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The Wall and the Law: A Tale of Two Judgements

Susan Akram* and Michael Lynk**

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I Introduction

*Before I built a wall I'd ask to know
What I was walling in or walling out
And to whom I was like to give offence*

Robert Frost, *Mending Wall*

In late June and early July of 2004, two courts in different parts of the world issued a pair of remarkable judgements examining the legality of the separation wall that Israel is building through the West Bank and East Jerusalem.¹ While both judgements were critical of the Wall, their judicial approaches and legal conclusions were strikingly divergent, particularly given that the two courts were purporting to rely upon the same principles of international law. Indeed, even their vocabulary differed: one court used the term “wall”, while the other called it a “fence”.² The judgements also elicited quite different political and diplomatic reactions, especially among the parties most involved in the Israel/Palestine conflict. Moreover, the subsequent impact of the judgements has been profoundly contradictory. On the one hand, the two rulings have made the clearest case yet for the indispensable role of the rule of law in mediating a just and lasting settlement of the conflict. Yet, more than a year after the judgements, the Wall continues to be built, and Israel has paid only a trifling price for its legal and political obstructionism.

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¹ For an insightful discussion of the Wall and its impact upon Palestinian society in the West Bank, as well as its contribution to the dwindling prospects for a two-state solution, see P. Lagerquist, “Facing the Last Sky: Excavating Palestine after Israel’s ‘Separation Wall’ ” (2004), 33 *Journal of Palestine Studies* 5.

² This article will adopt the terminology of the United Nations and the International Court of Justice, and refer to the physical barrier as the “Wall”.

On 9 July 2004, the International Court of Justice (ICJ) issued its widely-anticipated advisory opinion on the Wall's legality, in response to a question referred to it by the United Nations General Assembly the previous December.³ In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*,⁴ the International Court found, by a 14-1 margin, that the construction of the Wall in occupied territory violated international law, and held that Israel was required to dismantle it immediately and pay reparations to all those who have suffered damages. The political reaction was immediate. Coverage of the ICJ opinion was headline news around the world; Israel, the Bush administration, and the United States House of Representatives all sharply denounced the decision; the United Nations General Assembly voted overwhelmingly two weeks later to accept the Court's ruling; and the Israeli debate over the judgement became an incendiary political issue for the remainder of the summer. The *Advisory Opinion* marked the very first occasion where issues central to the Israel/Palestine conflict have been addressed by a prominent international judicial body. The forcefulness and clarity of the ICJ judgement has challenged the largely successful efforts to date by Israel and the United States to exclude international humanitarian and human rights principles from efforts to resolve the conflict.

Nine days earlier, on 30 June, the Israeli Supreme Court, sitting as the High Court of Justice, delivered its altogether more modest ruling in *Beit Sourik Village Council v. Israel*.⁵ The case had been initiated by Palestinian residents of villages to the northwest of Jerusalem, who sought to quash Israeli military orders to construct portions of the Wall through their lands. In its judgement, the Supreme Court rejected the villagers' arguments that the Wall violated international law, but it went on to rule that the actual route of this portion of the Wall near Jerusalem failed a proportionality test that balances the security

³ U.N.G.A. Res. ES-10/14 (8 December 2003). The formal question asked by the General Assembly was:
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 the relevant Security Council and General Assembly resolutions?

⁴ (2004), 43 ILM 1009. [Hereinafter *Advisory Opinion*]. The ICJ Opinion, formally called the *dispositif*, can be viewed at: <http://www.icj-cij.org/icjwww/idocket/imwp/imwp/imwpframe.htm>

⁵ *Beit Sourik Village Council v. The Government of Israel and the Commander of the IDF Forces in the West Bank* (2004), 43 ILM 1099. [Hereinafter *Beit Sourik*].

needs of the military and the humanitarian concerns of the occupied population. Accordingly, the Supreme Court ordered approximately 25 kilometres of the 40 kilometre stretch challenged by the villagers to be re-routed closer to the 1967 Green Line. Israeli political and military leaders at first expressed a mixture of dismay and guarded relief over the Supreme Court ruling. However, once the *Advisory Opinion* was released a week and a half later, they enthusiastically embraced the *Beit Sourik* judgement, stating that it would be the only judicial ruling they would respect and implement. Since the Supreme Court ruling, Israel has made some changes in the Wall's planned path in direct response to the decision, while continuing to build the barrier predominately on occupied lands and private Palestinian property.

Both decisions have received extensive legal and academic scrutiny since their release, particularly the *Advisory Opinion*.⁶ This is welcomed, as the broad legal and diplomatic consensus that Israel's occupation of Palestinian territory is manifestly illegal serves as an ongoing, if modest, constraint on its colonizing activities. However, the divergent approaches to international law employed in the two rulings, and their quite distinct legal conclusions, say as much about the two courts themselves as they do about the laws of occupation. One ruling, coming from the highest judicial organ of the United Nations, provides a dispassionate, yet erudite, application of the primary rules of international law. It offers guidelines for ending the conflict, and is a direct reminder to the international community of its obligations to bring to an end the illegal situation arising from the occupation. The other ruling, from the occupier's highest court, shares certain basic assumptions with the Israeli government and military on the critical features of the conflict, breaking rank only on tertiary issues about how to balance the acute humanitarian distress among the Palestinian population. Indeed, if law is politics by other means, then we can read into the rulings the two diametrically opposite approaches to the conflict: one reflecting the formal international consensus of the profound illegality of the Wall; and the other reflecting the strategy of legal exceptionalism that Israel has so

⁶ The *American Journal of International Law*, the principal scholarly publication of the American Society of International Law and probably the most prestigious international law journal in the world, devoted a large portion of a recent issue to the *Advisory Opinion*, with nine substantive articles defending or critiquing the ruling: (2005), 99 *American Journal of International Law* 1-141.

effectively employed over the decades to entrench its military conquest and its demographic gains.

II The ICJ Advisory Opinion

The Court considers that the construction of the wall and its associated regime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to de facto annexation.

Wall Advisory Opinion, at para. 121.

It is difficult to conceive, in a conflict as lengthy and complex as that of Palestine-Israel, that none of the significant underlying legal issues had reached the ICJ prior to the General Assembly's Advisory Request on Israel's Wall construction in 2004. Early attempts to challenge the legality of the General Assembly resolution recommending partition of historic Palestine through appeal to the ICJ were thwarted by political pressure exerted by the major powers.⁷ Unlike the situation of South Africa's occupation of Namibia and its apartheid policies, which generated four advisory opinions from the ICJ to the General Assembly,⁸ the political bodies of the United Nations made no attempt after 1948 to obtain an opinion from the ICJ respecting the issues underlying the conflict until the December 2003 request.⁹

After receiving the request for an advisory opinion on the Wall from the General Assembly, the ICJ provided the United Nations, its member states, and several interested

⁷ For texts of the requests by Egypt, Iraq and Syria to obtain an advisory opinion from the ICJ on the legality of the partition resolution, and the discussion in the General Assembly, see U.N. docs. A/AC.14/21; A/AC.14/25; A/AC.14/14, reprinted in 1949 U.N.Y.B. 1947-48, U.N. Sales No. 1949.I.13.

⁸ See: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep. 16 (Jun. 21); *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, Advisory Opinion, [1955] ICJ Rep. 67; *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, Advisory Opinion, [1956] ICJ Rep. 23 (Jun. 1); *International Status of South West Africa*, Advisory Opinion, [1950] ICJ Rep. 128 (Jul. 11). In addition, the ICJ also heard a contentious case on the issues relating to S. Africa's occupation and apartheid, see *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, [1966] ICJ Rep. 6 (Jul. 18).

⁹ In his concurring opinion issued in the *Advisory Opinion*, Judge Elaraby remarked on the singular absence of resort to the ICJ to clarify the highly contentious legal issues in the Palestine-Israel conflict, despite the special responsibility of the UN towards resolution of the problem: Elaraby Opinion, at para. 1.

inter-governmental organizations the opportunity to submit written statements and to participate in the oral proceedings held on February 23, 2004.¹⁰ Forty-three states, as well as Palestine, the United Nations, the Arab League, the Organization of the Islamic Conference, and the European Union, submitted written or oral statements, or both.¹¹ The content of Israel's submission of over one hundred pages comprised objections to the Court's jurisdiction; Israel otherwise declined to address the substantive issues raised in the General Assembly's request.¹² The United States also filed a submission contesting the Court's exercise of jurisdiction over the matter, but did not address the merits. Nevertheless, through the plethora of submissions, and Israel's statements in the case to the UN and readily available elsewhere, the Court received a substantive briefing of both the legal issues and the factual situation relevant to the request.

The Court's ruling, set out in 163 paragraphs, touched on many of the primary legal issues relevant to the Israel-Palestine conflict and the Israeli occupation – some in significant detail, and others with more superficial analysis that has raised questions about the soundness of the Court's conclusions on several points. The fifteen sitting justices voted 14-1 on all but two issues. On the issue of whether the ICJ had jurisdiction over the issue of the Wall, the judges ruled unanimously that it did. On the issue of whether there was an obligation on all states to take certain action concerning the Wall, the Court held that they did, by a 13-2 vote. Seven judges wrote separate opinions, including those who voted with the majority but elaborated their concerns about different aspects of the Court's conclusions.¹³

In the *Advisory Opinion*, the International Court dealt with seven significant legal issues. Its conclusions on these issues were supported by a substantial majority of the sitting

¹⁰ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Order of 19 Dec. 2003, Gen. List No. 131 (2003), <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>.

¹¹ See Written Statements, at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>.

¹² See Arthur Max, *World Court Hears Case on Israeli Barrier*, Associated Press, 23 February 2004, available at: <http://www.twincities.com/mld/twincities/8019092.html>.

¹³ See Separate Opinion of Judge Koroma, 43 ILM at 1056; Separate Opinion of Judge Al-Khasawneh, 43 ILM at 1075; Separate Opinion of Judge Elaraby, 43 ILM at 1081; Separate Opinion of Judge Owada, 43 ILM at 1091; Separate Opinion of Judge Higgins, 43 ILM at 1058; Separate Opinion of Judge Kooijmans, 43 ILM at 1065; and Declaration of Judge Buergenthal, 43 ILM at 1078.

justices, with the American justice, Thomas Buergenthal, the sole dissenter on five of the conclusions.¹⁴ The ICJ concluded that it had jurisdiction to render the advisory opinion as requested by the General Assembly;¹⁵ that there were no compelling political or diplomatic reasons for it to not render the opinion;¹⁶ that the Wall as currently constructed within the occupied territories and East Jerusalem violates international law;¹⁷ and that Israel must immediately stop construction, dismantle the Wall, terminate its breaches of international law in maintaining the Wall regime, and nullify all related legislation, actions and policies.¹⁸ The Court stated that Israel must restore all Palestinian properties confiscated in construction of the wall and pay reparations for all damage caused by such construction;¹⁹ that the community of states has an obligation to ensure compliance with the Fourth Geneva Convention of 1949, not to recognize Israel's actions in constructing the Wall and establishing the Wall regime, and to cease all aid to Israel that supports its acts;²⁰ and, finally, that the United Nations, particularly the General Assembly and the Security Council, must take further action to terminate the illegal situation resulting from the Wall's construction.²¹

(i) *Jurisdiction*

The ICJ's jurisdiction to address the case was strongly resisted by Israel, and also by a number of other states, primarily within the EU. The jurisdictional arguments were complicated, but the main challenges were to the competence of the Court to hear the request, the competence of the General Assembly to seek an advisory opinion in the manner that it did, whether the request concerned a 'legal matter' which the Court was competent to address, and whether the Court, in any event, should decline the request for prudential reasons. By a unanimous vote, the Court found that it had jurisdiction to render

¹⁴ Advisory Opinion, at para. 163.

¹⁵ *Id.* at para. 163(1).

¹⁶ *Id.* at para. 163(2).

¹⁷ *Id.* at para. 163(3)(A).

¹⁸ *Id.* at para. 163(3)(B).

¹⁹ *Id.* at para. 163(3)(C).

²⁰ *Id.* at para. 163(3)(D).

²¹ *Id.* at para. 163(3)(E).

the advisory opinion requested, and, with only Judge Buergenthal dissenting, that it should exercise its discretion to render its opinion.

In response to the various jurisdictional arguments that were raised, the Court made several significant points relevant to the fundamental issues of the Middle East conflict and to strategic considerations for the General Assembly's role in the conflict. First, the ICJ reaffirmed that Article 96 of the UN Charter and Article 65 of the ICJ Statute give it the authority to render an advisory opinion on any matter referred to it by a recognized organ of the United Nations.²² The Court emphasized that, as the formal judicial organ of the United Nations, it was required to give advisory opinions to any UN body in the exercise of its mandated functions under its statute, and that it has never in its history declined to render an advisory opinion to an authorized UN body. Further, the International Court found no impropriety in the General Assembly's decision to bring the issue to it through an ongoing process under the Uniting for Peace Resolution.²³ The Court's conclusions on the procedural background to the General Assembly's request affirmed the competence of the GA to take a deadlocked issue away from the Security Council, to pass resolutions concerning it, and to go directly to the ICJ for an advisory ruling.²⁴ In addition, it dismissed arguments that the issues were too political, should be left to the parties to decide, prejudiced one side, or otherwise conflicted with the negotiation process.²⁵ Finally, in a critical move, the Court recognized the standing of the Palestine Liberation Organization to appear before the ICJ.²⁶

²² See U.N. CHARTER art. 96, at para. 1 ("The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question"). See also Statute of the International Court of Justice, annexed to U.N. CHARTER, 26 June 1945, 59 Stat. 1055, T.S. No. 993, art. 65, para. 1 ("The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.").

²³ The Court observed that the Tenth Emergency Special Session of the General Assembly was convened numerous times under Resolution 377 (V)—the 'Uniting for Peace' Resolution—in response to the repeated negative votes of the US in the Security Council which prevented decisive action in the Palestine-Israel conflict in situations clearly threatening international peace and security. Resolution 377 (V) provides that if the Security Council fails to act because one or more Permanent Member fails to agree in situations of "a threat to peace, breach of the peace, or act of aggression..." the General Assembly shall consider the matter in emergency special session. G.A. Res. 377 (V), 302d plenary mtg., U.N. Doc. A/RES/377(V)(1950).

²⁴ *Advisory Opinion*, at paras. 28-35.

²⁵ *Id.* at paras. 41, 49, 53.

²⁶ *Id.* at paras. 4-5.

The authority of the International Court of Justice to exercise jurisdiction, and the propriety of its doing so, received overwhelming support amongst the judges. Only four of the justices expressed misgivings about how the jurisdiction question was analyzed.²⁷ However, several legal commentators have criticized the Court's exercise of jurisdiction on two main points: whether the General Assembly actually had the authority to seek an advisory opinion on the question in the first place; and whether the Court should have exercised its discretion to render the opinion based on the record before it.²⁸

The question of whether the General Assembly had the authority to refer the issue to the ICJ in the first place was, in essence, about the reach of Article 12(1) of the UN Charter, and the effect on that provision of the Uniting For Peace Resolution 377 (V).²⁹ To address the question, the Court reviewed the procedural history that brought the Advisory Question to it, and examined how Res. 377(V) had changed the practice and relationship between the two bodies, the Security Council and General Assembly. The ICJ concluded that the Security Council and General Assembly were now in agreement that the meaning of the language in Art. 12(1) that prohibited the General Assembly from acting on an issue if the Security Council "is exercising (its) functions" concerning that issue clearly meant that the Security Council had to be acting on the issue "at that moment".³⁰ As long as the Security Council was not debating the very issue at the same time as the General Assembly was considering it, then the Uniting for Peace Resolution gave the General Assembly full authority to address it. This critical finding has broad-ranging ramifications for the division of responsibility between the Security Council and General Assembly in terms of addressing threats to peace and security worldwide. It is particularly welcomed authority for the General Assembly to exercise greater power in the Palestine-Israel conflict when faced with the Security Council's perpetual deadlock

²⁷ See Separate Opinions of Justices Higgins, Kooijmans, Owada and Buergenthal.

²⁸ See, e.g., Michla Pomerance, *The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial*, (2005), 99 AJIL 26; see also, Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, (2005), 99 AJIL 52.

²⁹ Art. 12(1) of the UN Charter states: "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

³⁰ Remarks of the Legal Counsel of the United Nations, 23d GA, 3d Comm, 1637th mtg, A/C.3/SR.1637, para. 9, cited in *Advisory Opinion*, at paras. 27, 28.

from taking appropriate action to restore the rule of law – due, of course, to repeated vetoes of any criticism of Israel in the Council.

The second jurisdictional question – whether or not the Court should exercise its authority to render an opinion as a matter of discretion – has several significant features. These features include whether there was a sufficient factual record before the Court to properly respond to the Advisory Request, and whether Israel’s objection to jurisdiction should bind the Court. Israel’s position on this question was contradictory. In its submission, it exhaustively detailed the threats posed to it by Palestinian ‘terrorism,’ challenged the Court’s jurisdiction to address the Advisory Question, but then refused to provide the Court with its arguments on the merits, and made no oral presentation.³¹ Israel further argued that, since it refused to recognize the Court’s jurisdiction in this case, the Court must decline jurisdiction to render an opinion.

