinians' right to self-determination. On the contrary, the ruling unequivocally demonstrates that these rights and obligations are a matter of law and not negotiations, that Palestinians have legal rights not subject to negotiations nor derived from them."[25] Israel has another point of view, and pressed in its Written Statement to the ICJ on the fact that in their opinion the Wall is a non-violent measure to protect the security of the Israeli people.[26] Therefore aiming on the right and obligation of a state to protect itself and its inhabitants. The clash of the invoked rights makes it impossible for both Israel and Palestine to be "guided by a sense of moral and ethical obligation derived from considerations of natural law and justice,"[27] because the different natural laws that are invoked, i.e. self-determination and self-defense clash in the light of the 2004 advisory opinion.

## E. ICJ IS NOT AN ULTIMUM REMEDIUM

The fourth strand, suggested by Bentham in his international law writings could be seen as the 'managerial model'[28]. Which means "nations obey international rules not because they are threatened with sanctions, but because they are persuaded to comply by the dynamic created by the treaty regimes to which they belong."[29] This strand implicitly means the ICJ is not an *ultimum remedium*. Not some sort of final judge, but rather the main judicial body interpreting international law and being part of the management. Its opinion isn't decisive per se, but contributes to the managerial model to accomplish implementation of the overall management opinion. Which implements that the judicial branch of the trias politica is accounted for by the Court, while that same Court is also part of the legislative, or political, branch. Nonetheless, giving legal advice to political organs may be deemed to be an executive, rather than a judicial function.[30]

Having elaborated the four strands in the complications of international law, what conclusions, if any, can be drawn from the question of (or better: quest for) obedience in international law? The discussion evolves on different levels and within different disciplines. From law to philosophy and from international relations to history. Therefore it is not possible to deduct one conclusion that is considered irrefutable valid according to all disciplines. Not being able to draw one conclusion is the only valid conclusion so far.

## F. POLITICAL INFLUENCE

Having indicated the juridical complications in international law, the question rises what sort of influence politics has on the obedience of international law. To remain within the

[25] Usher, 2005, p. 39.
[26] Written Statement Israel.
[27] *See footnote 17.* Koh, 1997, p. 2611.
[28] Chayes, 1998, p. 3.
[29] Koh, 1997, p. 2601.
[30] Pomerance, 2005, p. 27.

context of this thesis, limited by political versus judicial considerations and the Israeli-Palestinian conflict, some remarkable coincidences serve as an example. It is commonly known the United States and Israel have forged a strong relationship over time.[31] Pomerance even goes as far as stating the US Middle East policy is built on two pillars; "securing Israel's existence and qualitative military edge over its neighbours"[32] and "the other being access, protection and control of energy supplies in the Gulf."[33] In a highly criticised article Mearsheimer and Walt dedicated the relationship between U.S. foreign policy and Israel to the powerful Israel Lobby in the United States.[34] In the context of this thesis it is sufficient to acknowledge the relationship between the two nations, without arguing the ground of it. In international proceedings, Israel backed the US in the 1984 ICJ case of Nicaragua v. the USA and the only dissenting ICJ judge in the 2004 advisory opinion was the American Judge Buergenthal.[35] Whether states should, based on their sovereignty and political arguments, be able to team-up against the application of international law is for anyone to judge. For this thesis it is only important to ascertain the political influence on judicial decisions in general.

## G. TWO-PEAK DISTRIBUTION OF POWER?

The International Court of Justice is not (always) a Court of last resort with unquestioned power and decision-abiding subjects. Due to the history, state-sovereignty, and political influence it probably will never become that powerful. Nonetheless, for the Court to be (depending on the arguments one could also say: become or remain) of substantial importance it must not become inferior to geopolitical considerations. Its effectiveness should not be measured by the number of successful implementations, but rather by the solution of complicated and multi-influenced cases. Those are the cases to break-through the dogmas of the Court and make development possible, as Gandhi so rightfully foresaw in his quote used at the beginning of this chapter. Perhaps we can now speak of the status quo as a two-peak distribution of power between the political and the judicial. Were the members of the Inter-Allied Committee in 1944 right when they concluded an international court should refrain from purely political matters?