Judge Buergenthal’s opinion – couched as a Declaration rather than a dissenting opinion – focused primarily on the issue of insufficiency of factual evidence, and was his stated motivation both for finding that the Court should not have exercised jurisdiction, and for dissenting on the merits.³² A careful reading of Judge Buergenthal’s opinion, however, reflects that his real concern was whether Israel’s *legal* arguments of self-defence and necessity had been fully made on the record, and considered by the Court.³³ Whether the Court had sufficiently well-developed legal arguments is a different question from whether it had such an inadequate factual record that it should have declined to address the advisory question. The ICJ is fully capable of understanding, researching and developing each of the relevant legal arguments presented, whether thoroughly analyzed

³¹ While Israel subsequently criticized the *Advisory Opinion* as lacking a sufficient factual record on the issue of terrorism and justified self-defence, it expended 42 pages of its written submission to detailing Palestinian terrorist attacks against Israel. Moreover, the Secretary-General included a summary of Israel’s legal arguments made to the UN in his dossier to the ICJ. See UN Doc. A/ES-10/248 (Nov. 24, 2003), Annex I, “Summary Legal Position of the Government of Israel.”

³² See Buergenthal Declaration, at para. 1 (stating: “...I am compelled to vote against the Court’s findings on the merits because the Court did not have before it the requisite factual bases for its sweeping findings; it should therefore have declined to hear the case.”)

³³ *Id.*, at para. 3 (stating that the Court may be right that all or part of the wall violated international law, but “to reach that conclusion with regard to the wall as a whole without having before it or seeking to ascertain all relevant facts bearing directly on issues of Israel’s legitimate right of self-defence, military necessity and security needs...cannot be justified as a matter of law).

by any of the various submissions or not, and its advisory function requires that it do so. It concluded, from all of the evidence available, that: "...it has before it sufficient information and evidence to enable it to give the advisory opinion requested by the General Assembly."³⁴

Citing a 1923 decision of the ICJ's predecessor, the Permanent Court of Justice (PCIJ), in the *Eastern Carelia* case, Israel claimed that the Court must decline to give an opinion since the question involved a dispute between two parties, and because one of the two parties – Israel – objected to the Court's jurisdiction.³⁵ Judge Buergenthal pointed out, correctly, that Israel had no obligation to consent to the proceedings, since they were advisory only. The Court's reading of *Eastern Carelia* concluded that, in that case, the dispositive issue was that one party to the dispute, Russia, was neither a member of the League of Nations, nor submitted to the jurisdiction of the PCIJ, as required under the League's Covenant. In contrast, Israel is a member of the United Nations, and as such, must accede to the authority of the various bodies of the UN to seek advisory opinions. Several of the separate opinions stressed the fact that the Palestine-Israel conflict is both a bilateral dispute as well as a dispute in which the UN has been intimately engaged for decades. As such, the existence of a bilateral dispute cannot, in the words of Judge Kooijmans, "deprive the organs of the organized community of the competence which has been assigned to them by the constitutive instruments."³⁶

The ICJ's conclusions that it had an adequate factual and legal record to exercise jurisdiction – with or without a submission by Israel on the merits – is likely to stand the test of time and criticism. The jurisdictional analysis of the opinion is thorough, sound, and adequately reflects the weight of the law on key points.³⁷ It would have been far

³⁴ *Advisory Opinion*, at para. 58.

³⁵ The Court's predecessor, the Permanent Court of Justice ("PCIJ"), declined to render an advisory opinion to the League of Nations for considerations relating to its mandate towards a non-League-member state and to its authorizing statute, issues the Court found were not relevant to the current Court and composition of the United Nations. See *Status of Eastern Carelia (Fin. v. Russ.)*, 1923 P.C.I.J. (ser. B) No. 5 (Russia was not a member of the League, and neither state conceded to PCIJ jurisdiction.).

³⁶ Kooijmans Opinion, at para. 27.

³⁷ See Richard Falk, *Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall*, (2005), 99 AJIL 42, at 45.

more difficult for the Court to support a decision that it did not have, or should not exercise, jurisdiction. As it pointed out: “[it] has never, in the exercise of this discretionary power, declined to respond to a request for an advisory opinion.”³⁸

(ii) *Substantive Arguments*

Certain aspects of the International Court of Justice’s treatment of the substantive arguments, particularly those relating to humanitarian law and the laws of war, are more problematic, and are already proving more controversial than its treatment of the jurisdictional issues. Before reaching the merits of the case, the Court briefly reviewed the relevant historical and legal status of the occupied territories and of Israel’s boundaries. It reviewed Palestine’s history as a former Mandate territory under the protection of the League of Nations, the critical UN Resolutions affecting the issues at hand, and the conflicts of 1948 and 1967. The ICJ concluded that under the 1949 Armistice Agreements and the corpus of UN Resolutions on the question, the areas between “the Green Line and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan.”³⁹ These areas, as well as East Jerusalem, were, as a legal matter, occupied territories and Israel, as the occupying power, was obligated to conform to certain international legal requirements. In finding that the West Bank, Gaza, and East Jerusalem are “occupied territories” and that Israel is an ‘occupying power,’ the Court had to address several longstanding Israeli objections to these characterizations, which it discussed at length later in the opinion. Preliminarily, it found that Israel was bound to the Hague Regulations of 1907 as a matter of customary law, and that Article 42 of those Regulations defined the status of these areas as occupied.⁴⁰

³⁸ *Advisory Opinion*, at para. 44. The Court distinguished its refusal to give an advisory opinion to the WHO in the *Nuclear Weapons* case because of the Court’s stated lack of jurisdiction over the question. See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, 1996 ICJ Rep. 226 (July 8).

³⁹ *Advisory Opinion*, at para. 78.

⁴⁰ “The Court would observe that, under customary international law as reflected...in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907...territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and

Having found that the West Bank, Gaza, and East Jerusalem have the status of occupied territories and that Israel's status as occupying power had significant legal consequences relating to the Advisory Request, the International Court turned to what it earlier described as the "the wall and its associated regime."⁴¹ It reviewed the extensive documentation submitted by the UN and other participants to the proceedings on the physical construction of the Wall, the related Israeli policies, the consequences to the Palestinians of the Wall's construction, and the purported motivations for constructing the Wall. Concerning the physical construction, the Court accepted the findings of the report and Written Statement of the Secretary-General, which were not contradicted by Israel, that the Wall was a 'complex' consisting of electronically-sensored fences, ditches up to 4 metres in depth, two-lane asphalt roads for Israeli patrols, paths running alongside the wall to track footprints, and stacks of barbed wire coils along the perimeter.⁴²

Describing the physical works as only part of a larger related system, the Court stated:

Lastly, it should be noted that the construction of the wall has been accompanied by the creation of a new administrative regime. Thus in October 2003 the Israeli Defence Forces issued Orders establishing the part of the West Bank lying between the Green Line and the wall as a 'Closed Area.' Residents of this area may no longer remain in it, nor may non-residents enter it, unless holding a permit or identity card issued by the Israeli authorities. According to the report of the Secretary-General, most residents have received permits for a limited period. Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel in accordance with the Law of Return may remain in, or move freely to, from and within the Closed Area without a permit. Access to and exit from the Closed Area can only be made through access gates, which are opened infrequently and for short periods.⁴³

The Court then turned to the most important substantive legal principles and rules applying to the conflict in order to spell out Israel's obligations with respect to the Wall

can be exercised....All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying power." *Id.*

⁴¹ *Id.* at paras. 79-85.

⁴² *Id.* at para. 82.

⁴³ *Id.* at para. 85.

regime.⁴⁴ In doing so, it reviewed Israel’s ongoing objections to the applicability of international humanitarian law and human rights conventions in the occupied territories.

Beginning with the United Nations Charter and customary international law principles, the International Court found that acquisition and annexation of territory by force is clearly and inherently illegal, and that states are required to refuse to recognize the forcible annexation of territory.⁴⁵ Further, under the UN Charter, numerous UN resolutions, and the main human rights conventions, all peoples have the right to self-determination.⁴⁶ The Court stated that there was no longer any question that the principle of self-determination applies to the Palestinian people; as recognized repeatedly by UN Resolutions and the international community: “the existence of the ‘Palestinian people’ is no longer at issue.”⁴⁷

In response to challenges to its actions towards Palestinians in their territories, Israel has consistently taken the position that neither international humanitarian law nor international human rights law applies to the occupation.⁴⁸ Israel’s stated position has been that international humanitarian law, primarily the Fourth Geneva Convention of 1949, does not apply to the occupied territories because Jordan was not a legally recognized ‘sovereign’ of the West Bank, as required by Article 2 of that Convention.⁴⁹ The International Court definitively rejected this ‘missing reversioner’ argument – an argument promoted by some Israeli jurists but overwhelmingly rejected by the weight of international legal authority. Putting the argument to rest, the ICJ stated that:

[It] considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke

⁴⁴ *Id.* at para. 86.

⁴⁵ *Id.* at para 88.

⁴⁶ *Id.*

⁴⁷ *Id.* at para. 118.

⁴⁸ *Id.* at para. 90.

⁴⁹ Article 2, at para. 2 of the Fourth Geneva Convention (Common Art. 2 of the four Conventions) states, in part: “[T]he present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them...” Convention (IV) relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.⁵⁰

As well, the Court found that Israel was bound to the provisions of the 1907 Hague Regulations, particularly Section III concerning military authority over hostile territory, as the Regulations had become customary international law governing situations of military occupation.⁵¹

After concluding that Israel was obligated to apply the main body of international humanitarian rules, the International Court turned to Israel's arguments that it was not bound to respect the international human rights conventions it had signed and ratified as far as its actions in the occupied territories were concerned. The three main international human rights instruments of concern to the Court were: the 1966 International Covenant on Civil and Political Rights ("ICCPR"), the 1966 International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the 1989 Convention on the Rights of the Child ("CRC"). Noting that Israel was party to all three instruments, the ICJ held that these conventions apply both in peacetime and during armed conflict, limited only by their derogation clauses.⁵² All three instruments, moreover, had already been construed by their interpretive bodies to clearly extend to areas outside a state's territory but under its effective jurisdiction or control.⁵³ With respect to Israel, two United Nations bodies – the Human Rights Committee, and the Committee on Economic, Social and Cultural Rights – had already rejected Israel's position taken before those bodies that the provisions of these covenants did not apply in the occupied territories.⁵⁴ The Court stated all three treaties were fully applicable to Israel's treatment of Palestinians in the

⁵⁰ *Advisory Opinion*, at para. 101.

⁵¹ The Court's conclusions on the applicability of the 1907 Hague Regulations were reinforced by the Israeli Supreme Court decision of 30 May 2004, concerning Israeli military actions in Rafah, Gaza, in which the Court found that such actions were clearly governed by Hague Convention IV, to which the 1907 Regulations are annexed, and by the Fourth Geneva Convention. H CJ 4764/04 *Physicians for Hum. Rts. v. Commander of the IDF Forces in the Gaza Strip* http://elyon1.court.gov.il/files_eng/04/640/047/a03/04047640/a03.pdf.

⁵² *Advisory Opinion*, at para. 106.

⁵³ *Id.* at paras. 109, 112.

⁵⁴ *Id.* at paras. 110, 112.

territories and in East Jerusalem, and then turned to the questions of what specific provisions of these humanitarian and human rights law instruments were triggered by the wall regime.

Having found that all of these treaties and conventions applied, the ICJ ruled that the construction of the Wall in the occupied territories contravened both international humanitarian and human rights law. In doing so, the Court rejected Israel's arguments of necessity and self-defense, very narrowly construing those arguments under international humanitarian law. Setting aside Israel's claims that building the Wall was necessary to deal with the threat of Palestinian terrorism, the *Advisory Opinion* stated:

[T]he Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated regime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by the military exigencies or by the requirements of national security or public order.⁵⁵

Finding that Israel was obliged not only to stop construction, the ICJ also held that it had to dismantle the Wall, to terminate its breaches of international law involved in the Wall regime, and to nullify all related legislation and policies. In declaring the 'wall regime' illegal, the Court addressed the discriminatory process of granting permits to Jews to pass through the Wall gates, but denying such permits to Palestinians, and linked these conclusions to its findings on violations of Palestinian human rights.

The heart of the *Advisory Opinion* was expressed in the Court's main findings that Israel had breached the principle tenets of international human rights laws:

...[T]he Court is of the opinion that the construction of the wall and its associated regime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention

⁵⁵ *Id.* at para. 137.

on the Rights of the Child. Lastly, the construction of the wall and its associated regime, by contributing to the demographic changes referred to [above], contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council Resolutions.⁵⁶

(iii) *Strengths and Weaknesses of the Advisory Opinion, and its Relevance for the Principle Issues of the Conflict*

Inasmuch as the ICJ opinion is a watershed as the first statement by the highest international court in the world as to what legal principles apply to the intractable Palestine/Israel conflict, its practical effect on resolution of the conflict is for the future to decide. Much of the *Advisory Opinion*'s future influence will depend on the strength of the key legal points that the Court sought to resolve. From this perspective, there are aspects of the decision that are legally solid and well-analyzed, and others that are conclusory and without sufficiently cogent legal analysis or foundation. The jurisdictional discussion and conclusions are, as noted above, solid and well-grounded in legal precedent and UN practice. On the merits, however, the main weaknesses in the decision are in the analysis of the applicability of international humanitarian law and the laws of war, particularly concerning Israel's claimed justifications for constructing the Wall: self-defense and necessity.

International Humanitarian Law, and Israel's Self-Defense and Necessity Arguments

The International Court's ruling that the Fourth Geneva Convention and the Hague Regulations were binding on Israel – the former as a matter of treaty law, and the latter as a matter of customary law – is fully consistent with overwhelming international legal consensus.⁵⁷ The ICJ's review of the basis of applicability of these provisions of international humanitarian law and the laws of war is thorough and detailed. It gives precise reasoning for its rejection of Israel's 'missing reversioner' argument challenging the *de jure* applicability of the Fourth Geneva Convention, and there is no disagreement

⁵⁶ *Id.* at para. 134.

⁵⁷ Israel ratified the Fourth Geneva Convention in July 1951, with no reservation concerning the Convention's applicability in territories under Israel's control but outside of its borders. Jordan has also been a party to the Fourth Geneva Convention since May 1951. Palestine made a unilateral declaration on June 7, 1982, that it would apply the Fourth Geneva Convention.

amongst the judges on this conclusion.⁵⁸ More important than the consensus of the justices is that their conclusion on the applicability of the Fourth Geneva Convention is supported by the weight of legal authority—Israel has, in fact, been the sole proponent of the argument that the Fourth Geneva Convention does not apply as a legal matter to its actions in the Occupied Territories.⁵⁹

However, the Court’s subsequent analysis of exactly which provisions Israel has breached by construction of the Wall is less satisfactory. The ICJ recites at length many provisions of the Fourth Geneva Convention and the Hague Regulations which it states are applicable to the issue, but focuses only on Articles 49 and 53 of the Fourth Geneva Convention, and Articles 46 and 52 of the Hague Regulations as the basis for its findings of Israeli breaches.⁶⁰ Many of the additional provisions of the Fourth Geneva Convention and The Hague Regulations raised by the various parties, or in the record before the Court, are recited in the opinion, but none are clearly stated or analyzed as grounds for its conclusions.⁶¹ As Judge Higgins pointed out, the Court’s discussion of the violations of international humanitarian law is ‘somewhat light.’ Among the important provisions that the Court should have discussed in detail but did not, relate to Israel’s self-defense and necessity justifications. It is precisely the ‘light’ treatment on

⁵⁸ The Court’s analysis underlying its conclusion that Israel is fully bound to the provisions of the Fourth Geneva Convention included a review of the plain language of both paragraphs of Art. 2 concerning when the Convention applies, and the *travaux préparatoires* explaining the drafting of those provisions under normal treaty interpretation prescribed by Art. 31 of the Vienna Convention on the Law of Treaties (VCLT). See *Advisory Opinion*, at paras. 94, 95.

⁵⁹ Resolutions of both the UN General Assembly and Security Council reflect the virtual unanimity of the international community of states that the Fourth Geneva Convention applies to the Occupied Territories, and bind Israel in its actions there. The Court cites the significant resolutions, *inter alia*, UNGA Res. 56/60 (10 Dec. 2001); UNGA Res. 58/97 (9 Dec. 2003); UNSC Res. 237 (14 June 1967); UNSC Res. 271 (15 Sept. 1969); UNSC Res. 446 (22 March 1979); UNSC Res 681 (20 Dec. 1990); UNSC Res. 799 (18 Dec. 1992); UNSC Res. 904 (18 March 1994), all affirming the obligations of Israel, as occupying power, to abide by the Fourth Geneva Convention in the Occupied Arab Territories.

⁶⁰ Article 49 of the Fourth Geneva Convention prohibits both transfer of the occupying power’s own civilian population into territory it occupies, as well as forcible transfers of persons from occupied areas into other areas. Article 53 of the Fourth Geneva Convention prohibits destruction of individual or collective property in occupied areas by the occupier, unless these are made ‘absolutely necessary by military operations.’ The Court found these to be the main provisions breached by the establishment and expansion of Israeli settlements, as well as the confiscation of Palestinian property and their forced removal for construction of the Wall. See *Advisory Opinion*, at paras. 120-122; 126, 132-135.

⁶¹ See Higgins Opinion, at para. 23.

these claims, in particular, that makes the opinion most vulnerable to attack, and weakens its contribution to the development of positive law bearing on the conflict.

The two important provisions relevant to Israel's claimed justification that the Wall is a necessary response to Palestinian terrorism are Articles 23(g) and 46 of the Hague Regulations. These provisions were raised both in the report of the Special Rapporteur John Dugard submitted by the Secretary-General, and by several participants. These two provisions prohibit destruction, seizure, or confiscation of private property, but 23(g) has a 'military necessity' exception.⁶² Article 23(g) appears in the section of the Hague Regulations that applies to times of hostility (Section II), while Article 46 applies to the extension of military occupation (Section III). The Court, in a terse conclusion without explanation, found that: "Only Section III is currently applicable in the West Bank and Article 23(g) of the Regulations, in Section II, is thus not pertinent."⁶³ However, there is not as clear a demarcation between the applicability of Sections II and III of the Hague Regulations as the Court seemed to suggest, and the Court fails to clarify *why* only Section II is applicable.

A number of authoritative reports have claimed that the Israel/Palestine conflict involves both an occupation and a state of hostilities, thus triggering the application of both sections of the Regulations. By summarily dismissing Article 23(g), the Court set aside one of the main provisions on which Israel's self-defense argument for confiscating Palestinian land might be based.⁶⁴ The Court dismissed other 'necessity' defenses based

⁶² Art. 23(g) prohibits 'destruction or seizure of enemy property, unless such destruction or seizure is imperatively demanded by the necessities of war.' Article 46 states that 'private property cannot be confiscated.'

⁶³ See *Advisory Opinion*, at para. 124.

⁶⁴ There is a significant difference of opinion amongst authoritative commentators about whether Israel's confiscation of Palestinian property in the occupied territories can be justified as a matter of military necessity under the Hague Regulations provisions. The Court did not engage in detailed analysis or related fact-finding to determine whether the violence in the OPTs was at the level of an 'armed conflict' such that Section II, and hence Art. 23(g), could be triggered? If the necessity defense of the Hague Regulations was arguably available to Israel, then the Court should have engaged in the detailed analysis and balancing necessary to determine whether that defense would have excused some, or all, of Israel's actions in confiscating Palestinian property to build the Wall. For contrasting views on this argument, see David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, (2005), 99 AJIL 88 and Ardi Imseis, *Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion* (2005), 99 AJIL 102.

on specific provisions, even when it found those provisions were violated – such as Article 53 of the Fourth Geneva Convention, which prohibits the destruction of property ‘except when militarily necessary.’⁶⁵ The Court was thus left with two main arguments supporting Israel’s justifications: the argument of self-defense under Article 51 of the UN Charter, and the more general defense of necessity in international law, not specific to one or other of the applicable Conventions.

The International Court’s treatment of Israel’s claim that its construction of the wall was justified as a defensive measure under Article 51 of the UN Charter is, at best, inadequately explained, and, at worst, incorrect. The Court concluded, in one rather terse paragraph, that Article 51 was not available to Israel as a defense, and nothing in the two Security Council resolutions concerning the use of force after September 11, changed this conclusion.⁶⁶ There were two reasons why the Court said Article 51 did not apply: first, it found that Article 51 applied to self-defense of one state when there is an armed attack by another state, and the Occupied Palestinian Territories were not a state. Second, the Court found that, since the threat to Israel comes from an area in which it is Israel herself that exercises control, the two Security Council resolutions, concerning acts of international terrorism, were inapplicable.⁶⁷

Concerning the first point – that Article 51 only applies in cases of armed attack on a state by another state – it cannot be legally accurate without additional qualification. Article 51 does not have such limiting language, and has not been understood to apply only in cases of attacks by other states. The Court’s own jurisprudence reflects that attacks by non-state actors could constitute an armed attack to trigger self-defense under

⁶⁵ See *Advisory Opinion*, at para. 126. The Court also did not engage in a detailed discussion of why the necessity defense of Article 53, as well as Article 49 of the Fourth Geneva Convention, did not cover Israel’s actions. The defense of necessity, as a matter of both these treaty and customary law principles, would require either a strict or loose balancing test between the military needs of the occupier and the protection of civilians, often articulated as a ‘five-prong test,’ See discussion below on the Israeli High Court Judgment; see also, Harvard Program on Humanitarian Policy and Conflict Research, *The Separation Barrier and International Humanitarian Law: Policy Brief 6* (July 2004), available at: <http://www.ihlresearch.org>.

⁶⁶ Article 51 of the UN Charter states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”)

⁶⁷ *Id.*

Article 51.⁶⁸ Judges Higgins and Buergenthal, in their separate opinions, make this point. If the Court's point here relates to its second conclusion, that Israel is in control in the OPTs, and hence cannot claim both self-defense under Article 51 and the right to use the means allowed it as an occupying power, the Court may be correct.⁶⁹ However, there is no clarity on the issue in the *Advisory Opinion* itself, and no explanation of the interrelationship between the two possible lines of argument: one applying to the laws of war, or when a state may take up arms, and the laws in war or humanitarian law under the Hague Regulations and Geneva Conventions. The Court might have meant that Israel could not use self-defense as a justification under both types of legal authority, as they are mutually exclusive. Indeed, Palestine argued this point before the Court:

The Fourth Geneva Convention permits forcible measures against civilian populations, subject to strict limits. That exhausts the legal rights of an Occupying Power. A State may not use all of its powers under the Fourth Geneva Convention and the Laws of War and then decide that those powers are inadequate and invoke that more general right of self-defence, which belongs to the *jus ad bellum*, in order to avoid the constraints of international humanitarian law.⁷⁰

Concerning the second point – the applicability of Security Council Resolutions 1368 and 1373 – the Court dismissed it simply by saying that these resolutions did not apply to threats to a state that emanated from an area which that state is occupying. Security Council Resolution 1368, passed on Sept. 12, 2001 in response to the attacks on the World Trade Center in New York, reaffirmed the right to use of “all means” to combat “threats to international peace and security caused by terrorist acts,” in individual or collective self defense. Security Council Resolution 1373 was passed on Sept. 28, 2001, to similar effect. There has been tremendous controversy about the meaning of these Resolutions, and whether they signal a paradigm shift in terms of when, and how, self-

⁶⁸ See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 ICJ Rep. 14 (June 27).

⁶⁹ The essence of this argument has to do with the relationship with *jus ad bellum*, or the right to wage war, and *jus ad bello*, or rights once war has commenced. Article 51 governs the circumstances in which states have the right to use arms as a means of self-defense, while the Hague Regulations and Geneva Conventions govern once conflict has begun. Whether these two sets of rules are mutually exclusive, or whether aspects of both can apply simultaneously, is not clear under state practice or in the authoritative commentary. For a detailed discussion of the issues raised by these two sets of principles and the ICJ's failure to clarify the debate on them, see Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?* (2005), 99 AJIL 62; cf Iain Scobbie, *Words my Mother never Taught Me—“In Defense of the International Court,”* (2005), 99 AJIL 62.

⁷⁰ Palestine Written Statement, at 233-34, at para. 534.

defense can be used under Article 51 of the Charter. The Court did not engage in any discussion to clarify the meaning of these Resolutions, and whether they reflected an expansion of the right of self-defense. Judge Kooijmans, in his separate opinion, rightly pointed out the dilemma with the Court's sparse reasoning, although agreeing with the Court's conclusion that self-defense was not available to Israel under Article 51:

Resolutions 1368 and 1273 recognize the inherent right of individual or collective self-defence without making any reference to an armed attack by a State. The Security Council called acts of international terrorism, without any further qualification, a threat to international peace and security which authorizes it to act under Chapter VII of the Charter. And it actually did so in resolution 1373 without ascribing these acts of terrorism to a particular State. This is the completely new element in these resolutions. This new element is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years. The Court has regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence.⁷¹

Aside from self-defense under Article 51, the International Court did address the general 'necessity' defense, finding such a defense generally in "some of the conventions at issue in the present instance," and as a matter of customary international law. As noted, the ICJ did not address necessity, or military necessity, as it applied in the specific Hague or Geneva Convention provisions raised in the opinion, but looked only at two sources for such a claim: its own precedent, and the International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts. The Court recited the *Gabcikovo-Nagymoros Project* case⁷² and the ILC's Article 25 on the Responsibility of States⁷³ as authority for finding that 'necessity' is available to defend a state's otherwise wrongful conduct in very narrow circumstances. In the words of ILC Article 25, the act taken must be "the only way for the State to safeguard an essential interest against a grave and imminent peril," and that Israel had not met that test here.

⁷¹ Kooijmans Opinion, at para. 35.

⁷² *Case Concerning the Gabcikovo-Nagymoros Project (Hungary/Slovakia)*, 1997 ICJ Rep. 7 (Sept. 25).

⁷³ Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, Art. 25, UN Doc. A/56/10 (2001).

All of the Justices concurred in the Court's conclusion that Israel had not met the requirements of self-defense or necessity as a justification for constructing the Wall,, with Judge Buergenthal claiming that he might also agree if the record were complete enough to satisfy his concerns. However, in arriving at this conclusion, the Court leaves many necessary and logical legal steps to guesswork. The very general treatment of a complex issue at the heart of Israel's claim of the Wall as a defensive measure weakens the force of the *Advisory Opinion*, and allows critics to claim that Israel's justifications were dismissed on flimsy legal reasoning.

Palestinian Self-Determination

The ICJ opinion recognized the Palestinians as a "people," and acknowledged the Palestinians' right to self-determination. The Court also found the Palestinian people entitled to exercise their right of self-determination over the territories occupied by Israel – the West Bank, Gaza, and East Jerusalem. It squarely placed the obligation to enforce the Palestinian people's rights to self-determination on the international community under the UN Charter: "It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end."⁷⁴ As well, the Court's recognition of the Palestinian people and their right to self-determination was coupled with explicit recognition of the PLO's right to appear before the ICJ as a legal 'entity.'⁷⁵

The strength of the Court's finding of the Palestinian people's right to self-determination was uncontested amongst the justices, even by Judge Buergenthal.⁷⁶ However, the consequences that flow from that determination, as outlined by the Court, were heavily debated by the judges in their separate opinions.⁷⁷ Judge Kooijmans challenged the vagueness of the Court's finding that the Wall "severely impedes the exercise by the

⁷⁴ *Advisory Opinion*, at para. 159.

⁷⁵ *Id.* at paras. 41, 49, 53.

⁷⁶ Buergenthal Declaration, at para. 4 (stating that: "I accept that the Palestinian people have the right to self-determination and that it is entitled to be fully protected.)

⁷⁷ See Buergenthal Declaration, Kooijmans Opinion, Higgins Opinion, Elaraby Opinion.

Palestinian people of its right to self-determination...”⁷⁸ As he pointed out, “not every impediment to the exercise of a right is by definition a breach of that right or of the obligation to respect it...”⁷⁹

The ICJ did not give a detailed explanation of precisely how and why the construction of the Wall violated Palestinian self-determination, taking into account Israel’s claims that the doctrines of self-defense and necessity justified the wall construction. Judge Buergenthal moved from the assumption that the Palestinians have a right to self-determination to pointing out that if Israel’s right to self-defense were fully articulated with a stronger factual and legal record, it could preclude a finding that Palestinian self-determination had been violated.⁸⁰ Other judges claimed that Israel’s violation of Palestinian self-determination was ongoing, regardless of whether construction of the Wall was a breach of that principle or not; or that the obligation to respect and enforce realization of Palestinian self-determination was incumbent on the international community, not just Israel. Judge Kooijmans concluded on this: “In my view the Court could not have concluded that Israel had committed a breach of its obligation to respect the Palestinians’ right to self-determination without further legal analysis.”⁸¹

Perhaps more troubling are the inconsistent ways in which the International Court viewed the status of the ‘Palestinian people’ and the PLO, and their rights to self-determination in various aspects of its legal findings. On the one hand, the Court recognized Palestine and the PLO as international entities with observer status at the UN, granted ‘Palestine’ recognition to appear before the Court under its Statute, and found that Palestinians in the OPTs have a defined status as occupied and protected people under international humanitarian law. On the other hand, the Court dismissed Israel’s claims of self-defense, primarily on the grounds that Palestine was not a ‘state’ such that it could be found responsible for carrying out armed attacks against Israel under Article 51 of the UN Charter. Judge Higgins found these inconsistent positions “formalism of an

⁷⁸ *Advisory Opinion*, at para. 122.

⁷⁹ Kooijmans Opinion, at para. 32.

⁸⁰ Buergenthal Declaration, at para. 4, 5.

⁸¹ Kooijmans Opinion, at para. 32.

unevenhanded sort,”⁸² and the incongruity of these positions has not been lost on critics of this opinion.⁸³ Although there are sound legal explanations that reconcile these inconsistencies, the Court failed to clearly articulate them, thus undermining its conclusions on a number of important issues besides self-determination, as further discussed below.⁸⁴

Settlements as part of the Jewish claims on Palestine

All Jewish settlements in the West Bank, Gaza, and East Jerusalem were explicitly declared illegal by the Court.⁸⁵ Citing Article 49(6) of the Fourth Geneva Convention as the key provision for finding Jewish settlements illegal, the Court ruled: “[T]he Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.”⁸⁶ The Court went on to cite Security Council Resolution 446 to condemn Jewish settlements as a means of altering the ‘demographic composition of the Arab territories.’⁸⁷

Comment [sma1]:

The Court’s finding that all Israeli settlements are illegal accurately reflects the weight of legal authority, and only Israel and a very few Israeli apologists in legal academia continue to contest the point.⁸⁸ Long before the ICJ addressed the question, the United Nations Security Council and General Assembly, the parties to the Fourth Geneva Convention, the International Committee of the Red Cross, most state governments and

⁸² Higgins Opinion, at para. 34.

⁸³ See, for example, Murphy, *supra* note 69; Wedgwood, *supra* note 28, at 52; and Pomerance, *supra* note 28.

⁸⁴ For persuasive arguments addressing these inconsistencies, and concluding that the Court’s rulings on this are correct, see Richard Falk, *supra* note 37, at 42, and Iain Scobbie, *supra* note 69, at 76.

⁸⁵ The *Advisory Opinion* did not address the distinction often made in Israeli official, press, and academic commentary between ‘illegal outposts’ and ‘Israeli towns.’

⁸⁶ *Advisory Opinion*, at para. 120.

⁸⁷ *Id.* at para. 120 (citing S.C. Res. 446, U.N. SCOR, 34th Sess., 2134th mtg., U.N. Doc. S/RES/35 (1979) and calling on Israel to: “rescind its previous measures and to desist in taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories.”). UNSC Res. 446 was reaffirmed by UNSC Res. 452 (20 July 1979) and 465 (1 March 1980).

⁸⁸ Among them would be Ruth Wedgwood, who recites Israel’s arguments that the legal status of settlements is ‘disputed,’ and characterizes the transfer of Israeli settlers into the OPTs as ‘voluntary settlement of nationals on an individual basis.’” See Wedgwood, *supra* note 28, at p. 60.

commentators had achieved consensus that Israeli settlements in the OPT's were a violation of international law. The *Advisory Opinion* substantially recites this body of authority. The Court's main basis for finding all Israeli settlement activity illegal is Article 49(6) of the Fourth Geneva Convention.⁸⁹ This provision states: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."⁹⁰ The ICJ went on to conclude that this language prohibits both forcible transfers of the occupier's population, as well as "any measures" that the occupying power might take to transfer parts of its population into the occupied areas. The Court's opinion then linked the illegality of settlement construction to the Wall regime as measures violating Palestinian self-determination, as well as a series of other rights.

There are even problems here. The *Advisory Opinion's* linking of the illegality of Israeli settlements to violations caused by construction of the Wall is imprecise, and leaves many questions unanswered. The Court does not detail how, or why, the Wall construction is related to illegal settlements. The ICJ suggests, but does not determine, that Israel's motivation in building the wall was to expand and entrench illegal settlements and permanently annex additional Palestinian territory. In fact, on the record before the Court, such a conclusion may not have been possible. The Court also suggests that Israel is prohibited from taking any measures to protect its settler population residing in occupied territory, but does not analyze which humanitarian law principles so prohibit. Although the Court may be right on these conclusions, the weakness of its analysis fuels ongoing controversy over these very critical points.⁹¹

International Human Rights Law and its Applicability in the OPT's

On the issue of the applicability of the primary international human rights treaties to Israel's actions in the OPTs, the *Advisory Opinion* settled two main points: whether

⁸⁹ *Advisory Opinion*, at para. 120.

⁹⁰ Fourth Geneva Convention, Art. 49(6).