Having set out the importance and the (lack of binding) powers of the world's main organizing bodies, the conclusion can be drawn that all of them lack the power to settle conflicts on their own. The question then rises how a peace process should than be constructed to be effective. The most obvious answer is cooperation between the powers, clarified by the metaphor of the political-judicial Waltz.

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[31] See for example: United States Congressional Research Service *Israel: Background and Relations with the United States*.
[32] See for example: United States Congressional Research Service *Israel: Missle Defense Cooperation With the United States*.
[33] Pomerance, 2005, p. 26.
[34] Mearsheimer & Walt, 2006.
[35] ICJ, 2004 Advisory Opinion.

# IV. THE ISRAEL-PALESTINE CONFLICT – A CASE STUDY

## A. THE CONFLICT

Out of 26 cases in which the Court gave an advisory opinion, the Court's decision on the Wall in the Israel-Palestine conflict serves best to explain the need for a more constructive peace process through the application of the political-judicial Waltz. To be able to apply the first part on the Israel-Palestine conflict and zoom in on the 2004 advisory opinion (chapter five), first the conflict and the Wall have to be revised.

### 1. REACH OF THE CONFLICT

The Israel-Palestine conflict is perhaps the most far-reaching one of this time. The sensibility of it is enormous because of the many influences involved. The conflict is the last remaining frontline of the Cold War, situated in the oil region, with a religious discrepancy poured over it. There is no absolute truth in the conflict because what may be valid for one party might discredit the other. Therefore it is very hard to describe the conflict without choosing sides. Those who dare to interfere are very easily deemed either pro-Israel and thus inherently anti-Palestine, while at the same time a minor nuance in one's stance might result in the stamp anti-Israel and thus pro-Palestine.[36] It is important to once more stress that the purpose of this thesis is merely to apply the complication of the research puzzle on the conflict, without taking a stance in the conflict itself.

The first question to be asked is why does this conflict serve best to explain the theory behind the complication in the research puzzle? To clarify the theory, this chapter will first evaluate the political and judicial tendencies in the conflict. A little bit of balanced history is inevitable to comprehend the conflict. Then the next paragraph will zoom in on the Wall, being the materialization of the conflict, evaluating the facts and explaining the controversy. The chapter will end with placing the Wall in the wider conflict.

### 2. CONFLICT IN THE RESEARCH PUZZLE

The next day after the establishment of the State of Israel on 14 May 1948, neighbouring Arab forces invaded and fought the newborn state. Israel has fought several wars in the region since then and its foreign policy has been characterized by achieving "peace, universal recognition and acceptance, security, and economic as well as social well-being."[37] Although it has signed peace treaties with Egypt and Jordan, the Jewish state is in a constant and ongoing conflict with the Palestine Authority. Attempts have been made and an international influenced peace process called the 'Roadmap to Peace'[38] is being worked on, but until today none of the attempts have resulted in peace. The ongoing and seemingly never ending character of the conflict makes it suitable for the application of the theory of the political-judicial Waltz. Both the judicial (2004 AO), as well as the political (Roadmap) elements have tried to establish peace, but they did so apart from each other and from their own perspective, without acknowledging the

[36] Nierop, 9 December 2013 in: *NRC Handelsblad*.
[37] Reich, 2004, p. 121.
[38] Roadmap to Peace.

importance of the other's perspective. The next chapter will dig deeper in this discrepancy between the judicial and political in the 2004 advisory opinion.

After the second *intifada* the Israeli's built a construction, spanning from the north to the south to prevent suicide bombers and terrorists from the West Bank to enter Israel. The construction, in this thesis mostly referred to as 'the Wall', is controversial for many reasons, which will be evaluated in the next paragraph.

The influence of both international political and judicial interference, their lack of cooperation, the conflict being the frontline of both historical as well as religious issues and the actual measures taken, by building the Wall, make this particular conflict suitable to explain the theory of the political-judicial Waltz. The importance of the conflict in the world order is also emphasized by the Court in its advisory opinion, stating: "Furthermore, the Court does not consider 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 in general and the General Assembly in particular."[39]

[39] ICJ, 2004 Advisory Opinion, p. 5.