⁹¹ Among the detailed commentaries concluding that Israel has no legal right to construct the Wall, confiscate property, and use other measures affecting the rights of the Palestinian population in order to protect or expand its settlements, see Harvard Program on Humanitarian Policy and Conflict Research, *The Separation Barrier and International Humanitarian Law: Briefing Paper* (February 2004); and Imseis, *Critical Reflections*, *supra* note 64, at 112-113.

human rights law continues to apply when humanitarian law principles are triggered in time of hostilities; and whether the human rights treaty provisions apply extraterritorially. Answering both questions in the affirmative, the Court quite carefully reviews its own jurisprudence, the interpretations and practice of the relevant treaty bodies themselves, as well as the drafting history of the human rights conventions. Israel's contention that the main human rights treaties discussed in this case – the International Covenant of Civil and Political Rights (ICCPR), the International Covenant of Economic, Social, and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC) – do not apply in the OPTs has been a long-standing dispute between the treaty bodies entrusted with enforcing the Conventions and Israel. However, this contention is a distinctly minority position, based primarily on the premise that it is humanitarian law that applies as *lex specialis* (special law) to the conflict, and therefore human rights law does not apply. The United States and Israel have been the main proponents of this position.⁹²

Noting that Israel is the only state involved in the *Advisory Opinion* proceedings that contested the applicability of human rights treaties in the OPTs, the ICJ's reading on both issues has solid legal basis.⁹³ Indeed, none of the judges on the case disagreed. Here again, however, the application of the precise provisions of the treaties that the Court discusses, is light, although thoroughly supported in their conclusions by a plethora of treaty body concluding observations and special rapporteur reports on Israel's violation of the cited rights in general, and how the Wall construction further violates those rights. The Court cites a number of articles in all three human rights covenants and convention articles – including provisions guaranteeing freedom of movement, the right to work, the protection of families and children, and the right to an adequate standard of living, health and education – were “impeded” by the Wall.⁹⁴ Despite its rather comprehensive listing

⁹² See Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, (2005), 99 AJIL 119.

⁹³ Israel ratified the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child on October 3, 1991. The Court cited *The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996 ICJ Rep.) 226, to conclude that, in general, ‘protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind found in Article 4 of the [ICCPR]’: *Advisory Opinion*, at para. 106.

⁹⁴ The Court cites and discusses ICCPR Art. 12 (‘everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence’) and Art.

of which human rights provisions the Court considered Israel was violating, the Court analyzed only Article 12 of the ICCPR in any detail. However, the Court did review and summarize its factual findings from both the state submissions and the authoritative UN reports to show how the cited provisions were being breached, and the impact the Wall construction was making on the individual rights of the Palestinian population. Yet, with Judge Higgins' complaint in mind, the Court could have been much clearer about which of these rights were actually breached by construction of the Wall, and in precisely what manner.

Remedies for Violations, and Obligations of the International Community to Resolving the Conflict

In what may be the most far-reaching aspect of its ruling, the Court concluded that there were not only international legal obligations binding the parties to the conflict, but additional *erga omnes* obligations—or obligations that are the “concern of all states.”⁹⁵ Citing Common Article 1 of the Geneva Conventions, the *Advisory Opinion* ruled that all states are obliged not to recognize the illegal situation arising from the Wall, including the cessation of any assistance and aid to Israel that would be used to support its construction and regime.⁹⁶ The ICJ found that state parties to the Fourth Geneva Convention of 1949 have obligations to ensure that Israel complies with the provisions of international humanitarian law in the occupied territories:

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory,

17 (‘no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence...’); ICESCR Arts. 6 & 7 (guaranteeing the right to work), Art. 10 (rights of family, protection of children and young people), Art. 11 (rights to adequate standard of living, and the right to be free from hunger), Art. 12 (right to health), and Arts. 13 & 14 (right to education); CRC Arts. 16 (prohibition of arbitrary interference with privacy, family, home), Art. 24 (right to highest attainable standard of health and medical treatment), Art. 27 (right to adequate standard of living for physical, mental and social development), and Art. 28 (right to education). See *Advisory Opinion*, at paras. 127-131.

⁹⁵ Citing the *Barcelona Traction* case, the Court described obligations *erga omnes* as: “In view of the importance of the rights involved, all States can be held to have a legal interest in their protection.” *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, ICJ Reports 1970*, p. 32, para. 33) (cited in *Advisory Opinion*, at para. 155).

⁹⁶ Common Art. 1 of the Four Geneva Conventions states: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”

including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction..... In addition, all the States parties to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.⁹⁷

The obligation to enforce the Fourth Geneva Convention provisions applies to those explicitly discussed in the *Advisory Opinion*, such as Article 49, which prohibits individual or mass forcible transfers of the population of occupied territory and prohibits transfers of parts of its own civilian population into occupied territory.⁹⁸ The obligation also applies by extension to provisions not explicitly listed in the opinion, such as those requiring a state to permit persons evacuated during hostilities to return to their homes as soon as hostilities have ceased, which is one of the principles underlying the Palestinian right of return.

The International Court found that the General Assembly and the Security Council should consider further actions to terminate the illegal situation resulting from the Wall construction in light of the *Advisory Opinion*. The Court's insistence that the international community must act to remedy Israel's breach of this provision, as it did in the South Africa precedent, can be seen as a signal for the political bodies of the UN to consider, among other actions, sanctions against Israel for non-compliance with the Geneva Conventions. Sanctions, whether through individual or collective action, should be carefully considered under various legal mechanisms, but might be argued as one of the remedies flowing from the ICJ's opinion.⁹⁹

However, as many of the judges complained, and on which Judge Kooijmans specifically dissented, the *erga omnes* obligations were not explained, and the consequences to states unclear. The Court did not specify whether it meant that states had any obligation beyond refusing to recognize an illegal action—that is, the Wall—that placed some additional

⁹⁷ *Advisory Opinion*, at para. 159.

⁹⁸ Fourth Geneva Convention, art. 49.

⁹⁹ See Victor Kattan, "The Wall, Obligations Erga Omnes and Human Rights: The Case for Withdrawing the European Community's Terms of Preferential Trade with Israel" (*forthcoming*, (2006), 13 *Palestine Yearbook of Int'l. Law.*)

affirmative obligation on states. It also did not explain precisely what it meant by states having an obligation not to render ‘aid or assistance in maintaining the situation’ created by the Wall. The implications for humanitarian assistance organizations operating in the OPTs are left open. As Ardi Imseis observes: “[B]y failing to thoroughly examine the scope of common Article 1 of the Fourth Geneva Convention and to offer sound argumentation in support of its findings, having due regard to the practical difficulties of delivering international humanitarian aid and assistance in the OPT, the Court missed yet another opportunity to contribute to the substantive development of a highly important area of public international law.”¹⁰⁰

(iv) Some Conclusions on the Legacy of the Advisory Opinion

On the wider implications of the Opinion concerning the main issues underlying the conflict for Palestinians—refugees, right of return, land restitution, there are four significant points in the ICJ decision for Palestinians.

First, the Court affirmed the applicability of law to the conflict, *i.e.*, the conflict can no longer be declared a purely political issue. One of the *Advisory Opinion*’s major contributions is to bring the conflict squarely back into a rights-based construct. The Court’s rejection of the premise that this conflict is to be determined solely on a political basis is a victory for those challenging the various negotiation processes from Oslo onwards as being political-power-based rather than rights-based. For the refugee question, this is a critical paradigm shift. It implies that key rights of refugees are also to be respected, and certainly the Court set out the legal principles on two of them: the right to restitution of property illegally expropriated, and the right to compensation for loss and damage to property.¹⁰¹

¹⁰⁰ Imseis, *supra* note 64, at 117.

¹⁰¹ *Advisory Opinion*, at paras. 150-153.

Second, the ICJ found that Israel is responsible for making reparations for all damage caused by construction of the Wall.¹⁰² In this ruling, the Court affirmed Palestinians restitution rights under the international legal doctrine which establishes that restitution, and not the narrower concept of compensation, is the required remedy for wrongful property expropriation. The Court cited the 1928 *Chorzow Factory* decision of the Permanent Court of International Justice, the critical case establishing the principle of restitution in international law.¹⁰³ Although the restitution required by the *Advisory Opinion* was limited to property confiscated for the Wall regime, the principle is clearly applicable to any finding of wrongful taking, and should thus be applicable to Palestinian refugee property arising from 1948.¹⁰⁴ Although the Court based the requirement of restitution of property on the law of state responsibility and did not refer to General Assembly resolution 194, this ruling relies on the same legal principles underlying resolution 194.¹⁰⁵

A third important finding is the obligation the Court placed on all states-parties to the Fourth Geneva Convention to enforce Israel's obligations under that Convention. One of the Fourth Geneva Convention articles, Article 49, which was discussed at length as the basis for the illegality of Jewish settlements, is also a key provision underlying the right of refugees to return home after hostilities forcing their displacement have ceased.¹⁰⁶

¹⁰² *Advisory Opinion*, at para. 163(3)(C).

¹⁰³ See *Factory at Chorzow (F.R.G. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13) [hereinafter *Chorzow Factory*]. The ICJ Opinion quoted relevant language from that case, including the main principle on restitution being the primary redress for illegal confiscation: "The essential principle contained in the actual notion of an illegal act...is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would...have existed if that act had not been committed. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear..." *Advisory Opinion*, at para. 152 (citing *Factory at Chorzow, supra*, at 47).

¹⁰⁴ The clearest codification of the international legal principles governing illegal property takings are in the International Law Commission's *Articles on State Responsibility*. These articles establish that the hierarchy of remedies in such cases is, first, restitution, and only if that is impossible (strictly interpreted), compensation, and third, if those are insufficient, 'to give satisfaction for the injury.' See *Draft Articles on Responsibility of States for internationally wrongful acts*, U.N. GAOR Int'l Law Comm'n, 56th Sess., Supp. No. 10, at chap. IV.E.1, U.N. Doc. A/56/10 (2001).

¹⁰⁵ UNGA Resolution 194 is based on the principles of the right of Palestinian refugees to return to their homes and lands, to obtain full restitution of properties wrongfully taken by Israel, and to additional reparations for damages to properties that cannot physically be reclaimed. GA Res. 194 (III), U.N. GAOR, 3d Sess., 186th Plen. Mtg., at 21 UN Doc. A/810 (1948).

¹⁰⁶ Article 49 of the Fourth Geneva Convention.

Finally, there is now a clear ruling from the highest international legal authority that all of the principal humanitarian law and human rights treaties, the Fourth Geneva Convention, The Hague Regulations, the ICCPR, the ICESCR and the CRC, apply in full to Israel respecting its actions towards the Palestinians. Both the ICCPR and the ICESCR were found to bind Israel regarding the occupied Palestinian territories, despite the occupier's consistent assertions to the contrary. Both of these treaties impose substantial obligations on Israel vis-à-vis the Palestinian refugees, including important provisions underlying Palestinian refugee right of return and property restitution.¹⁰⁷

In sum, despite the weaknesses in aspects of its analysis, the *Advisory Opinion* is a watershed in the legal history of the Palestine-Israeli conflict. The key conclusions, although flawed in some of their analytical foundations, are sound, not only as reflected by the high degree of unanimity amongst the sitting judges, but also as reflecting the overwhelming weight of state practice, UN resolutions, treaty body interpretations and learned commentary. It is important to point out that the Court's main finding is that the construction of the Wall '*in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, are contrary to... Israel's international obligations.*' In reaching this conclusion, the Court has laid out all the relevant legal sources, and cogent reasons to support it. The main focus of the criticism of the Opinion is in whether the Court should have addressed potential defenses raised by Israel, or analyzed the scope and reach of one or more IHL or human rights provisions; however helpful for clarity and analytical understanding, more was not necessary for the Court to find as it did. If the Court addressed issues relating to actions Israel was taking within Israeli territory, or specific Israeli military actions in the OPT's, the weaknesses in the Court's examination of the military necessity or self-defense arguments would have been far more problematic.

¹⁰⁷ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 99 U.N.T.S. 171 (entered into force 23 March 1976). International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force 3 January 1976).

In the words of Richard Falk: “The Court made clear here that if this security wall had been located on Israeli territory rather than occupied Palestinian territory, it would not have been illegal. The illegality of the wall derived from its location and the resulting severe harm inflicted upon the scope of the Palestinian right of self-determination, as well as the suffering caused to those Palestinians trapped on the structure’s west side, that is, the Israeli side. There were no indications that if Israel had believed that it needed to build a wall as an aspect of defensive necessity, it could not have done so on its side of the Green Line rather than by constructing it in a manner that transferred to Israeli control as much as 16.6 percent of the West Bank which itself is only 22 percent of the original Palestine Mandate.”¹⁰⁸

Critics of the *Opinion* argue that it is a non-binding decision and thus of little value—an argument which is technically true but misses the point. The General Assembly sought an advisory opinion about what international law required concerning the construction of the Wall. In rendering such an opinion, the Court detailed what international legal principles apply in answering that question. The Court’s conclusions specify the legal obligations that bind all states involved, particularly the parties to the conflict, based on existing treaty and customary law. The Court’s conclusions about the nature of the legal principles involved are extremely helpful in clarifying aspects of the legal arguments in contention, but reflect pre-existing legal consensus about the principles and rights involved based on applicable treaties and binding legal custom.

A second criticism of the *Opinion* is that it is merely a political one, and thus should be disregarded. This argument is misplaced. The Court is composed of the most highly qualified jurists from every geographical region in the world. The current judges hail from Brazil, China, Egypt, France, Germany, Japan, Jordan, Madagascar, the Netherlands, Russia, Sierra Leone, Slovakia, the UK, the US, and Venezuela. Israel sought to preclude one of the two Arab judges from presiding, which the Court rejected; however, if there had been a real concern that the Court was too politicized, any participant could have sought appointment of a judge *ad hoc* to sit on the case, as

¹⁰⁸ Falk, *Toward Authoritativeness*, *supra* note 37, at 50.

provided for by the Rules of the Court. Israel did not seek such an appointment, nor did any of the other participants.¹⁰⁹ The Court's judges, on the whole, are considered conservative, rarely reaching beyond settled judicial authority on most questions. The unusual unanimity of the judges on all of the conclusions in the opinion reflects little politicization, but rather the strength of already-existing legal consensus on these key issues.

The ICJ has reflected *what the law is*.¹¹⁰ It remains for the international community and the UN bodies to implement the legal principles enunciated by the Court. Whether this *Advisory Opinion* will be one of many opinions from the Court that will assist in giving very specific guideposts for resolving the conflict as the Court's opinions did in the South Africa situation depends primarily on the actions of the political bodies of the UN. However, whether this opinion will provide a concrete and useful framework for action on the ground to dismantle the Wall and its discriminatory regime depends primarily on how well civil society actors understand and utilize the important legal principles found in this decision.

III The Israeli High Court Judgement

To the extent that construction of the Fence is a military necessity, it is permitted, therefore, by international law. Indeed, the obstacle is intended to take the place of combat military operations, by physically blocking terrorist infiltration into Israeli population centers. The building of the obstacle, to the extent it is done out of military necessity, is within the authority of the military commander. Of course, the route of the Separation Fence must take the needs of the local population into account. That issue, however, concerns the route of the Fence and not the authority to erect it.

Beit Sourik Village Council v. Israel, *at para. 32*

In June 2002, when the Israeli government announced its formal decision to build an integrated system of walls, trenches, barriers and fences throughout the West Bank, it stated that the Wall was initiated solely as a response to the series of Palestinian suicide bombings that had killed approximately 450 Israelis since the start of the second *Intifada*

¹⁰⁹ See Owada Opinion, at para. 19, on this point.

¹¹⁰ *Marbury v. Madison*, 5 U.S. 137 (1803), 1 Cranch 137 (1803).

in September 2000. As the magnitude, length and location of the Wall became apparent, especially its plans to separate hundreds of thousands of Palestinians from their agricultural lands and social services and to include most of the Jewish settlement blocs on the 'Israeli' side of the project, Palestinian villagers began to file petitions with the Israeli Supreme Court, sitting as the High Court.¹¹¹ These petitions were supported by a number of Palestinian and Israeli human rights groups. Many of these petitions challenged not only the crude expropriation process frequently employed by the Israeli military and the occupation administration to seize Palestinian lands, but also the very legality of the Wall itself under the international law of belligerent occupation.

The Israeli Supreme Court has a widely-accepted but rather undeserved reputation for judicial liberalism.¹¹² Most of this reputation derives from its rulings in the area of civil rights within Israel, where it has issued affirmative judgements in cases involving gender and sexual orientation rights, freedom of expression, the environment, and personal freedoms. However, its substantial body of decisions on the occupation tells quite another story. The Court's judgements have found in favour of the Israeli state in virtually every matter involving its rule in the Occupied Territories. The Supreme Court has consistently avoided ruling on the issue of whether the Fourth Geneva Convention applies *de jure* to the Territories,¹¹³ despite the virtually unanimous view of the international community.¹¹⁴ As well, it has refused every petitioned request over the years to rule on the legal status of

¹¹¹ The Israeli Supreme Court wears two judicial hats. It is the final court of appeal in Israel from judgements of lower courts. It also serves as the High Court of Justice, through its power to issue prerogative writs against government agencies. For ease of explanation, we will refer to the Court as the Supreme Court throughout our discussion.