## B. THE WALL – FACTS AND CONTROVERSY

Israeli West Bank barrier, Security Fence, Anti-Terrorist Fence, Separation Barrier, Apartheids Wall or Racial Segregation Wall, all names that are used for the same structure. The various names and their meaning already show the division of the views on this particular structure. The Wall is (being) built roughly following the 1949 Armistice Line, or the "Green Line" between Israel and the West Bank that demarcates the 'borders'. Not all of the planned more than 700 kilometres is finished yet. As the map shows, the Wall deviates from the Green Line to surround Israeli settlements deep into the West Bank. Those settlements in the occupied territories have more than once been deemed illegal under international law by the Security Council,[40] the General Assembly[41] as well as by the International Court of Justice.[42]

According to the report of the Secretary-General[43] the barrier consists of a fence with electronic sensors, a ditch, a patrol road, a trace road and a stack of six coils of barbed wire, in total spanning up to 100 meters wide. Only a small part is actually made of concrete. 16.6 per cent of the West Bank is situated between the Green Line and the Wall. Home to approximately 17,000 Palestinians in the West Bank and 220,000 in East Jerusalem. If completed, another 160,000 Palestinians will live in enclaves, while the Wall incorporates 320,000 Israeli settlers. All people born and raised in those areas call it home. People that desperately feel the need for the protection of their homes against what

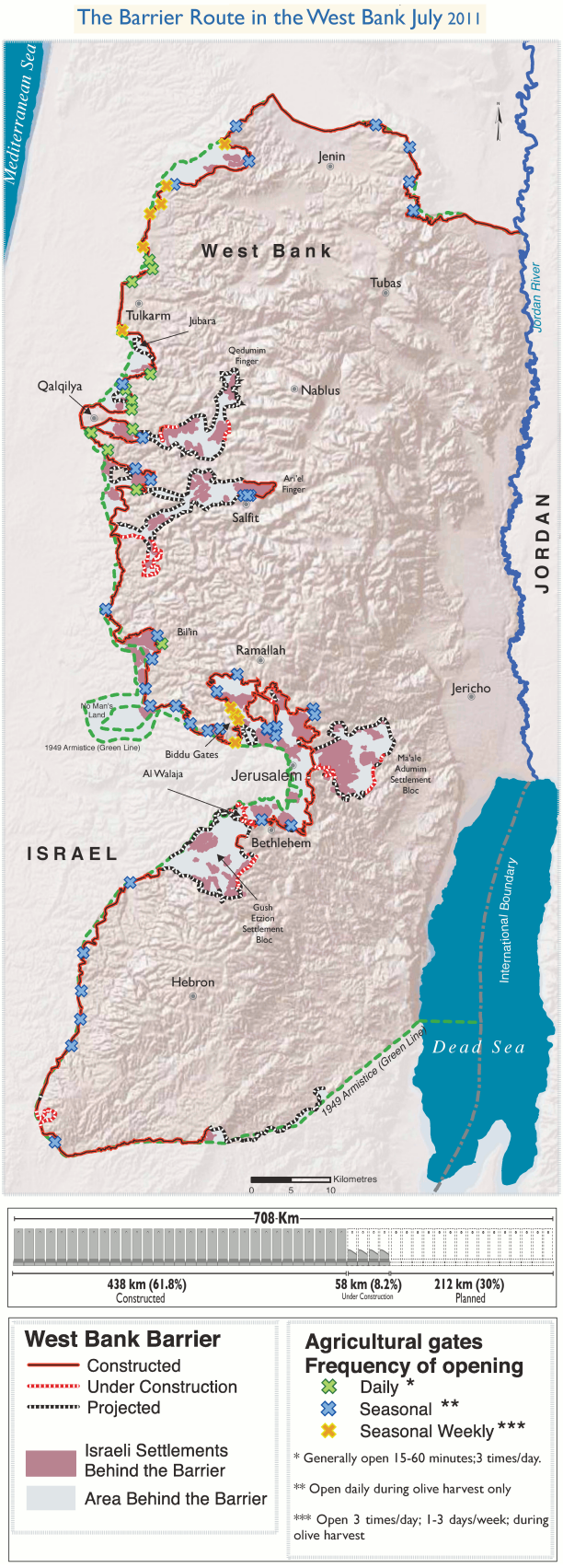


**Figure downloaded via Wikipedia. http://upload.wikimedia.org/wikipedia/commons/b/b7/Barrier_route_July_2011.png**

[40] UNSC Res. 446. The US abstained from voting.
[41] See for example: UNGA resolutions 2851, 3414, 33/29, 34/70.
[42] ICJ, 2004, Advisory Opinion.
[43] Report of the SG.

they perceive as Palestinian terrorists and people that have the feeling their land is being taken from them by new-comers while they're expelled from their own lands. Both points of view can be underpinned by international law.