¹¹² The Court enjoys a considerable degree of support among Israeli Jews, who in public opinion polls consistently rank it as the most respected civilian institution in the country.

¹¹³ *Afu v. IDF Commander of the West Bank* (1993), 23 *Israeli Yearbook of Human Rights* [IYIL] 277 (ISC – Summary); *Sajedia v. Minister of Defence* (1993), 23 *IYIL* 288 (ISC – Summary). The Israeli government has persistently maintained that, while the Fourth Geneva Convention does not apply to the Occupied Territories, it will apply the humanitarian features of the Convention. This is a legal contortion, since the entire Convention is humanitarian law. The Israeli Supreme Court has accepted this legal fiction, most recently in *Beit Sourik* (at para. 23), which has allowed it to avoid addressing a number of issues going to the considerable legal obligations of an occupying authority. Having said this, the Court has accepted that some parts of the Fourth Geneva Convention apply to the Occupied Territories, on the grounds that they reflect customary international law: *Center for the Defence of the Individual v. IDF Commander*, H.C.J. 3278/02 (18 December 2002).

¹¹⁴ U.N.S.C. Res. 904 (18 March 1994); U.N.G.A. Res. 57/269 (5 March 2003); *Declaration of the Conference of High Contracting Parties to the Fourth Geneva Convention*, 5 December 2001, at para. 1.

the Israeli settlements under the Convention,¹¹⁵ despite the *corpus* of international law condemning them in absolute terms.¹¹⁶ On those occasional instances where it has disagreed with the Israeli government, it has done so on narrow issues of administrative application, none of which have proven to be a significant impediment to Israel's actions in the occupied territories. As the judicial handmaiden to the occupation, the Court has rarely attracted even principled dissents from justices brave enough to endorse the robust obligations of international law.

Where the Israeli Supreme Court has applied norms of international law on belligerent occupation, its legal analysis has been arthritic and formalistic, leading inevitably to deferential and inert decisions that have legitimized the ongoing colonization of Palestinian lands and the perpetuation of military rule.¹¹⁷ Examples of this languid deference include seminal judgements which have permitted the building of settler roads,¹¹⁸ the deportation of Palestinian prisoners to prisons outside of the Occupied Territories,¹¹⁹ administrative detentions,¹²⁰ house demolitions and collective punishment,¹²¹ the denial or revocation of residency status and family reunification,¹²² and, until recently, torture.¹²³ The manner in which Israel committed these acts is in

¹¹⁵ *Amira v. Minister of Defence* ("Mattityahu") (1980), 10 *IYIL* 331 (IHC – Summary); *Ayyub v. Minister of Defence* ("Beit El") (1979), 9 *IYIL* 337 (IHC – Summary). Even in the celebrated *Elon Moreh* case, where the Court refused to sanction the seizure of private Palestinian lands for a settlement, the Court made its ruling on a narrow basis, and explicitly avoided answering the question of the illegality of settlements in international law: *Dweikat v. Government of Israel* (1979), 9 *IYIL* 384 (IHC – Summary).

¹¹⁶ Article 49(6) of the Fourth Geneva Convention.

¹¹⁷ For a critical assessment of the Court's judicial decision-making pertaining to the occupation, see David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002).

¹¹⁸ *Ja'amait Ascan v. IDF Commander in Judea and Samaria* (HCJ 393/82), described in Kretzmer, *id.* at pp. 97-98.

¹¹⁹ *Afu v. IDF Commander of the West Bank* (1993), 23 *IYIL* 277 (IHC—Summary); *Na'azal v. IDF Commander in Judea and Samaria* (1986), 16 *IYIL* 329 (IHC – Summary).

¹²⁰ *Sajedia v. Minister of Defence* (1993), 23 *IYIL* 288 (IHC – Summary).

¹²¹ *Sanuar v. IDF Commander in Gaza* (1995), 25 *IYIL* 324 (IHC – Summary); *Dujlas v. IDF Commander in Judea and Samaria* (1987), 17 *IYIL* 315 (IHC – Summary).

¹²² *Shahin v. IDF Commander in Judea and Samaria* (1988), 18 *IYIL* 241 (IHC – Summary); *Al-Teen v. Minister of Defence* (1972), described in Kretzmer, *supra* note 117, at pp. 103-4.

¹²³ In *Public Committee Against Torture in Israel v. Government of Israel*, the Court in 1999 ruled that the Israeli General Security Service had no legal basis for the use of physical force when interrogating detainees. This ruling contrasted with earlier judgements by the Court where it had allowed the Security Service to apply physical force during interrogation: *Mubarak v. General Security Service* (1996); *Khamdan v. General Security Service* (1996); *Balebisi v. General Security Service* (1995); all described in Kretzmer, *supra*, note 105, at pp. 138-143.

substantive violation of international law, which has occasionally troubled the Court, but has rarely impeded it from finding a legal justification.

In its decisions on the occupation, the Supreme Court has shared a common narrative with the Israeli government and military on the origins and principle features of the conflict.¹²⁴ It accepts that the state is under attack, that the occupation has been largely benign, that the military and the government are motivated by security concerns and guided by human values, and that the benefit of any judicial doubt should be given to the military unless the minimal legal restraints on the occupation have been unmistakably ignored. These shared assumptions are particularly visible in the Court's choice of language. In *Beit Sourik*, for example, it refers to the West Bank as "Judea and Samaria", the Wall is called the "Separation Fence", and Jewish settlements in the West Bank and East Jerusalem are "towns" and "neighbourhoods".

In front of the Supreme Court in *Beit Sourik*, the Palestinian petitioners raised two substantive legal issues in opposition to the Wall. First, they argued that, under international law, Israel lacked the authority to construct the Wall on territory held in belligerent occupation. In particular, they maintained that the Wall *de facto* annexes parts of the Occupied Territories to Israel, and serves the needs of the occupying power rather than those of the occupied population. Had the Wall been built on the 1949 Green Line rather than predominately on occupied lands, the petitioners stated, they would have had no objections to its existence. If that argument failed, then the petitioners advanced a second legal issue. They submitted that the particular route of the Wall, with its severe harm to hundreds of thousands of Palestinians, outweighs its security benefits, and should be re-located elsewhere to lessen these injuries. As evidence of the humanitarian harm, the petitioners pointed to the denial of access to farming lands; the expropriation of property; the loss of markets; the inability to reach their schools, hospitals, jobs and places of worship; and the degradation of the landscape.

¹²⁴ In particular, the immediate past and current presidents of the Israeli Supreme Court have been former Attorneys-General of Israel, and a number of the other justices have served as either Attorney-General or as State Prosecutor.

In reply to the petitioners' arguments, the IDF maintained that its authority to build the Wall was well established in Israeli law, and that every effort had been made to minimize any "disturbances" to the daily lives of the Palestinians. As well, a group of retired Israeli military officers – the Council for Peace and Security – intervened in the case. They submitted an affidavit which endorsed the necessity of the Wall and did not quarrel with its location on occupied territories. However, the Council did argue that its planned route compromised Israel's security because it was placed too close to Palestinian homes and communities, thus making it more difficult for the IDF to effectively defend Israeli interests.

(i) *The Israeli Supreme Court: The Legality of the Wall*

The President of the Israeli Supreme Court, Aharon Barak, presided over the hearings in *Beit Sourik*, and wrote the unanimous decision for the three judge panel. Dealing with the first question – on the IDF's legal authority to construct the Wall – the Court accepted the principles and the language of international humanitarian law. It held that Israel's rule over the Palestinian territories amounted to 'belligerent occupation' and was inherently temporary. It also ruled that the IDF commander could not build the Wall if the motivation was political or was an attempt to annex the territories. Most importantly, the Court stated that Israel could not build roads or make other changes to the lands it belligerently rules if the objective was for its own benefit, as opposed to the only two reasons permitted under international law: for the benefit of the local population, or for military and security reasons. These are all significant acknowledgements and, if applied purposively, the occupation and its many projects, including the Wall, would have been declared illegal. In the hands of the Israeli Supreme Court, however, it has proven more expedient to accept the principles and then deny them in practice, than to reject the principles.

International humanitarian law and the rules of belligerent occupation are designed, first and foremost, to protect the interests of the local population, and to maintain the *status quo* of the occupied territories until they are returned to the new sovereign power as soon

as reasonably possible.¹²⁵ The occupying power is not permitted to develop new laws and structures that may change features of the pre-existing legal or social order, unless these changes protect or advance the welfare of the local population and do not advantage the occupying power beyond ensuring a more effective security and administrative regime.¹²⁶ The laws of occupation do not grant the occupying power any claim or leverage respecting future sovereignty over any of the lands it controls resulting from an armed conflict.¹²⁷ In particular, any acts which denote permanence or a presence beyond the requirements of a temporary administration are incompatible with the law. Accordingly, the occupying power cannot alienate lands or property, unless they are strictly and only for reasons of security for the military personnel, and even then only for the transitory period of the occupation. Security and military necessity are narrowly defined in international law, lest the occupier seek unwarranted benefits for itself.

Although the Israeli Supreme Court in *Beit Sourik* accepted, in principle, the main tenets of the law of belligerent occupation, it rejected the argument of the Palestinian petitioners that the Wall was illegal by giving an expansive meaning to ‘security’ and a correspondingly lifeless definition to the obligations of an occupying authority under international humanitarian law. As a grounding premise, it endorsed the affidavit evidence of the IDF Commander, who had stated that the objective of the Wall was to prevent the infiltration of terrorists into Israel, and for no other reason. The Court said: “These are security reasons *par excellence*. In an additional affidavit, Major General Kaplinsky testified that: ‘it is not a permanent Fence, but rather a temporary Fence erected for security needs.’ We have no reason not to give this testimony less than full

¹²⁵ See the 1907 Hague Regulations, and particularly Articles 43 and 55. For commentary on the Regulations that supports this widely-held interpretation, see E. Benvenisti, *The International Law of Occupation* (Princeton University Press, Princeton, 2004); and I. Scobbie, “Natural Resources and Belligerent Occupation: Mutation Through Permanent Sovereignty” in S. Bowen, *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories* (Martinus Nijhoff Publishers, the Hague, 1997).

¹²⁶ Article 47 of the Fourth Geneva Convention.

¹²⁷ This principle has been at the core of post World War II international law, and it expressly stated in United Nations Security Council Resolution 242 (22 November 1967): “Emphasizing the inadmissibility of the acquisition of territory by war...”.

weight, and we have no reason not to believe the sincerity of the military commander.”¹²⁸ As has been its habit, the Supreme Court turned a blind eye to the historical record of the occupation that there is rarely anything so permanent as a temporary Israeli installation on Palestinian lands.

With this minimal security threshold satisfied, the Supreme Court proceeded to reject the arguments of the Palestinian petitioners that the confiscation of private lands for the erection of the Wall was illegal. Ignoring the exacting requirements for the protection of the private property of the occupied population under international law,¹²⁹ the Court cited a supportive, if telling, legal authority for its ruling: its own substantial prior caselaw. Its past rulings had authorized the expropriation of private Palestinian lands to build roads, settlements, barriers, administrative offices, and military facilities in the name of the occupation.¹³⁰ In effect, this body of decisions has turned the international humanitarian principle that all belligerent occupations are inherently temporary into the opposite of its intended purpose. Rather than constrict the operations of the occupying authority because its rule is suppose to be transitory, the Israeli Supreme Court has habitually used the obligation of ‘temporariness’ to accept virtually all of the transformative acts that the Israeli government and the IDF have accomplished in the occupied territories.¹³¹ If the Wall or a settlement or a military installation is labeled as temporary by the IDF or the Israeli government, then, regardless of the probable permanence of its structure and intent, the Court will bless its formal compliance with international law, and refrain from

¹²⁸ *Beit Sourik*, at para. 29. The Court also accepted the Israel government’s word that the Wall was motivated only by security concerns: “As we have seen in the government decisions concerning the construction of the Fence, the government has emphasized, numerous times, that ‘the Fence, like the additional obstacles, is a security measure. Its construction does not express a political border, or any other border.’” (para. 28)

¹²⁹ See generally Article 46 of the 1907 Hague Regulations: “Private property cannot be confiscated.” International law permits the *requisition* of private lands and property, if it is meant solely for the military and administrative requirements of the occupation, but, consistent with the temporary character of occupation, such properties are to be returned to their rightful owners upon the termination of the occupation.

¹³⁰ *Beit Sourik*, at para. 32.

¹³¹ According to B’Tselem, the Israeli State Attorney’s office said to the Israeli Supreme Court in 2002, when defending the initial seizure orders to expropriate private Palestinian lands to construct the Wall, that Israel is only taking control of the lands temporarily. The seizure orders were valid only until the end of 2005. However, the military legal regime governing the occupied territories permits the indefinite extension of these orders, which is the IDF’s common practice regarding lands seized for new settlements or for by-pass roads. B’Tselem, *Behind the Barrier* (Jerusalem: B’Tselem, 2003), at p. 34.

imposing any judicial stop-watch to measure how it is that temporary facts become something else.¹³²

The largest hole in the heart of the *Beit Sourik* decision on the first issue was the Court's astounding silence on the routing of the Wall to encompass the bulk of the Israeli settlement blocs. The petitioners had argued that, if the Wall had been primarily motivated by security considerations, it would have not been built predominately inside the occupied territories. This, they maintained, demonstrated the unacceptably political nature of the Wall, and thus its illegality.¹³³ However, the argument that proved so persuasive at the International Court of Justice was succinctly rejected by the Israeli Supreme Court. With a dismissive wave of its hand, it held: "We have no reason to assume that the objective is political rather than security-based."¹³⁴ In arriving at this evidence-free finding, the Court did not mention the settlements in this part of the decision, it did not question the dense web of settler-only roads in the occupied territories, nor did it ask why many of the largest settlements were to be located on the 'Israeli' side of the Wall. Unlike the ICJ,¹³⁵ and even leading Israeli political leaders,¹³⁶ the Supreme Court identified no symmetry among the various aspects of the occupation, preferring to view the Wall, the settlements, and the regime of military occupation in splendid isolation from each other.

¹³² In a decision released shortly before *Beit Sourik*, the Court stated in *Na'aleh v. Civil Administration of Judea and Samaria* (HCJ 9717/03, 14 June 2004) that: "When we deal with very long periods of time, it seems it is justified to recognize the authority of the occupant state to take actions that will affect the territory under belligerent occupation for a long time."

¹³³ According to the Senat think tank in Israel, building the Wall on the Green Line would also have cut its length and its cost in half: "Cost of fence could be halved if built along 1967 lines" *Ha'aretz*, 2 April 2004.

¹³⁴ *Beit Sourik*, at para. 31.

¹³⁵ *Advisory Opinion*, at para. 120

¹³⁶ For a prescient view of the relationship between the Wall and the settlements, see the remarks of Israeli Deputy Prime Minister Ehud Olmert in support of the Israeli government's unilateral disengagement strategy combined with the construction of the Wall, quoted and described in *Ha'aretz*, 14 November 2003: "[The] formula for the parameters of a unilateral solution are: To maximize the number of Jews; to minimize the number of Palestinians; not to withdraw to the 1967 border and not to divide Jerusalem.' Large settlements such as Ariel would 'obviously' be carved into Israel. ...The fence, now being built amid much controversy, would 'ultimately become part of the unilateral plan', Olmert says with deliberate vagueness...[H]is unilateralism 'would inevitably preclude a dialogue with the Palestinians for at least 25 years.' "

Once the legal awkwardness of the settlements question, and the demographic and territorial intentions of the Israeli political leadership, had been judicially airbrushed, the Supreme Court had little trouble in re-affirming the security *Weltanschauung* that it shares with the government and the military. It stated: “We cannot accept this argument [that the Wall’s objectives are political]. The opposite is the case: It is the security perspective – and not the political one – which must examine a route based on its security merits alone, without regard for the Green Line.”¹³⁷ This was a direct echo of the position adopted by the Israeli cabinet two years previously, when then Minister of the Interior Eli Yishai successfully recommended that: “the fence’s route not coincide with the Green Line, but that it be as far away as possible so that it will indeed be a security, and not a political, separation fence.”¹³⁸ According to the Court’s reasoning, had the Wall been built on the 1967 border, it would have become a political structure, and therefore, in its eyes, illegal. A dynamic linguistic process is evident here: over the years, the Supreme Court has instructed the Israeli political and military leadership on the proper terminology to use when defending its projects in the occupied territories in order to pass the Court’s judicial litmus test (“security”; “temporary”; “military necessity”; “the humanitarian features of the Fourth Geneva Convention”), and, in their subsequent appearances before the Court, they have learnt the lesson well.¹³⁹

In reaching the conclusion that the Wall’s route was for security purposes only, the Israeli Supreme Court adopted the untenable legal assumption that an occupying power is permitted to take a broad range of security actions to defend the state’s interests, including erecting civilian settlements in occupied lands. In contrast, the strong consensus in international law excludes from the coverage of the circumscribed definition of security any action, even if it is military or security in scope, that is ulterior to the *bona*

¹³⁷ *Beit Sourik*, at para. 30.