The question that divides the opinions about the Wall into two camps is whether the Wall serves as a means to annex occupied territory, or if it is merely a security measure to keep suicide bombers out? Or in other words, does it serve the right of self-protection, or infringe the right of self-determination? The main problem in solving disputes over the Wall is that the one does not exclude the other. Depending on the point of view, arguments, political considerations, religion or primary sources one can choose either side, based on a relative truth in the absence of an absolute truth. Therefore it is very difficult for the UN bodies to come up with answers to the questions that are both fair and truthful towards the Israeli as well as the Palestinian points of view. Chapter five will deal further with the different views on the Wall in the light of the advisory opinion.

### 1. A SPECIAL WALL

The question that remains is why the Wall serves as an example for the political-judicial Waltz? Israel's Wall isn't unique in separating two societies, nor is it a new measure. The Chinese built a Wall a long time ago to protect their dynasty, Berlin was separated after WW II and Cyprus was split up by the United Nations itself to preserve peace and security on the island.[44] Then what makes this particular wall so special? It is because the Wall is built on the sharpest edge of world politics but is deemed illegal according to international law at the same time. Montesquieu's separated powers in the world order are thus no longer leaning on each other, but rather standing in each other's way. Perhaps because the UN lacks a third, executive power or perhaps because there's a lack of cooperation between the two. Having already set out the problem of establishing an executive power in the intergovernmental structure of the UN, we'll have to focus on the potential cooperation between the remaining powers. Even more for it is more likely to achieve cooperation than to turn the UN into a supranational organization.

### 2. CONFLICT LARGER THAN WALL

Assuming the critique that the conflict itself is a larger obstacle than the Wall to the Palestinian right of self-determination[45] is correct and thus a legal opinion on merely the Wall is too narrow an approach, only adds value to the application of the theory. Because if the conflict consists of many issues and influences, of which the Wall is only one, it also means a multidisciplinary approach of the peace process would have more impact than the sole judicial approach of only one element. The latter was in fact being done by requesting the Court's opinion on the *legal* consequences of merely the Wall, without giving notice to other, non-legal, influences. Although Israel used the relatively narrow request in the light of the wider conflict as an argument for the Court to decline its jurisdiction, the Court did not consider the Wall being merely one aspect of the wider conflict to be a reason for it to do so.[46]

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[44] Thein, 2004.
[45] ICJ, 2004, Advisory Opinion. Separate opinion of Judge Kooijmans, par. 32.
[46] ICJ, 2004, Advisory Opinion, p. 5.

# V. THE 2004 ADVISORY OPINION

The outline of the elementary thought of the trias politica, the application of it in the world order and the bodies charged with the different powers and their consequences constituted the first part of this thesis. To clarify the practical meaning of those formalities, the Wall in the Israel-Palestine conflict is used as a case study in the second part. This last chapter will zoom-in on the 2004 advisory opinion of the International Court of Justice, aiming to bring the knowledge of the previous chapters together. In order to do so the first and preliminary question to be asked is were there any formalities that had to be overcome before being able to give the opinion. If so, what was their influence? Having checked that box, the participants' submissions will be revised to understand both points of view concerning the Wall. Then, what were the arguments they based their conclusions on? Up next is the Court's decision, how did the Court deal with arguments relating to the difference between the political and the judicial functions?

## A. FORMALITIES

On 8 December 2003 the Secretary-General of the UN, Kofi Annan, informed the ICJ that the General Assembly decided with 90 votes in favour, 8 against and 74 abstentions to request the Court to render its advisory opinion on the following question:

> "What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?"[47]

Palestine pleaded for such a request in the General Assembly. One may ask why Israel and Palestine did not submit their conflict to the Court for a binding decision. The answer encounters another problem in the formalities. To submit a conflict according to the contentious proceedings of the Court, both parties must be states. Israel does not acknowledge Palestine to be a state. All that's left then in solving the judicial part of the conflict is the Court's advisory proceeding. The 2004 AO was the only way, but was it the best way to perceive the legal aspects of an issue in a conflict as such?

The Court may desist from responding to the GA's request for an advisory opinion if it finds there are compelling reasons to do so. Pomerance argues there was no shortage of such reasons, which included "the transparent motives of its sponsors; the unprecedented number of states urging judicial restraint; the absence of an agreed factual basis for adjudication; the legitimacy and consequences of judicial intervention in an acute and ongoing conflict in which, additionally, the Security Council was actively engaged; and above all, the objection of Israel, the targeted state, to back-door non-consensual adjudication of matters impinging so crucially on its existence, its territorial rights, and the defence of its citizens from a continuing daily terrorist onslaught."

[47] UNGA, Res. A/RES/ES-10/14, 8 December 2003.

Nonetheless, the Court repeated its mantra and "applied its duty-to-cooperate doctrine again.[48] Why it did so will be evaluated in this chapter's last paragraph.

## B. PARTIES SUBMISSIONS

To understand the views of both the State of Israel and Palestine, this paragraph will briefly explain the scope of their written statements submitted to the Court. Not all of the considerations will be discussed, nor will the complete statements be summarized. The aim is not to reconstruct the advisory proceedings, but rather to mark the differences between the submissions and link them to the importance of the fixing part in the research puzzle. Because if the consequences of the application of international law by the Court lacks binding power inherently on the basis of the trias politica and the state sovereignty, how can that discrepancy be fixed? In other words and additionally answering the question incompletely: "Since advisory opinions are inherently nonbinding – and do not gain in legal force when endorsed by the General Assembly or even the Security Council – their authoritativeness depends, naturally, on the persuasiveness of their reasoning."[49] Assuming the material effectiveness of the advisory proceedings comes down to merely the persuasiveness of the reasoning lacks the more formal problem of the ability of the receiving subject to be persuaded. In comparison: one can make the best pie in the world, but if those who are meant to eat it are allergic, the pie ends up in the bin. The same goes for political arguments in judicial proceedings and vice versa. That is why the two powers should work together, rather than trying to value the others' arguments.

### 1. PALESTINIAN VIEW

Palestine concluded the Court was both competent to give its requested opinion and there were no compelling reasons that prevented the Court from giving its opinion. Furthermore Palestine goes into the factual background and legal issues according to international law and concludes the Wall is in breach of several international (humanitarian) laws.[50] Palestine focused on the latter, the material matters of the procedure, in such an extensive manner; one can assume that it would happily submit the conflict for a binding adjudication if it would be possible to do so.

### 2. ISRAELI VIEW

The State of Israel only addressed the questions of jurisdiction and propriety affecting the Court's treatment of the request. It concluded the Court does not have jurisdiction. "Moreover, and in any event, the Court should exercise its undoubted discretion to decline to give an advisory opinion on a matter that takes it deeply into the political arena."[51] In contrast to the Palestinian view, the written statements thus focused highly on the formal issues of the conflict.

The difference between the Palestinian and the Israeli submissions lies with the focus of their arguments. Palestine makes notion of the Court's competence, but focuses on the (material) infringements of international laws. While Israel does not bother to address

[48] Pomerance, 2005, p. 31.
[49] Ibidem, p. 36.
[50] Written statement Palestine.
[51] Ibidem, par. 1.2.

the substantive question put to the Court, but instead focuses on the jurisdictional (formal) element in order to prevent the Court from giving its opinion on the material matters.

### C. THE COURT'S DECISION

The Court gave its decision in the 2004 advisory opinion, refuting the merits of the Israeli submission and concluding its own jurisdiction. Furthermore the Court addressed the arguments of Palestine on the material issues and concluded by fourteen votes to one that "the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law."[52] In the light of the political-judicial Waltz, the Court's conclusions about its jurisdiction in contrast to the political power of the General Assembly are more important than evaluating the answer on the material matters of the Wall's legality.