¹³⁸ “Shas: Include More Communities West of the Fence” *Ha’aretz*, 4 July 2002. Cited in B’Tselem, *Behind the Barrier*, *supra* note 131, at p. 31.

¹³⁹ A prime example of this lesson arose from the 1979 *Elon Moreh* decision, *supra* note 115. The Israeli Supreme Court refused to accept the military requisition of private Palestinian land for a settlement in the West Bank, on the grounds that the purpose of the requisition was for ‘political’ rather than ‘security’ or ‘military’ reasons. Following the decision, the Israeli government has built its settlements on ‘public lands’ in the occupied territories, and has never formally labeled its settlement activities in the occupied territories as ‘political’ before any domestic legal forum. Following *Elon Moreh*, the Supreme Court has not subsequently issued a ruling against the legality of a settlement.

fide administrative and military necessities of the occupying power and not in conformity with the foreseeable termination of its rule of occupation.¹⁴⁰ Security cannot be used as a pretext for acquiring advantages otherwise forbidden to the occupying power. Yet, in its elastic definition of security, the Supreme Court absorbed and implicitly endorsed a primary *raison d'être* of the Israeli settlement project: the establishment of a critical mass of settlers in the occupied territories to justify a sustained military and political presence in order to provide 'security' for the privileged minority.¹⁴¹ Thus, only by misconstruing international law could the Court conclude that: "To the extent that construction of the Fence is a military necessity, it is permitted, therefore, by international law."¹⁴²

(ii) *The Israeli Supreme Court: The Routing of the Wall*

Having decided that the IDF Commander had the legal authority to construct the Wall in the occupied territories, the Israeli Supreme Court then turned to the second, narrower, issue before it: whether the Wall's actual and proposed route through Palestinian lands properly balanced Israel's military requirements in the occupied territories against the needs of the 'local population'. This analysis is known in international law and constitutional law circles as the proportionality test. As commonly applied, the test requires a court to measure an armed force's actions or a government's justifications against another vital purpose, such as humanitarian obligations, human rights or democratic values, in order to assess its legitimacy. However, this test is susceptible to different approaches. Some legal commentators have stated that, in international law, the humanitarian purpose is foremost, and the military justifications must be interpreted strictly and narrowly. In their eyes, the proportionality test is less a balancing exercise than it is a broad rule of protection (humanitarian) with circumscribed exceptions

¹⁴⁰ The Official Commentary to Article 53 (dealing with the prohibition against the destruction of private or public property in the occupied territories) warns that "unscrupulous recourse to the clause concerning military necessity would allow the Occupying Power to circumvent the prohibition set forth in the Convention."

¹⁴¹ Moshe Dayan, one of the primary architects of Israel's settlement policy, stated in 1979 that the settlements were necessary "not because they can ensure security better than the army, but because without them we cannot keep the army in these territories. Without settlements, the IDF would be merely an occupying army in these occupied territories." *Jerusalem Post*, 11 April 1979.

¹⁴² *Beit Sourik*, at para. 32.

(military necessity).¹⁴³ Other legal commentators would place comparatively greater weight on the military justifications, and define the test more as a balancing act between two equivalent and legitimate values.¹⁴⁴

The Israeli Supreme Court has long adopted the later view. While this more pliable version of the test still retains some teeth, which the Court would employ in *Beit Sourik*, it provides a diminished defence of the humanitarian purpose that lies at the heart of the laws of belligerent occupation. Indeed, in its prior caselaw, the Court had applied a limp and troubling interpretation of the proportionality test. Most controversially, it has used its version of the test to justify the punitive demolitions of homes belonging to the families and relatives of persons suspected of engaging in resistance or terrorists acts.¹⁴⁵ Although international humanitarian law expressly forbids the collective punishment of the protected population for the deeds of an individual or a group,¹⁴⁶ and prohibits the destruction of real or personal property of the state or individuals “except where such destruction is rendered absolutely necessary by military operations,”¹⁴⁷ the Supreme Court has repeatedly ruled that the concept of deterrence justified the practice, even when little reliable evidence was produced to establish this.¹⁴⁸ B’Tselem has described the Supreme Court as acting like a “rubber stamp” for the Israeli government on home demolitions.¹⁴⁹ What the Court disregarded in these cases was that the proportionality test was inappropriate to apply in the case of collective punishments (the prohibition admits

¹⁴³ Alain Pellet, “The Destruction of Troy Will Not Take Place”, in Emma Playfair, (ed.) *International Law and the Administration of Occupied Territories* (Oxford: Oxford University Press 1992), at p. 196.

¹⁴⁴ Y. Dinstein, “Legislative Authority in the Administrated Territories” (1979), 2 *Iyunei Mishpat* 505 (“The law of war usually creates a delicate balance between two poles: military necessity on one hand and humanitarian considerations on the other”) Cited in *Beit Sourik*, at para. 34.

¹⁴⁵ According to the eminent Israeli political historian Tom Segev, “In the history of the Israeli occupation, there may not be any practice more despicable than the home demolition of the family of terrorists. The High Court has repeatedly lent a hand to it, since when it comes to the occupation, the court has been far from its image as the stronghold for the defence of human rights.” *Ha’aretz*, 30 June 2005.

¹⁴⁶ Article 33 of the Fourth Geneva Convention prohibits the punishment of a protected person for an offence that he or she did not commit: “Collective penalties...are prohibited.”

¹⁴⁷ Article 53 of the Fourth Geneva Convention.

¹⁴⁸ *Farj v. IDF Commander* (HCJ 893/04); *Turkman v. Minister of Defence* (1995), 25 *IYIL* 347 (IHC – Summary). Since October 2000, the IDF had demolished 675 homes for punitive purposes, leaving more than 4,000 homeless. The IDF announced in February 2005 that it was ending the practice of punitive home demolitions, because it proved not to be a deterrent. Israeli political historian Tom Segev has written that: “The army, out of a cost-benefit calculation, adopted a more humane policy than the [Supreme] Court would ever have dared to impose on it.” *Ha’aretz*, 30 June 2005.

¹⁴⁹ “B’Tselem: High Court ‘rubber stamp’ for IDF house demolitions”, *Ha’aretz*, 15 November 2004.

no exceptions, therefore a balancing approach does not arise), and that the exception to the interdiction against property destruction is limited to “imperative military requirements”,¹⁵⁰ and does not include the broad operational security measures of the IDF which the Court has regularly approved.¹⁵¹

The version of the proportionality test used by the Israeli Supreme Court in *Beit Sourik* consisted of three cumulative requirements. (The inability to satisfy even one of them would result in the failure to meet the test.) First, the Court had to determine whether there was a reasonable relationship between the end objective (security) and the means used to reach that end (the Wall). The second part of the test required the Israeli government to show that the Wall would cause the least possible impairment: stated another way, were there other, less injurious, means available to accomplish the end objective? The third part required the Court to ask itself: was the increased security gained from the chosen route of the Wall proportional to the harm imposed upon the local Palestinian population?

This three-part version is consistent with the requirements of international law, but incomplete. The more robust proportionality test includes two additional cumulative parts: (1) Is the occupying power facing an actual and pressing state of necessity? and (2) Does the measure in question violate an absolute prohibition in international humanitarian law?¹⁵² Addressing all five issues in a purposeful fashion would have almost certainly lead a liberal court to find that the Wall was so disproportionately harmful to humanitarian objectives in comparison to military necessities that its very construction would fail the test. Asking only some of these questions, and filtering them

¹⁵⁰ Official Commentary on Article 53 of the Fourth Geneva Convention, provided by the International Committee of the Red Cross.

¹⁵¹ For a critical review of the Supreme Court’s caselaw in this area, see Kretzmer, *The Occupation of Justice*, *supra*, note 117, at chap. 9; and B’Tselem, *Through No Fault of Their Own: Punitive House Demolitions during the al-Asqa Intifata* (Jerusalem: B’Tselem, 2004).

¹⁵² For a detailed explanation of these principles in their robust fashion, see the work of the International Humanitarian Law Research Initiative of the Harvard Program on Humanitarian Policy and Conflict Research, found in “The Separation Barrier and International Humanitarian Law: Policy Brief # 6, *supra* note 65.

through a judicial lens that gives an elevated emphasis to the security interests of the occupier, would inevitably result in a much more constrained conclusion.

Turning to the first part of its version of the proportionality test – whether there existed a rational connection between the underlying purpose of the Wall and its chosen route – the Supreme Court in *Beit Sourik* paid serious attention only to the views of the IDF commander and the ever-so-slightly dissenting views on the security route of the Wall expressed by the Council for Peace and Security, the grouping of retired Israeli military officers. The Court ruled, as it had traditionally done in prior security cases, that it would grant particular deference to the views of the IDF commander: “All we can determine is whether a reasonable military commander would have set out the route as this military commander did.”¹⁵³ (In doing so, the Court made a significant assumption that the route of the Wall was determined entirely or largely by military judgements. This assumption, however consistent it is with its view that the Wall is a security exercise *par excellence*, neglects the decisive role played by the Israeli cabinet in not only approving the various stages of the Wall project, but also in supervising the details of its path through the occupied territories.)¹⁵⁴ Accordingly, as this part of the test requires only the establishment of a ‘rational connection’ between means and ends, it is unsurprising that the Court found that the IDF had satisfied this initial part of the test.

Similarly, on the second leg of the test – whether there were less harmful alternatives available to the IDF which would achieve the same security goal – the Court held that proportionality had also been established. This was a more troubling finding. Even accepting the contentious premise that Israel could legally erect security defenses for its civilian settlements in occupied territories, other effective methods far less injurious to the Palestinians were available to the IDF. B’Tselem, the Israeli human rights organization, has argued that the Wall actually presents “the most extreme solution that

¹⁵³ *Beit Sourik*, at para. 46.

¹⁵⁴ At a cabinet meeting in February 2005, after the *Beit Sourik* ruling, Prime Minister Ariel Sharon led his political colleagues through a detailed decision-making process on the route of the Wall. According to *Ha’aretz* (“Israel’s new frontier”, 25 February 2005).

causes the greatest harm to the local population.”¹⁵⁵ The alternative measures that Israel could have employed, but did not, would include increasing the effectiveness of roadside checkpoints, providing greater security coverage in the ‘seam zone’ around the Green Line, or erecting better fortification around the settlements.¹⁵⁶ Yet, the Supreme Court again expressed its deference to the military-security views of the IDF, and displayed no evident curiosity about the other alternatives.

However, on the third prong of the test – whether the Wall’s harm to humanitarian interests outweigh its security benefits – the Court found that segments of the forty kilometres of the Wall under review disproportionately harmed the interests of the local Palestinians. A ten kilometre portion of the Wall which ran up a mountain ridge and placed the high ground on the Israeli side would also separate 13,000 Palestinian farmers from their lands and trees, in an area with an unemployment rate already approaching 75%. As well, three other segments of this forty kilometre stretch of the Wall were found to cause a considerable degree of economic harm to thousands more local inhabitants. The Court accepted the evidence of the Council for Peace and Security that alternative routes existed that would move the Wall away from some of the Palestinian villages and still provide equivalent or even better protection for Israel and its settlements from a security perspective. Disputing the position of the IDF commander that the humanitarian concerns of the Palestinian villagers were adequately met through access gates in the Wall and an appeal process against land expropriation, the Court held that the “injury caused by the Separation Fence is not restricted to the lands of the inhabitants or to their access to these lands. The injury is of far wider scope. It is the fabric of life of the entire population.”¹⁵⁷

Accordingly, the proportionality test failed the third leg of the test. The Supreme Court ordered the IDF commander to review the routing of approximately twenty-five kilometres of the challenged segment of the Wall, with a view to finding a path that was less disruptive to the Palestinian inhabitants. The IDF was also ordered to consider land

¹⁵⁵ “Separation Barrier”, found at: www.btselem.org/English/Separation_Barrier/

¹⁵⁶ B’Tselem, *Behind the Barrier*, *supra* note 131.

¹⁵⁷ *Beit Sourik*, at para. 84.

swaps for Palestinians who lost their properties, or, alternatively, to provide compensation if no alternative lands were available. The Court's concluding statement that "A democracy must sometimes fight with one arm tied behind her back"¹⁵⁸ has been frequently cited by sympathetic commentators in the international press as an example of Israel's sensitivity to the difficult balance between law and terrorism.¹⁵⁹ What the statement actually camouflages is the Supreme Court's incessant unwillingness to condemn Israel's lawless methods in confronting the Palestinian opposition to the occupation, including the government's reliance on extra-judicial assassinations,¹⁶⁰ the ongoing torture of prisoners,¹⁶¹ collective punishment,¹⁶² and the warrantless deaths of unarmed civilians,¹⁶³ all acts prohibited under international law.

(iii) Beit Sourik and its Limitations

As a matter of both law and politics, *Beit Sourik* is a seminal ruling that illustrates both the limited possibilities and the exceptional difficulties faced by those who attempt to challenge the Israeli occupation through judicial means. As a legal judgement, the Supreme Court decision has provided a deeply flawed and unsatisfactory analysis of the applicable principles of belligerent occupation and humanitarian law. To its credit, the Court acknowledged and detailed the serious harm imposed by the Wall upon a number of Palestinian communities in the northern Jerusalem area, and it did order a review of a small portion of its route which may perhaps lessen some of the barrier's more egregious consequences. The consequence of the ruling will mean that the Wall's routing elsewhere on the occupied territories will have to satisfy some minimal humanitarian standards. But little other praise can be extended. The harm that the Court recognized was to individual

¹⁵⁸ *Beit Sourik*, para. 86.

¹⁵⁹ See, for example, the remarks of Cherie Booth Blair, the wife of British Prime Minister Tony Blair, as reported in *The Guardian* (UK), 28 July 2005.

¹⁶⁰ See B'Tselem "Israel's Assassination Policy: Extra-judicial Executions" (Jerusalem: B'Tselem, 2001).

¹⁶¹ See Amnesty International, *Combating Torture* (London: Amnesty International, 2003); B'Tselem, "Standard Routine: Beatings and Abuses of Palestinians by Israeli Security Forces during the Al-Aqsa Intifada" (Jerusalem: B'Tselem, 2001).

¹⁶² See Human Rights Watch, "Razing Gaza: Mass Home Demolitions in the Gaza Strip" (18 October 2004), accessed at: <<http://hrw.org/reports/2004/rafah1004/rafah1004text.pdf>>

¹⁶³ See Human Rights Watch, "Promoting Impunity: The Israeli Military's Failure to Investigate Wrongdoing" (22 June 2005), accessed at: <<http://hrw.org/reports/2005/iopt0605/iopt0605text.pdf>>

Palestinians; otherwise, it maintained its customary silence on the injuries done to the rights of the Palestinians as a people. Indeed, the Court's adamant refusal to confront the enormous elephant in the room – an occupier who repudiates both the *de jure* applicability of the Fourth Geneva Convention, with all of its robust protections, as well as the modern instruments of human rights law – has become its chronic infirmity, distorting its judicial supervision towards virtually every other issue involving the occupation.¹⁶⁴

As a political expression of the law, *Beit Sourik* represents a difference at a tertiary level of the relationship between the Court and the two other central institutions of the country: the Israeli government and the IDF. Regarding the primary and secondary assumptions about the justness of Israel's approach towards its present predicaments, all three institutions stand on common ground. "In the struggle between government policies and Palestinian arguments of rights based on justice, international legal standards, or lofty legal principles," writes a leading Israeli legal scholar on the Supreme Court, "[it] has shown a marked preference for 'state arguments.'"¹⁶⁵ Some Israeli intellectuals critical of their own society have defended the Supreme Court as the last institutional bastion of moderate values in a political culture increasingly prone to intolerance.¹⁶⁶ This defence is not without some validity, but the anaemic caselaw produced by the Court on the occupation demonstrates, above all else, how a prolonged regime of subjugation over another people eventually corrupts democratic values and the rule of law in all of the leading institutions of the dominant society.

IV Epilogue

The fence epitomizes Israel at the start of the 21st century. It is a massive, crude and destructive response to genuine distress. It embodies the modern Israeli spirit: the power to get things done, financial resources, good intentions and apathy all wrapped up in one. The fence basically amounts to an admission by the state that it is unable and unwilling to reach an agreement with the

¹⁶⁴ Meron Benvenisti has observed: "The government of Israel and the High Court of Justice [the Supreme Court] have reached a silent agreement. The government will not argue the non-application of the Convention, and the Court will not rule." *Ha'aretz*, 26 August 2004.

¹⁶⁵ Kretzmer, *supra* note 117, at p. 196.

¹⁶⁶ Ze'ev Sternhell, "Removing the Oxygen Mask", *Haaretz*, 17 June 2005 ("...the Supreme Court is now the last hurdle before the gradual collapse of democratic patterns of government.")

Palestinians...It is a declaration of Israeli society's intention to close itself off behind ghetto walls, to give up on a connection with its neighbours and to disregard, because of an excessive sense of power, their needs and troubles.