Firstly it was contented by the Israeli submission that the advisory opinion, no matter the outcome, would cut across the plans of the Roadmap and in fact be more of a tree trunk on it than contributing to the peace process.[53] The Court interpreted this argument as such that an advisory opinion on the "legality of the Wall and the legal consequences of it could impede a political, negotiated solution to the Israeli-Palestinian conflict."[54] It then concludes that the influence of its opinion on the negotiations is not clear; the participants have expressed different views and therefore the argument cannot be regarded as a compelling reason to decline the request for its opinion.[55] The Court thus actually says that as long as the influence of its opinion on the political negotiating process is unknown because the participants are divided, there is no compelling reason to decline exercising its jurisdiction. Would that implicate, on the contrary, that if the influence is known and the parties aren't divided, the Court might see the factor as a compelling reason to decline? Without going into hypothetical situations, incidents in which that might be undesirable can be thought of.

Secondly the Court acknowledged the fact that the Wall is only one part of a wider conflict, but concluded that is not a reason to decline to give its opinion. The question the GA formulated was confined to the legal consequences of the Wall. Therefore the Court did not give its opinion on the conflict as a whole.[56] The Court thus respects the boundaries of its jurisdiction, which are set out by the GA's question. How interesting would it become if the ICJ were asked to give its advisory opinion on the entire width of the conflict? Or at least be able to contribute to the peace process on a freer basis, without the strict boundaries given to it by the political organ. Perhaps then the material considerations of the Court could have been more acceptable for Israel, de facto the losing state.

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[52] ICJ, 2004, Advisory Opinion, p.15.
[53] Written Statement Israel, par. 1.3-1.4.
[54] ICJ, 2004, Advisory Opinion, p. 5.
[55] Ibidem.
[56] Ibid.

Thirdly the argument has been brought to the Court that it lacks sufficient factual information to form its opinion. The Court refuted this argument stating is has sufficient information and "moreover, the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task."[57] Again, the Court found no compelling reason to decline the request. Not due to a lack of factual information, and more important, nor to the political or subjective manner of interpretations of those facts.

Another argument submitted was that the ICJ should decline because its "opinion would lack any useful purpose,"[58] because the GA already declared the Wall to be illegal and urged Israel to stop and reverse its construction. The Court makes a comeback observing "advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action."[59] By stating observations as such, the Court puts itself in the shadow of the political organs. It declares itself inferior to the political bodies of the UN when it comes to the advisory proceedings. What happened to the legal effect of the advisory opinion, which it derives from being the opinion of the UN's main judicial body? The Court continues stating it is not up to the Court to decide whether or not an advisory opinion would and could be useful to the General Assembly, but the Court sets out the legal consequences, from which the General Assembly and Security Council draw their conclusions. The inferiority of the Court in the advisory proceedings discredits the balance of the trias politica. Even more so in the current case, where the contentious proceeding is excluded. Wouldn't the balance of powers be more equal if the ICJ had the possibility only to urge the GA and/or SC to incorporate the Court's legal opinion, rather than letting them draw their own conclusions from it?

Lastly Israel argued that Palestine did not come to the proceedings with 'clean hands', i.e. Palestine should be held accountable for the terrorist attacks during the *intifada*. Therefore Palestine "cannot seek from the Court a remedy for a situation resulting from its own wrongdoing."[60] The Court discharged this argument reiterating it was the General Assembly that requested the advisory opinion. Although this argument is more of a formality, it is of importance because it once more confirms the applicability of the political-judicial Waltz in the advisory proceedings.

As set out above, Israel highly focused on the imbalance between the political and judicial functions, concluding the Court should decline the request to give its opinion. The Court took an ostrich-like stance and kept its strict judicial interpretation, but its opinion could have been way more constructive in the peace process if the arguments submitted by Israel would have been meaningless because of the close cooperation between the political and the judicial organs practising international law. In other words: if the political and judicial were dancing a Waltz together, rather than watching each other dance while sticking to their own rhythm.

[57] ICJ, 2004, Advisory Opinion, p. 6.
[58] Ibidem.
[59] Ibid.
[60] Ibid.