Uzi Benziman, Israeli author and journalist¹⁶⁷

In the initial weeks following the release of the *Advisory Opinion* and *Beit Sourik*, clear lines were drawn by significant international and regional actors with their reactions to the legal judgements. On 20 July 2004, the United Nations General Assembly voted 150-6-10 to accept the ICJ ruling and to demand that “Israel, the occupying power, comply with its legal obligations as mentioned in the advisory opinion”.¹⁶⁸ The UNGA resolution also called upon all UN members “to comply with their legal obligations as mentioned in the advisory opinion.” However, no stronger measures to ensure compliance were adopted. A month later, in Durban, South Africa, the ministerial meeting of the Non-Aligned Movement, representing 115 member states, issued a special declaration welcoming the *Advisory Opinion* and the UNGA resolution. Among other measures, the Non-Aligned Movement ministers called for specific action from member states in response to the Israeli rejection of the ICJ ruling. These actions included the prevention of “any products of illegal Israeli settlements from entering their markets, to decline entry to Israeli settlers, and to impose sanctions against companies and entities involved in the construction of the wall and other illegal activities” in the occupied territories.¹⁶⁹

The United States harshly criticized the *Advisory Opinion*, and subsequently voted against the UNGA resolution. The American ambassador to the UN, John Danforth, explained that the US opposed the UNGA reference to the ICJ because it “points away from a political solution” to the Middle East conflict. He went on to state that the US voted against the UNGA resolution accepting the *Advisory Opinion* because it “...is not balanced. It is wholly one-sided. It does not mention the threat terrorists pose to Israel. It follows a long line of one-sided resolutions adopted by the General Assembly.”¹⁷⁰ The

¹⁶⁷ *Ha'aretz*, 2 July 2004.

¹⁶⁸ U.N.G.A. Res. A/Res/ES-10/15. The six states voting against the resolution were: Australia, Micronesia, Israel, Marshall Islands, Tuvalu and the United States.

¹⁶⁹ “Declaration on Palestine”, XIV Ministerial Conference of the Non-Aligned Movement, Durban, South Africa (17-19 August 2004), accessed at: www.nam.gov.za/media/040820a.htm, at para. 5.

¹⁷⁰ “Remove Wall, Israel is Told by the U.N.” *New York Times*, 21 July 2004.

week before the UNGA vote, the U.S. House of Representatives overwhelmingly passed (361-45) a bi-partisan resolution deploring the “misuse of the International Court of Justice” by the United Nations General Assembly “for the narrow political purpose of advancing the Palestinian position.” The House of Representatives’ resolution also cautioned “members of the international community that they risk a strongly negative impact on their relationship” with the United States “should they use the ICJ’s advisory judgment as an excuse to interfere on the Roadmap process.”¹⁷¹ Both President Bush and the presumptive Democratic presidential nominee, John Kerry, condemned the ICJ judgement shortly after its release, with Kerry stating that: “Israel’s fence is a legitimate response to terror that only exists in response to the wave of terror attacks against Israel.”¹⁷²

In Israel, the response among the leading political, military and media circles to the ICJ proceedings was aptly summarized by *Ha’aretz* writer Amira Hass as: “Hague, shmague”.¹⁷³ The Israeli ambassador to the United Nations, Dan Gillerman, stated that his country was “especially disappointed by the exploitation of the [ICJ] in this case,” and criticized the *Advisory Opinion* for not seriously addressing the issue of terrorism.¹⁷⁴ According to Ra’anan Gissin, a senior advisor to Prime Minister Sharon, the *Advisory Opinion* belonged in “the trash-bin of history”, and the *Beit Sourik* ruling by the Israeli Supreme Court was the only legal judgement that Israel would obey. “The building of the fence will go on,” he said, immediately after the UNGA vote. “Israel will not stop building it or abdicate its inalienable right to self-defence.”¹⁷⁵ During the same period, the Israeli Foreign Ministry accused the European Union “of encouraging Palestinian terrorism” by supporting the UNGA resolution. “The willingness of the EU to fall in with the Palestinian position, together with its desire to reach a European consensus at the

¹⁷¹ U.S. House of Representatives, House Resolution 713, 108th Congress, 2nd Session. Accessed at: www.israelisgorges.org/hres713.html

¹⁷² Quoted in Stephen Zunes, “Attacks Against the World Court by Bush, Kerry, and Congress Reveal Growing Bipartisan Hostility to International Law” *Foreign Policy in Focus Policy Report* (August 2004).

¹⁷³ Amira Hass, “What really influences the High Court”, *Ha’aretz*, 8 July 2004.

¹⁷⁴ “Statement by UN Ambassador Dan Gillerman to the 10th Emergency Special Session of the 58th UN General Assembly”, 16 July 2004. Accessed at: www.mfa.gov.il/MFA/Foreign+Relations/Israel+and+the+UN/Speeches.

¹⁷⁵ “Israel to press on with fence after UN resolution condemns it”, *Ha’aretz*, 21 July 2004.

price of descending to the lowest common denominator, raises doubt as to the ability of the EU to contribute anything constructive to the diplomatic process.”¹⁷⁶

However, within some Israeli decision-making circles, the ICJ judgement ignited a serious debate during the summer of 2004 about the applicability of the Fourth Geneva Convention and the potential danger of international sanctions if the *Advisory Opinion* was ignored. Justice Minister Yosef Lapid warned in mid-July that Israel could become an international pariah, and urged the Israeli government not to ignore the ICJ ruling. “If we don’t respect human rights in the territories, we’ll be putting ourselves in the situation in which South Africa found itself.”¹⁷⁷ The Israeli Attorney-General, Menachem Mazuz, stated the following month in a legal opinion to the Prime Minister that: “It is difficult to exaggerate the negative ramifications of the ICJ’s opinion.” He recommended that Israel fully apply the Fourth Geneva Convention to the occupied territories, and pointed out how an international campaign of boycotts against South Africa gained momentum after the International Court had ruled that its occupation of Namibia was illegal.¹⁷⁸ However, these cautions were resisted by others in the senior Israeli political and military leadership. The Legal Advisor to the Israeli Foreign Ministry, Alan Baker, publicly criticized Mazuz, saying that “This is why there is a Foreign Ministry...It doesn’t need this type of team of academics to tell it what to do.”¹⁷⁹ The Ministry of Defence also responded to the internal critics with its stated commitment that the Wall would not be moved to the 1967 Green Line.¹⁸⁰ It did, however, begin to plan some alternative routes for the Wall in the West Bank and East Jerusalem, consistent with its reading of the *Beit Sourik* ruling. In early September 2004, Ariel Sharon announced that, once the new route of the Wall had been accepted by himself and the Defence Minister, Shaul Mofaz, the

¹⁷⁶ Chris McGreal, “Israel lashes out at EU for backing UN vote on wall”, *The Guardian* (UK), 22 July 2004; “Israel summons EU envoys over support for anti-fence ruling”, *Ha’aretz*, 22 July 2004.

¹⁷⁷ “Lapid: Israel may become pariah if it does not respect ICJ” *Ha’aretz*, 19 July 2004.

¹⁷⁸ “A new legal reality for the fence” *Ha’aretz*, 22 August 2004; “Legal team recommends applying Fourth Geneva Convention”, *Ha’aretz*, 24 August 2004; “Cracking under the strain” *Al-Ahram Weekly*, 27 August 2004.

¹⁷⁹ *Ibid.*, *Al-Ahram*.

¹⁸⁰ “Defence Ministry official: Fence won’t run along 1967 line”, *Ha’aretz*, 29 July 2004.

plan would be first taken to Washington for approval by National Security Advisor Condoleezza Rice, before being presented to the Israeli cabinet.¹⁸¹

During the autumn of 2004 and the early winter of 2005, the United Nations maintained its focus on the deleterious effects of the Wall on the Palestinians in the West Bank. In October 2004, John Dugard, the UN Special Rapporteur on human rights in the occupied territories, stated bluntly that the Wall's purpose went well beyond security. "It appears to be designed to seize land for the present settlers and future settlers – that is, for the State of Israel. It also appears to be designed to cause an exodus of Palestinians from the areas adjacent to the Wall."¹⁸² By way of contrast, in late November, Kofi Annan, the Secretary-General of the United Nations, described the events of the prior year concerning the Wall in a strangely flat tone, observing simply that: "Israel was continuing construction of the barrier in parts of the West Bank during the year," before listing the various events surrounding the ICJ ruling, without any further comment.¹⁸³ In early January 2005, following up on the request of the General Assembly, the Secretary-General's office announced that it would seek to establish a Registry of Damage, which would gather claims regarding material damages suffered by Palestinians by the construction of the Wall.¹⁸⁴ In March 2005, the United Nations issued a comprehensive and grim portrait of the humanitarian consequences of the Wall.¹⁸⁵ The report provided extensive examples of the economic hardship faced by the West Bank inhabitants from

¹⁸¹ "New fence route to be presented to U.S. first, then cabinet", *Ha'aretz*, 7 September 2004.

¹⁸² Statement by Mr. John Dugard, 59th Session of the General Assembly, New York, 28 October 2004. He reiterated this argument in greater detail on 23 March 2005, in a statement given to the 61st session of the United Nations Commission on Human Rights.

¹⁸³ Report of the Secretary-General to the General Assembly and the Security Council pursuant to GA resolution 58/21, "Peaceful Settlement of the Question of Palestine", 29 November 2004. UN Doc. A/59/574*-S/2004/909*, at para. 14. By comparison, the Secretary-General in November 2003 has stated in his report to the General Assembly that: "In the midst of the Road Map process...the Barrier's construction in the West Bank cannot, in this regard, be seen as anything but a deeply counterproductive act." Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13, 24 November 2003, UN Doc. A/ES-10/248, at para. 30.

¹⁸⁴ "Letter dated 11 January 2005 from the Secretary-General to the President of the General Assembly, UN Doc. A/ES-10/294.

¹⁸⁵ "The Humanitarian Impact of the West Bank Barrier on Palestinian Communities" (March 2005, Update No. 5). This report was compiled by the United Nations Office for Coordination of Humanitarian Affairs and the United Nations Relief and Works Agency for Palestinian Refugees for the Humanitarian Emergency Policy Group.

being restricted from, or unable to, reach their agricultural lands, or being cut off from schools, health care and social services. It observed that: “The damage caused by the destruction of land and property for the Barrier’s construction will take many years to recover and hinder Palestinian development should a political situation allow this.”¹⁸⁶

On 20 February 2005, eight months after the *Beit Sourik* ruling, the Israeli cabinet approved the revised route of the Wall. According to the United Nations,¹⁸⁷ the total length of the new route approved by the cabinet would be increased to 670 kilometres, compared to 622 kilometres for the original route, and would now cost an estimated \$3.4 billion (US). The Wall’s new route, 80% of which will be located within the West Bank, would encompass approximately 10% of the West Bank and East Jerusalem, 2.5% less land area than the previous path, primarily because of changes to the planned route in the South Hebron area.¹⁸⁸ More than 80% of the settler population in the West Bank and East Jerusalem would now be on the ‘Israeli’ side of the Wall. The new route would make two large incursions into the West Bank, in order to encompass the Israeli settlements of Ariel and Ma’aleh Adumim.¹⁸⁹ At the cabinet meeting, the Israeli ministers understood that the *Beit Sourik* and *Advisory Opinion* judgements had narrowed their options, and time was now of the essence: “ ‘What it was possible to do two years ago cannot be done anymore,’ said Defence Minister Shaul Mofaz to his colleague Benjamin Netanyahu. ‘And what it is possible to do now, you won’t be able to do in another two years. Which is why we have to finish it now.’ ”¹⁹⁰ The cabinet ministers also understood that they were deciding not only the route of the Wall, but also the new frontiers of Israel. According to Israeli journalist Aluf Benn of *Ha’aretz*, who covered the decisive cabinet

¹⁸⁶ *Id.* at p. 6.

¹⁸⁷ *Id.* at pp. 3-5.

¹⁸⁸ The Wall’s revised route will penetrate deeply in the southern West Bank to encompass the Gush Etzion settlement bloc near Bethlehem, while following the Green Line around the South Hebron hills. Israeli government sources were quoted in late December 2004 to say that this specific ‘compromise’ had two purposes: “To soften international criticism of the Gush Etzion section by linking it with the concessions in the South Hebron Hills region, and to mute rightist criticism of these concessions by linking it to the enclosure of the Gush Etzion settlements.” “Cabinet to see new fence route after PA vote”, *Ha’aretz*, 30 December 2004.

¹⁸⁹ The Wall’s Ariel/Emmanuel “finger” would extend approximately 22 kilometres, or 42%, across the width of the northern West Bank, while the finger to Ma’aleh Adumin would stretch 14 kilometres, or 45%, of its width to the east of Jerusalem.

¹⁹⁰ Aluf Benn, “Israel’s new frontier”, *Ha’aretz*, 25 February 2005.

meeting: “The cabinet decision states that the fence is a ‘temporary means of securing against terror attacks,’ but despite the cautious wording, those present at the meeting had no doubt that they were drawing the borders of the future.”¹⁹¹

Shortly after the cabinet decision, the Israeli State Attorney’s Office filed a 180 page response to the ICJ ruling with the Israeli Supreme Court. This response had been requested by the Court in late August 2004, while they were hearing further petitions from Palestinian villagers affected by the Wall who were now basing some of their arguments on the *Advisory Opinion*.¹⁹² The State Attorney’s Office argued that the ICJ judgement was, for two reasons, no longer relevant to any court challenges to the Wall in Israel. First, it maintained, the facts relied upon by the ICJ were unbalanced and now outdated, the International Court’s decision underplayed both the threat of terrorism to Israel and the importance of military necessity, and it failed to appreciate the considerations that shaped the routing of each particular section of the Wall. Second, the Office argued that the *Beit Sourik* ruling had improved the ‘fabric of life’ for the Palestinians living near the Wall by increasing access to their lands. As well, the route changes triggered by the Israeli Supreme Court decision, and approved by the Israeli cabinet, have created a ‘materially different’ path for the Wall than what had been considered by the International Court of Justice. In its conclusion, the State Attorney’s Office said to the Supreme Court that: “the factual background before the [ICJ] when it wrote the Advisory Opinion was lacking, inexact and now irrelevant in a manner that precludes its conclusions that the entire route of the fence within the West Bank was in violation of international law from having any application upon the cases before the High Court of Justice.”¹⁹³ As subsequent legal critiques by NGOs have pointed out,¹⁹⁴ the Office’s response was fatuous, since the vast majority of the Wall will remain in the

¹⁹¹ *Id.* The same cabinet meeting also decided on the withdrawal of the Gaza settlements. According to Benn: “Gaza in exchange for the West Bank. Sharon assumed, correctly, that the combined decisions would reduce international criticism of the route of the fence.”

¹⁹² An English summary of the response has been provided by the Israeli Ministry of Foreign Affairs, accessed at: www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Summary

¹⁹³ *Id.*, at para. 23.

¹⁹⁴ Palestinian Centre for Human Rights, “Securing the Wall from International Law: An initial response to the Israeli State Attorney” (April 2005); The Association for Civil Rights in Israel, “A statement of opinion that the ruling by the International Court of Justice in The Hague is binding to Israel” (5 May 2005).

occupied territories, a reality unaltered by the *Beit Sourik* decision. The fact that nowhere in the State Attorney Office's lengthy response was there any direct discussion of the *Advisory Opinion's* principal finding – that a security barrier built on occupied territory to protect illegal civilian settlements and to consolidate unlawful military gains is itself illegal – can be seen as an implicit acknowledgement that the heart of the ICJ ruling is unanswerable.

During the spring and early summer months of 2005, the primary focus of the Wall's construction and its legal challenges was centred around East Jerusalem. In early July, Prime Minister Sharon criticized the IDF for "taking too long" in completing the Jerusalem section of the Wall: "You have no budgetary problems, and you must improve the pace [of construction]."¹⁹⁵ According to *Ha'aretz*, more than 70% of the 130 kilometres of the Wall along the IDF's proposed route around East Jerusalem would be within the territory of the West Bank, up to a depth of 10 kilometres. Only four kilometres would be placed within the post-1967 illegally annexed municipal area of Jerusalem, with another 12 kilometres running near its present border.¹⁹⁶ If the Israeli Supreme Court endorses this planned route by dismissing petitions from Palestinians challenging the Wall's path, and if there is no judicial objection to extending the Wall to include the settlement of Ma'aleh Adumim, then the total area of Jerusalem would expand by 165 square kilometres.¹⁹⁷ This would more than double the existing size of Jerusalem, with the vast majority of the municipality located on occupied territory. In early July, the Israeli cabinet decided to place a number of Palestinian neighbourhoods in and around Jerusalem, where most of the 55,000 inhabitants possess legal status as Jerusalemites, on the West Bank side of the Wall.¹⁹⁸ Even though these Jerusalemites would remain in their houses, the Wall will remove them from their city, creating additional hardships for an already disadvantaged population.¹⁹⁹ As Israeli political historian Tom Segev observed, after touring the Wall's route around East Jerusalem:

¹⁹⁵ Aluf Benn, "PM orders acceleration in work on West Bank barrier", *Ha'aretz*, 6 July 2005.