## VI. CONCLUSIONS – THE ADVISORY OPINION IN THE POLITICAL-JUDICIAL WALTZ

The trias politica is best applicable to the organisation of the United Nations in the world order. The General Assembly and the Security Council make up the political branch and the International Court of Justice, being the main judicial body, makes up the juridical branch. The UN lacks a body that is charged with the third, executive power. The main reason for the incomplete separation of powers is the intergovernmental character of the UN, which means the organization consists of sovereign states. The goal of the UN is to maintain international peace and security. All bodies of it share that common goal and should strive to achieve it. As is explained throughout this thesis, the different bodies, operating on their own have not been successful (yet) in achieving peace and security in the Israel-Palestine conflict. In order to become successful, the difference in the powers between the contentious and the advisory proceedings of the Court make the latter best suitable in the idea of the political-judicial Waltz. The advisory proceedings and their effect are related to the political bodies of international law, while the effectiveness of a decision of the Court in contentious proceedings is attributable to the consent of the parties submitting their conflict.

International law has to cope with the difficulty of obedience. On the subject of obedience, different rightful claims can be made, depending on the arguments used. The claims can vary from stating international law is not really law, to international law is binding in every form. Arguments for the first claim can be the lack of an executive power, exemplified by the 1984 Nicaragua v. US case and the non-binding nature of the advisory opinion. For the latter, one can argue the adjudications of the Court are binding due to the UN Charter and the binding power of the advisory proceedings can be deducted from being the opinion of the world court. No matter the claim, they're all subject to multidisciplinary discussions in which there is not one truth. Nonetheless, in order to be able to keep on developing, critique on the dogmas is of elementary importance.

In the multidisciplinary discussions, the role of the political influence is an important factor disturbing the legal aspects of international law. The Court is not an institution of last resort in the advisory proceedings. If the Court's legal opinion in resolving international conflicts is to be of importance, then more cooperation with the political institutions is necessary. As set out, the branches of the trias politica lack the power to solve conflicts on their own.

In the Israel-Palestine conflict many (international) political influences are involved, the most obvious one is the Roadmap to Peace that addresses the wider conflict and the American support for Israel. The Wall is only one part of that wider conflict, but at the same time iconic for it.

The chapters on the difference between the powers and consequences and the question of obedience are brought together in the request of the General Assembly for the 2004 advisory opinion of the International Court of Justice and the fact that notwithstanding its legal opinion, the Wall is still standing tall. Whether the Israeli right to self-protection, or the Palestinian right of self-determination is invoked, depending on the

point of view either one can be argued to weigh heavier. Taking part in the controversial discussion about the Wall is explicitly not the purpose of this thesis. For an understanding of the theory of the political-judicial Waltz, it is only important to acknowledge the controversy. The controversy formed the ground for the General Assembly to request the Court's opinion, and it is also responsible for the lack of obedience of Israel to the outcome of the proceedings. It thus forms the complication of the research puzzle.

The Court could have desisted from giving an advisory opinion if it found there was a compelling reason to do so. The Palestinian submission focused primarily on the material question of the actual infringements of international laws by the Wall, while Israel only focused on emphasizing its view on the compelling reasons to desist the request and the lack of jurisdiction of the Court. In order to underpin its arguments, Israel used highly political considerations. The Court showed itself not sensible to them and dismissed all the politically charged arguments that aimed to exclude the Court's jurisdiction. Although the strict division enabled the Court to formulate its opinion, it also resulted in the Court hiding behind the non-binding nature of its opinion. It had to decide it was up to the political organs to draw conclusions from the advisory opinion. By doing so, the Court implicitly acknowledged the lack of cooperation between the political and the judicial institutions when it comes to the advisory proceedings. Taking into account that the contentious jurisdiction is for states to rely on and the advisory proceedings is for the UN's political bodies to request a legal opinion; the cooperation between the trias powers has to be developed in the latter.

Having concluded both the lack of and need for cooperation between the General Assembly, Security Council and the International Court of Justice, the political-judicial Waltz might contribute to a more constructive peace process. Development through cooperation can increase the effectiveness of international law in reaching the shared goal of international peace and security and will contribute to fixing the discrepancy of the research puzzle.

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