¹⁹⁶ Editorial, "Sharon is dividing Jerusalem", *Ha'aretz*, 13 July 2005.

¹⁹⁷ Akiva Eldar, "Diplomats without diplomacy", *Ha'aretz*, 24 June 2005.

¹⁹⁸ Greg Myre, "Israeli Barrier in Jerusalem will cut off 55,000 Arabs", *New York Times*, 11 July 2005.

Also see the remarks of Israeli cabinet minister Haim Ramon (Labor Party), who said that the Wall's route "makes [Jerusalem] more Jewish," *Ha'aretz*, 11 July 2005.

¹⁹⁹ International Crisis Group, *The Jerusalem Powder Keg*, 2 August 2005.

“what is happening today in Jerusalem goes beyond security needs and reflects the essence of the original Zionist dream: maximum territory, minimum Arabs.”²⁰⁰

During the hearings by the Israeli Supreme Court in the late spring and early summer of 2005 respecting petitions against the Wall around Jerusalem, the Israeli State Attorney’s Office acknowledged, for the first time before an Israeli court, that part of Israel’s motivation to build the Wall was indeed political. The Israeli government lawyer stated to the Court that, when building the Wall within the municipal boundaries of Jerusalem (which he argued was a sovereign part of Israel), the route of the fence can legitimately have political, and not just security, implications.²⁰¹ This appears to be a coded legal reference to placing as many Palestinian, including Palestinian Jerusalemites, outside of the Wall as possible.²⁰² During the course of the hearings, the Chief Justice of the Supreme Court, Aharon Barak, indicated that he accepted this argument. Despite the clear statements of international law,²⁰³ Chief Justice Barak also said that Jerusalem is the capital of Israel, East Jerusalem is Israel’s territory and Israel is sovereign to act there regardless of international law. He continued: “The reference to East Jerusalem as conquered territory does not apply from our perspective.”²⁰⁴ In the Court’s eyes, political motivations for the Wall in the West Bank would be illegitimate, but political considerations for the Wall in and around Jerusalem would create no judicial implications, because no part of the city is deemed by it to be occupied territory. Yet, even this dubious distinction did not last long. In early July 2005, an Israeli government lawyer opposing a number of petitions to change the route of the Wall in the northern West Bank around the settlement of Alfei Menashe acknowledged to the Court for the

²⁰⁰ Tom Segev, “The paradox of Jerusalem”, *Ha’aretz*, 9 June 2005. Those Palestinians holding Jerusalemite status normally have Israeli ID cards, which enables them to have access to state benefits such as health care and education, and to live in Jerusalem.

²⁰¹ Yuval Yoaz, “State: Jerusalem security fence also politically motivated”, *Ha’aretz*, 21 June 2005; Yuval Yoaz, “The route less travelled”, *Ha’aretz*, 5 July 2005.

²⁰² Yuval Yoaz, “High Court rejects petition against fence in Jerusalem”, *Ha’aretz*, 22 June 2005. The article quotes the Israeli government lawyer as telling the Supreme Court that: “An alternative that moves the barrier near Jewish neighbourhoods and leaves the Arab residents of East Jerusalem on the other side of the barrier also has political significance that cannot be ignored.”

²⁰³ For example, see U.N.S.C. Res. 476, 30 June 1980 (“Reconfirms that all legislative and administrative measures and actions taken by Israel, the occupying Power, which purport to alter the character and status of the Holy City of Jerusalem have no legal validity and constitute a flagrant violation of the Fourth Geneva Convention”).

²⁰⁴ Yuval Yoaz, “The route less travelled”, *supra* note 184.

first time that political considerations played a part in the Israeli government's decision-making regarding the path of the Wall through the West Bank as well. Belying the temporary nature of the Wall, the lawyer also argued before the Court that the Wall, as it had already been constructed and "would be very expensive to move", should be left on its original route.²⁰⁵

On the first anniversary of the *Advisory Opinion* and the General Assembly resolution accepting the ICJ ruling, the international community maintained its supine reluctance to meaningfully oppose the Wall. At the end of June, the Swiss Ambassador to the United Nations, Peter Maurer, wrote to the President of the General Assembly to report on his consultations with the 189 state signatories of the Fourth Geneva Convention on the Wall, as requested by the July 2004 General Assembly resolution.²⁰⁶ Ambassador Maurer stated that there was a virtual consensus among the consulted states that holding a special conference under the Fourth Geneva Convention would be inadvisable at this time. Apparently reflecting the views of many of the consulted nations, Maurer's letter did not even reiterate the General Assembly's call for the Wall to be halted and demolished. Instead, he simply stressed the need for an improvement in the humanitarian and economic situation of the Palestinians, and to promote more dialogue between Israel and the Palestinian Authority. During a visit to the Middle East in early July, Javier Solana, the European Community's High Representative for Foreign Policy, criticized the route of the Wall around Jerusalem, but did not threaten any action.²⁰⁷ Later in the month, the Security Council heard a debate from UN members regarding Israel's ongoing construction of the Wall, but it ended the consultation without issuing a statement or calling for any deterrent measures against Israel.²⁰⁸ Commenting on the first anniversary of the *Advisory Opinion*, the Foreign Minister of the Palestinian Authority, Nasser al-

²⁰⁵ Yuval Yoaz, "State to High Court: Fence route determined not only by security considerations," *Ha'aretz*, 4 July 2005.

²⁰⁶ Peter Maurer, "Letter dated 30 June 2005 from the Permanent Representative of Switzerland to the United Nations addressed to the President of the General Assembly", U.N. Doc. A/ES-10/304.

²⁰⁷ "EU's Solana slams Jerusalem fence; PA: It makes pullout useless", *Ha'aretz*, 11 July 2005. Solana was reported to have said: "We think that Israel has the right to defend itself, but we think that the fence which will stand outside the territory of Israel is not legally proper and it creates also humanitarian problems."

²⁰⁸ Agence France Presse, "Israel under fire in Security Council over separation barrier", *The Beirut Daily Star*, 23 July 2005; Peter Heinlein, "Palestinians take Israeli Barrier to UN Security Council", *Voice of America*, 21 July 2005.

Kidwa, criticized the “miserable failure” of the international community to take steps to enforce the remedies directed by the International Court of Justice.²⁰⁹ In early August, eight Special Rapporteurs with the United Nations Commission on Human Rights issued a joint international appeal, which stated that “the ICJ’s Opinion has been ignored in favour of negotiations conducted in terms of the Road Map process.” This sidelining of the *Advisory Opinion* was unacceptable, the Special Rapporteurs argued, because the Road Map permitted “the continued presence of some settlements, which were found by the ICJ to be unlawful, and by necessary implication the continued existence of some parts of the wall in Palestinian territory.”²¹⁰

On 15 September 2005, the Israeli Supreme Court issued *Mara’abe v. The Prime Minister of Israel*, dealing with the route of the Wall around the settlement of Alfei Menashe.²¹¹ The Court’s unanimous decision was a direct echo of its earlier ruling in *Beit Sourik*. It rejected the arguments of the Palestinian petitioners that the construction of the Wall in occupied territory was illegal,²¹² that it was built for political reasons,²¹³ or that it was anything but temporary.²¹⁴ As well, it again refused to grapple with the illegality of the Israeli settlements in international law.²¹⁵ Equally significantly, the Supreme Court accepted the Israeli government’s arguments as to why the Wall could not be built on the 1949 Green Line: the topography of the 1949 armistice line, the close proximity of many modern Israeli towns and cities to the 1949 line, and the protection of the large number of

²⁰⁹ Donald Macintyre, “Palestinians seek EU help to stop settlement spread”, *The Independent* (UK), 11 July 2005. In the interview, Mr. al-Kidwa also acknowledged that the PA made a mistake in 2004 by not asking for an immediate endorsement of the ICJ ruling by the Security Council, and, if that had been vetoed by the United States, then proceeding to the General Assembly to seek its formal support for sanctions against Israel.

²¹⁰ Report of the Special Rapporteurs, 4 August 2005, United Nations Commission on Human Rights, accessed at <www.unchr.ch/hurricane/hurricane.nsf/newsroom>

²¹¹ H.C.J. 7957/04.

²¹² *Id.* at para. 19. (“Our conclusion is, therefore, that the military commander is authorized to construct a separation fence in the *area* for the purpose of defending the lives and safety of the Israeli settlers in the *area*.”)

²¹³ *Id.* at para 98. (“We reached the conclusion, on the basis of the data before us [in *Beit Sourik*] that the motivation behind construction of the fence is not political. That is our conclusion in the petition before us as well.”)

²¹⁴ *Id.* at para. 100. (“The fence is inherently temporary.”)

²¹⁵ *Id.* at para. 19. (“It is not relevant...to examine whether this settlement activity conforms to international law or defies it, as determined in the *Advisory Opinion* of the International Court of Justice at The Hague. For this reason, we shall express no position regarding that question.”)

Israeli settlers living beyond the Green Line. However, as in *Beit Sourik*, the Supreme Court went on to find that the particular section of the Wall in the northern West Bank created a “chokehold” around the five Palestinian villages neighbouring Alfei Menashe, and therefore failed the Court’s constrained proportionality test.²¹⁶

Equally significantly, the Supreme Court took this occasion to distance itself from the International Court of Justice’s ruling in *Advisory Opinion*. Adopting many of the arguments advanced by the Israeli State Attorney’s Office in its response to the ICJ ruling, the Supreme Court stated that the *Advisory Opinion* was deficient because the International Court lacked a comprehensive factual record before it to properly assess Israel’s difficult security-military needs.²¹⁷ As well, according to the Supreme Court, the ICJ did not appreciate the necessity for proportionally assessing the different segments of the Wall; rather, the Court said that, by determining the Wall’s legality only looking at the entire route, the ICJ was unable to engage in a more particular analytical review of the barrier’s specific impact.²¹⁸ Without grappling with many of the substantive legal findings of law in the *Advisory Opinion*, the Supreme Court found that the ICJ’s ruling was distinguishable largely on the facts, and thus did not bind it:

...the ICJ’s conclusion, based upon a factual basis different from the one before us, is not *res judicata*, and does not obligate the Supreme Court of Israel to rule that each and every segment of the fence violates international law.²¹⁹

The ISC ruling in *Mara’abe* was issued on the same day that Prime Minister Ariel Sharon spoke before the United Nations General Assembly. Following the Israeli withdrawal from Gaza, Sharon was greeted at the UN as a statesman, and Israel was enjoying its highest international standing since the start of the Oslo process. Any concerns among the Israeli political and military leadership that its continued construction of the Wall would result in serious political costs had entirely dissipated. Indeed, by the late autumn, some senior Israeli political leaders were confident enough to speak more frankly about the

²¹⁶ For an informative and critical analysis of the Wall’s impact on the five Palestinian villages, see the chapter on Alfei Menashe in B’Tselem, *Under the Guise of Security: Routing the Separation Barrier to Enable Settlement Expansion in the West Bank* (Jerusalem: B’Tselem, 2005).

²¹⁷ *Supra*, note 211, at paras. 57-69.

²¹⁸ *Id.*, at paras. 70-72.

²¹⁹ *Id.*, at para. 74.

ultimate consequences of the Wall. Addressing an Israeli legal conference in late November, the Minister of Justice, Tzipi Livni, stated that the Wall will serve as “the future border of the state of Israel” and that “the High Court of Justice, in its rulings over the fence, is drawing the country’s borders.”²²⁰ In response, the Vice-President of the Israeli Supreme Court, Mishael Cheshin, remarked that: “This is not what you have contended in court”, noting that the state prosecution lawyers, whom Livni supervises as Minister, had stated many times in judicial proceedings that the fence was only a temporary security tool.²²¹

V Conclusion

“[A state] which consistently sets itself above the solemnly and repeatedly expressed judgment of the [United Nations] Organization, in particular in proportion as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction.”

Judge Hersch Lauterpacht, The International Court of Justice, 1955 ²²²

The *Advisory Opinion* of the International Court of Justice on the Separation Wall has illustrated both the significance and the necessity of a rights-based approach as an integral part of any political process to reach a comprehensive, just and durable settlement of the Israel/Palestine conflict. On many of the core issues of the conflict, the most important international court in the world delivered clear and purposive findings. The right of the Palestinians to self-determination was recognized. The West Bank, Gaza and East Jerusalem were designated as occupied territories under international law. Israel’s obligations as an occupying power, and the rights of the Palestinians as an occupied people, were spelled out. As well, the International Court of Justice ruled that Israel’s settlements were illegal; its land confiscation and house demolition regime was

²²⁰ Yuval Yoaz, “Justice Minister: West Bank fence is future border”, *Ha’aretz*, 1 December 2005.

²²¹ *Id.*

²²² *Voting Procedures on Questions relating to Reports and Petitions Concerning the Territory of South West Africa, Advisory Opinion*, [1955] I.C.J. Reports 67, at 120.

unlawful; and the international community bore a special responsibility to enforce the humanitarian law obligations violated by the conduct of the occupying power. And, on the central issue before the Court, Israel's Separation Wall was found to be in fundamental breach of international humanitarian and human rights law. The weakness of the *Advisory Opinion* – its lack of fully developed legal explanations for several of its justifiable findings – pales in comparison to the persuasiveness of much of its reasoning, the strength of its conclusions, and the breadth of its remedial proposals. In a seemingly intractable conflict fraught with competing political and historical narratives that confuse most casual observers, the lucidity of the law, particularly as expressed in the ICJ opinion, can sweep away much of the obfuscation and make the solutions appear both understandable and obtainable.

Much less can be said about the *Beit Sourik* ruling of the Israeli Supreme Court. Working with many of the same legal instruments as the International Court of Justice, the Supreme Court produced a limp and submissive judgement that misapplied or ignored a number of the applicable legal principles on occupation and humanitarian requirements. While *Beit Sourik* curbed aspects of the very worst excesses of the Wall, it also endorsed a barrier that entrenches the occupation, solidifies the Israeli settlement project, intensifies the economic and social crises of the occupied population, and advances the demographic division of the land and its spoils for the benefit of the occupier. International law speaks clearly and critically on all these issues, but not through the garbled voice of the Israeli Supreme Court. Many liberal supporters of Israel hailed *Beit Sourik* as an important example of the judicial independence and openness of the Supreme Court, but more reflective observers have pointed out that the judgement is actually quite consistent with the abject historical unwillingness of the Court to meaningfully confront the Israeli occupation with the sharp and available tools of the law. Indeed, as an articulation of the dual nature of law, *Beit Sourik* illustrates the flip side of the coin from the *Advisory Opinion*: the shaping and application of legal principles to secure privilege, rather than to curb power.

More than ever, a rights-based approach is required to unlock the barricaded door to Middle East peace. Such an approach requires the parties to a conflict to resolve their differences, and to build their new relationship, through the cornerstone principles of national, human and individual rights which have emerged since the Second World War. These rights are found in the United Nations Charter and in UN resolutions, in international treaties and conventions, and in the affirmative practice of modern states. A rights-based approach – which emphasizes equality, dignity, social and political rights, reconciliation, and human security – has become an integral part of the successful settlement of recent conflicts throughout the world. Indeed, applying this approach to the Israel/Palestine conflict would finally create something close to a level playing field at the negotiating table between two quite asymmetrical parties, and thus offer a real chance for peace. It is uncontested that the *status quo* approach to Middle-East peace-making has failed bitterly. Unequal power politics have guided all peace-making efforts to resolve the conflict in the modern era, producing peace proposals and political agreements that have not only been lopsided, but have been unworkable precisely because they are so lopsided.

Yet, it cannot be forgotten that international public law commands authority almost entirely through moral suasion, for it has no courts or police to enforce its strictures. Without the political will of states to compel serial or abusive violators to comply with their humanitarian and human rights obligations, it is only through the social mobilization of civil society that the aspirations of justice and equality embedded in the covenants of international public law may be realized. More than a year after the *Advisory Opinion* was issued, the political will of the United Nations and its members to enforce the ICJ ruling has been distressingly somnolent. This has left virtually the entire task of keeping the *Advisory Opinion* on the world's agenda to the domain of civil society and its nascent organs: non-governmental organizations, intellectuals, critical journalism, human rights activism, and the popular conscience. To date, alas, they have had only sparse influence. Yet, it has become painfully clear that nothing short of comprehensive deterrent actions by the United Nations and its members – such as the threat or application of diplomatic isolation and economic sanctions – will compel Israel to take its legal obligations

seriously. Indeed, the struggle between Israel and Palestine may be now approaching that dangerous hour between a chronically unstable yet managed conflict and a wider, more uncontrollable and more savage maelstrom, exacerbated by the unilateral imposition by Israel of a grossly inequitable separation of the land and populations via the Wall. Should the promise of the *Advisory Opinion* go unfulfilled, and it loses its way down the same diplomatic memory hole inhabited by the countless UN resolutions on the conflict, then the international community may well ponder in future years about how it lost one of its very best last chances to affirmatively shape a conclusive and satisfying peace for all of those Palestinians and Israelis who live under the shadow of the sword.